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NOTE

# Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts

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**Abstract.** In recent years, the Supreme Court has repeatedly deployed a new doctrine with potentially seismic implications for the future of the federal administrative state. The "major questions doctrine," formally embraced by a majority of the Court for the first time in *West Virginia v. EPA*, requires administrative agencies to demonstrate "clear congressional authorization" when they assert authority over matters of "vast 'economic and political significance.'" But what makes a question "major" or congressional authorization "clear"? And how might this doctrine affect related principles of administrative law?

As the Supreme Court has left these questions unanswered, this Note provides the first account of how lower courts and litigants are attempting to fill in the gaps. It first examines the contexts in which litigants and courts have addressed the doctrine and the strategies that challenger plaintiffs and governmental defendants have employed. It then analyzes how courts and litigants have applied the elements of the major questions test and assesses the implications of that test for two administrative law doctrines with uncertain fates: *Chevron* deference and nondelegation.

As this Note explores, the major questions doctrine has already featured in challenges across a vast expanse of policy areas, including environmental regulation, public health, education, immigration, data privacy, labor and employment, election law, public safety, and national security, economic affairs, and anti-discrimination law. The doctrine has also been used to challenge various types of executive actions, including agency rules and regulations, enforcement actions for statutory violations, presidential (nonagency) actions, and actions that confer a public benefit rather than regulating private conduct. While the major questions doctrine remains in its early stages of development, this Note

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identifies emerging trends in an important group of "first movers" to illuminate the doctrine's potential impact in the years to come.

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## Introduction

In *Biden v. Nebraska*, the Supreme Court affirmed the vitality of a new doctrine with potentially seismic implications for the future of the federal administrative state.[1] Among members of the Court itself, this doctrine has aroused both staunch support and fierce opposition. Justices Gorsuch and Alito have praised the doctrine as safeguarding the interests of "self-government, equality, fair notice, federalism, and the separation of powers."[2] Contemplating the doctrine's consequences, Justices Kagan, Breyer, and Sotomayor have warned they "cannot think of many things more frightening."[3]

The "major questions doctrine," formally adopted for the first time in *West Virginia v. EPA*,[4] requires administrative agencies to demonstrate "clear congressional authorization" when they seek to exercise authority over matters of "vast 'economic and political significance.'"[5] The doctrine represents a sharp departure from the familiar regime of deference from which agencies have traditionally benefitted. Under the longstanding *Chevron* doctrine, where an agency interprets an ambiguous provision in its organic statute—the statute that created the agency and that sets forth its jurisdiction—and that interpretation is reasonable, courts accord deference to the agency's interpretation.[6] As a result, courts have resolved uncertainties about questions of law, and thus questions about an agency's authority, in the agency's favor.[7]

The fate of *Chevron* has recently come into question. The Supreme Court is poised to decide two cases this term presenting the following question: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[8]

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1. 143 S. Ct. 2355 (2023).
2. West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).
3. *Id.* at 2644 (Kagan, J., dissenting).
4. *See* Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T. L. & POL'Y REV. 47, 48-49 (2022).
5. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (quoting *id.* at 2608-09 (majority opinion)).
6. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984).
7. *See* Michael W. McConnell, *Kavanaugh and the "Chevron Doctrine,"* HOOVER INST. (July 30, 2018), https://perma.cc/ZQ63-T5AB.
8. Petition for Writ of Certiorari at i-ii, Loper Bright Enters. v. Raimondo, 143 S. Ct 2429 (2023) (No. 22-451), 2022 WL 19770137 [hereinafter Petition, *Loper Bright*]; Petition for Writ of Certiorari at i, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023) (No. 22-1219), 2023 WL 4108515; *see Loper Bright*, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari); *Relentless*, 144 S. Ct. 325 (2023) (mem.) (granting certiorari).

But where the major questions doctrine applies, its impact extends well beyond the mere denial of deference. Indeed, the doctrine does not simply wipe the slate clean, returning the standard of review to a neutral *de novo* as if *Chevron* never existed. Instead, where a governmental action qualifies as "major," the major questions doctrine instructs courts to treat that action with "skepticism."[9] To overcome this presumption, an agency must do more than show that a statute provides a "plausible textual basis" for the action the agency took.[10] Rather, for that agency action to survive judicial scrutiny, the agency must satisfy the heightened showing of "clear congressional authorization."[11]

Placing a heavy burden on agencies when they act on "major questions" has wide-ranging implications. Agencies are responsible for making and enforcing regulations across a broad spectrum of industries and issue areas, from health and safety to housing to consumer protection and national defense. The major questions doctrine transfers power from agencies and the executive branch to not only the legislature, which retains authority to decide significant issues, but also to the judiciary, which assumes the gatekeeping function of determining whether an action is major in the first instance.[12] The doctrine thus alters the balance of power between the branches of government. This shift is significant because the transsubstantive nature of the major questions doctrine means that the doctrine has the potential to touch "all corners of the administrative state,"[13] holding up government action across the board.[14] Indeed, as this Note later explores, plaintiffs in approximately forty percent of major questions challenges in the year following the doctrine's announcement in *West Virginia v. EPA* were successful in blocking federal government actions.[15]

Given these implications, the scholarly commentary assessing the doctrine's merits has been deeply divided. Scholars writing in support of the major questions doctrine have argued that the doctrine is necessary to ensure that the legislature, the most democratically accountable decisionmaker, resolves the issues of greatest importance to the American public.[16] By contrast,

9. *West Virginia*, 142 S. Ct. at 2609, 2614.

10. *Id.* at 2609.

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

12. *See* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS L.J., 635, 650-51 (2023); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 495 (2021); Cass R. Sunstein, Essay, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 253 (2024).

13. *West Virginia*, 142 S. Ct. at 2608.

14. *See infra* Part II.A (listing a number of contexts in which major questions issues have arisen in the lower courts).

15. *See infra* note 286 and accompanying text.

16. *See infra* notes 55-66 and accompanying text.

scholars opposed to the major questions doctrine have predicted that it will allow a democratically unaccountable judiciary to selectively hold up agency action, undermining the federal government's ability to regulate effectively.[17]

But a point of seeming consensus in the current literature surrounding the major questions doctrine is uncertainty about how the doctrine is supposed to work. Scholars have described the doctrine as "deliberately vague" and "an exercise in 'strategic ambiguity.'"[18] The concepts of "major question" and "clear congressional authorization" are slippery and lack historical precedent to imbue them with meaning.[19] And despite Justice Gorsuch's attempt to clarify those terms in *West Virginia v. EPA*,[20] a majority of the Court has not yet embraced his formulation of the test or fleshed out its own, leaving little guidance for lower courts and litigants seeking to apply the doctrine. Similarly, it is unclear how the major questions doctrine figures into the patchwork of administrative law doctrines and what spillover effects, if any, it will have. But despite the abundance of scholarship highlighting the uncertainties in the major questions doctrine and speculating about its future, no scholarship has yet attempted to illuminate how lower courts and litigants are in fact beginning to apply the doctrine.[21]

This Note offers an original contribution to the existing literature on two fronts. First, it explores how litigants and lower courts are actually applying the major questions doctrine in light of the Supreme Court's directive. Second, it uncovers how litigants and lower courts in major questions cases have treated two closely related administrative law doctrines: *Chevron* deference and the nondelegation doctrine. While the major questions doctrine remains in an early stage of development, identifying emerging trends among this important group of "first movers" on the doctrine will facilitate a deeper understanding of where the doctrine stands and where it may be headed in the coming years. Grasping, as a positive matter, the state of the doctrine as it plays out in the courts below is in turn crucial to identifying which normative concerns about the doctrine are most likely to be borne out and are most deserving of attention.

17. *See infra* notes 67-77 and accompanying text.

18. *See, e.g.*, Patrick J. Sobkowski, *Of Major Questions and Nondelegation*, YALE J. ON REGUL.: NOTICE & COMMENT (July 3, 2023), https://perma.cc/MTF9-NEUW.

19. *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 218-19 (2022).

20. *See* 142 S. Ct. 2587, 2620-21 (Gorsuch, J., concurring) (outlining a version of the major questions test).

21. In the course of editing this Note, one other author has provided an overview of lower court major questions cases, focusing primarily on the partisan nature of the rulings. *See* Natasha Brunstein, *Taking Stock of West Virginia on Its One-Year Anniversary*, YALE J. ON REGUL.: NOTICE & COMMENT (June 18, 2023), https://perma.cc/EP3B-3BYW.

As this Note later explores, the major questions doctrine has featured in lower court challenges across a vast expanse of policy areas, including but not limited to: environmental regulation, public health, education, immigration, data privacy, labor and employment, election law, public safety, and national security, economic affairs, and anti-discrimination law.[22] The doctrine has also been used to challenge various types of executive actions, including agency rules and regulations, enforcement actions for statutory violations, presidential (nonagency) actions, and actions that confer a public benefit rather than regulating private conduct.[23] Lower courts and litigants appear to diverge on the subject of how to assess whether a given action qualifies as "major," with each group focusing on different indicia.[24] But once a court finds that an action implicates a major question, it is evident that the "clear congressional authorization" bar has teeth. Indeed, in the year following the Supreme Court's adoption of the major questions doctrine, the government only prevailed in one case where a major question was found.[25] As to the major questions doctrine's relationship to other administrative law principles, early lower court cases suggest a decreasing reliance on *Chevron* deference and, despite the efforts of litigants, a continued aversion to the nondelegation doctrine.[26]

This Note proceeds in two Parts. Part I reviews the major questions doctrine as the Supreme Court has articulated it thus far. It distills the core precedents at the heart of the doctrine and traces the debate regarding the doctrine's merits. It also identifies key questions that the Supreme Court has left open and current scholarship has left unanswered. Part II analyzes how federal lower courts and litigants are beginning to implement the Supreme Court's major questions mandate. It first examines the contexts in which litigants and courts have raised major questions issues and the strategies that plaintiffs and defendants have adopted with respect to the doctrine. It then analyzes how courts and litigants are applying the elements of the major questions test and explores the implications of that test for two related administrative law doctrines: *Chevron* deference and the nondelegation doctrine.

## I. The Supreme Court's Major Questions Doctrine

This Part discusses the emergence of the major questions doctrine, the normative debate surrounding the doctrine, and the current forecast regarding the doctrine's future. Subpart A reviews the most recent Supreme Court cases

22. *See infra* notes 116-26 and accompanying text.

23. See *infra* Part II.A.

24. *See infra* Part II.B.1.

25. *See infra* notes 249-57 and accompanying text.

26. *See infra* Part II.C.

that form the core of the burgeoning major questions canon. Subpart B explores key policy arguments that scholars have advanced in support of and in opposition to the doctrine. Finally, Subpart C identifies remaining grey areas and previews scholarly predictions about how courts might interpret the doctrine and negotiate its intersections with other tenets of administrative law.

### A. The Major Questions Quintet

A majority of the Supreme Court explicitly embraced the major questions doctrine for the first time in *West Virginia v. EPA*.[27] In that case, the Court invalidated the Clean Power Plan, an attempt by the Environmental Protection Agency (EPA) to compel power plants to reduce reliance on fossil fuels through generation shifting. Under the Plan, power plants could reduce their energy production, subsidize a form of renewable energy, or purchase emissions credits through a cap-and-trade system.[28] The EPA based its authority on the Clean Air Act, which authorizes it to set a "standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . [it] determines has been adequately demonstrated."[29] The Court rejected this position, reasoning that the EPA had asserted an "unheralded power" constituting a "transformative expansion in [its] regulatory authority."[30] The Court concluded that "the vague

27. 142 S. Ct. 2587, 2609 (2022). Outside of the major questions quintet, certain members of the Court had made explicit reference to the "major questions doctrine" in two cases, foreshadowing the doctrine's arrival. *See* Gundy v. United States, 139 S. Ct. 2116, 2141-42 (2019) (Gorsuch, J., dissenting); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring in part and dissenting in part). Considerable effort has been dedicated to debating whether the doctrine can properly be understood as having historical origins beyond these more recent cases. *Compare* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 197 (2023) (connecting the doctrine to nineteenth-century caselaw evincing a presumption against implied delegations in arguably "major" contexts), *and West Virginia*, 142 S. Ct. at 2609 (defending the doctrine's consistency with past precedents), *with* Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation,* Chevron*, and More*, 65 WM. & MARY L. REV. 1265, 1272 (2024) ("[T]he [major questions doctrine] has no basis in the Administrative Procedure Act (APA) or prior law under it . . . ."), Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 272 (2022) (distinguishing recent major questions decisions from past cases associated with the doctrine), *and West Virginia*, 142 S. Ct. 2587, 2641 (Kagan, J., dissenting) (contending that the major questions doctrine "magically appear[ed] as [a] get-out-of-text-free card[]"). *See generally* Allison Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1 (2024) (discussing how the major questions doctrine evolved from an academic concept to a judicially recognized canon).

28. *West Virginia*, 142 S. Ct. at 2603 (2022).

29. 42 U.S.C. § 7411(a)(1).

30. *West Virginia*, 142 S. Ct. at 2610 (alteration in original) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

language of an 'ancillary provision[]' of the [Clean Air] Act" was an insufficient statutory basis for this assertion of authority.[31]

While *West Virginia* formalized the major questions doctrine, it is not the only case in which the Court has employed a version of this doctrine to assess the propriety of agency action. Rather, *West Virginia* is one case in a set that came to be known as the "major questions quartet."[32] In the earliest of these cases, *Alabama Association of Realtors v. Department of Health and Human Services*,[33] the Court concluded that the Centers for Disease Control (CDC) had exceeded its statutory authority by issuing a nationwide eviction moratorium in response to the COVID-19 pandemic. Although the Public Health Service Act permits the agency "to make and enforce such regulations as in [its] judgment are necessary" to prevent the spread of disease, the Court construed that power narrowly in light of another provision specifying "inspection, fumigation, disinfection, sanitation, [and] pest extermination" as among the kinds of measures the agency could take.[34] The Court also stressed that the CDC's claimed authority was "unprecedented" in size and scope.[35] The Court emphasized that the moratorium would affect "[a]t least 80% of the country," cost landlords approximately $50 billion plus criminal penalties for violators in the form of jail time and fines, and "intrude[] into an area that is the particular domain of state law: the landlord-tenant relationship."[36] The Court also cautioned that the CDC's interpretation lacked meaningful limits to future action.[37]

Similarly, in *National Federation of Independent Business v. Occupational Safety and Health Administration*, the Court held that the Occupational Safety and Health Administration (OSHA) could not lawfully impose on employers a program requiring employees to either be vaccinated for COVID-19 or to regularly mask and test.[38] The Court reasoned that COVID-19 was not an occupational hazard falling within OSHA's statutory authority to "set 'occupational safety or health standards,'" including "emergency temporary standard[s] . . . necessary to protect 'employees'" from "new hazards."[39] In

31. *Id.* (alteration in original) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

32. *See* Sohoni, *supra* note 27, at 262.

33. 141 S. Ct. 2485 (2021) (per curiam).

34. *Id.* at 2488; 42 U.S.C. § 264(a).

35. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

36. *Id.*

37. *See id.* ("It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit . . . beyond the requirement that the CDC deem a measure 'necessary.'").

38. 142 S. Ct. 661, 666-67 (2022).

39. *Id.* at 663, 665 (emphasis omitted) (quoting 29 U.S.C. § 655(b)-(c)).

reaching its holding, the Court emphasized the number of Americans that would be affected by OSHA's policy—eighty-four million—as well as the "significant encroachment" on individual liberty that a vaccine-or-test requirement represented.[40]

One case in the quartet came out the other way. In *Biden v. Missouri*, the Court held that the Department of Health and Human Services had the authority to condition the disbursement of Medicare and Medicaid funds to healthcare facilities on the requirement that employees of those facilities be vaccinated against COVID-19.[41] In support of its decision, the Court pointed to the consistency of this new condition with "the longstanding practice of [the Department]," the routineness of vaccine requirements as part and parcel of "the provision of healthcare in America," and the "overwhelming[] support" for the mandate among healthcare workers and organizations.[42] The Court concluded that the Department's policy "fits neatly within" its organic statute, which permits it to impose funding conditions that its "Secretary finds necessary in the interest of the health and safety of individuals who are furnished services."[43]

Exactly one year after it embraced the major questions doctrine in *West Virginia*, the Supreme Court extended the quartet to a quintet in response to a consolidated challenge to the Biden Administration's student loan debt forgiveness policy.[44] Under this policy, the Department of Education provided for the relief of up to $10,000 in student loan debt for eligible borrowers, or up to $20,000 for Pell Grant recipients.[45] It based its authority on the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), which vests the Secretary of Education with the authority to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Higher Education Act of 1965] . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency."[46]

The program, while a pandemic measure like the policies at issue in the other major questions cases, differed in that it conferred a federal benefit rather

40. *Id.* at 665.

41. 142 S. Ct. 647, 653 (2022).

42. *Id.* at 652-53.

43. *Id.* at 652 (quoting 42 U.S.C. § 1395x(e)(9)).

44. Biden v. Nebraska, 143 S. Ct. 2355 (2023).

45. *See* Brief for the Petitioners at 8-9, *Nebraska*, 143 S. Ct. 2355 (No. 22-506), 2022 WL 18146216. This brief was also filed in *Department of Education v. Brown*, 143 S. Ct. 2343 (2023) (No. 22-535), a closely related case which the Court consolidated with *Nebraska* for argument.

46. Brief for the Petitioners, *supra* note 45, at 8-9; 20 U.S.C. § 1098b(a)(1).

than regulating private conduct.[47] Nonetheless, the challengers characterized the program as "a textbook case for the major-questions doctrine."[48] They cited, among other things, the policy's $430 billion cost, the level of public attention it had garnered, Congress's unwillingness to pass similar legislation, the Department's lack of macroeconomics expertise, and the novelty of using the HEROES Act for this particular purpose.[49]

In *Biden v. Nebraska*, the Supreme Court held that both the plain text of the statute and the major questions doctrine precluded the student debt relief plan.[50] As to the latter ground, the Court underscored the high number of beneficiaries and the program's overall cost, both to taxpayers and in relation to the government's typical annual spending.[51] The Court also found it significant that Congress had declined to enact student debt relief and voiced concern that such relief was a "personal and emotionally charged" issue in the public discourse.[52]

### B. Common Rationales and Critiques

As a policy matter, the merits of the major questions doctrine are hotly contested.[53] Scholars have analyzed the doctrine from a number of perspectives, inquiring into its historical pedigree or lack thereof, its compatibility with other methods of interpretation, and its impact on the balance of power

47. *See* Brief for the Petitioners, *supra* note 45, at 20.

48. *See* Brief for Respondents at 20, *Brown*, 143 S. Ct. 2343 (No. 22-535), 2023 WL 1455040.

49. *See* Brief for the Respondents at 31-35, *Nebraska*, 143 S. Ct. 2355 (No. 22-506), 2023 WL 1481073.

50. *See Nebraska*, 143 S. Ct. at 2375. The case also presented standing issues, which the Court resolved in favor of the plaintiff states prior to reaching a decision on the merits. *See id.* at 2365, 2368. However, the Court dismissed the other pending student debt challenge on the grounds that the individual challengers who had been denied debt relief under the program lacked standing. *See Brown*, 143 S. Ct. at 2354-55.

51. *See Nebraska*, 143 S. Ct. at 2373.

52. *See id.* at 2373-74 (quoting Jeff Stein, *Biden Student Debt Plan Fuels Debate over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022, 6:00 AM EDT), https://perma.cc/5GN2-KZTV). Justice Barrett concurred, justifying the major questions doctrine as a "tool for discerning . . . the text's most natural interpretation" rather than a substantive canon and attempting to clarify the clear congressional authorization requirement. *Id.* at 2376-78 (Barrett, J., concurring). Justices Kagan, Sotomayor, and Jackson dissented. *Id.* at 2384 (Kagan, J., dissenting).

53. *See, e.g.*, Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 390-409 (2016) (summarizing several arguments for and against the major questions doctrine).

between the branches of government.[54] This Part focuses on the key rationales for and critiques of the doctrine from a separation of powers perspective.

Proponents of the major questions doctrine have posited that the doctrine is necessary to prevent executive aggrandizement and maintain parity between the branches of government.[55] The Constitution provides for the separation of powers through the Vesting Clauses.[56] Agencies, the argument goes, are only empowered to act so long as Congress has delegated authority to them. Where an organic statute is unclear about an agency's powers, it is unreasonable to assume that Congress intended to delegate authority to the agency, for "[t]here is no empirical evidence to suggest that Congress legislates on important matters through ambiguity."[57] In other words, "Congress does not usually 'hide elephants in mouseholes.'"[58] A check is thus necessary to reign in empire-building agencies that would exploit ambiguous statutory provisions to expand their regulatory powers beyond what Congress could have foreseen and intended. Adherence to congressional intent in turn promotes democratic accountability and good governance because it commits unelected agency bureaucrats to carrying out, rather than thwarting, the decisions of elected representatives.[59]

Scholars have described the major questions doctrine as imposing constraints not only on executive power but on congressional and judicial power as well. As to congressional power, the doctrine, by requiring clear congressional authorization for major agency actions, "directs how Congress must draft statutes."[60] Requiring Congress to be more specific if it wants its delegations to be upheld may be beneficial. There is an argument to be made

54. *See generally* Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT, https://perma.cc/6FXZ-DGEL (last updated Mar. 18, 2023) (collecting recent articles on these themes).

55. *See* Richardson, *supra* note 53, at 397-401 (explaining the aggrandizement rationale for the major questions doctrine); *see, e.g.*, Randolph J. May & Andrew K. Magloughlin, NFIB v. OSHA*: A Unified Separation of Powers Doctrine and* Chevron*'s No Show*, 74 S.C. L. REV. 265, 294 (2022).

56. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); *id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President . . . ."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

57. Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 40), https://perma.cc/9TXY-AXGP; *see also* Richardson, *supra* note 53, at 390 (discussing the argument that "the legal fiction of implied delegation is weak or even disappears when the legal question at issue is sufficiently significant").

58. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

59. *See* Richardson, *supra* note 53, at 393.

60. Sohoni, *supra* note 27, at 276.

that even if Congress intends to delegate authority on a major question, it should not be able to do so without scrutiny. Congress's choice to delegate to an agency may not always be attributable to a belief that the agency is best suited to address a given issue. Legislators may also delegate to claim credit for solving a problem while avoiding blame for unpopular actions that arise in the course of doing so.[61] Perhaps the major questions doctrine will encourage Congress to do its job of legislating on major social and economic policy problems, taking up the mantle instead of passing the buck through vague delegations.[62]

Supporters of the doctrine have also pointed to its potential to address judicial abdication. Under *Marbury v. Madison*, it is "the province and duty of the judicial department to say what the law is."[63] Because *Chevron*'s regime of deferring to agencies on questions of law suggests that it is instead "the province of the *executive* department to say what the law is," some have dubbed *Chevron* the "counter-*Marbury* for the administrative state."[64] Those who espouse the view that the judiciary is better suited to interpret the law also tend to favor the major questions doctrine because that doctrine represents a significant carveout within which *Chevron* is not applied.[65] And even some who want to see *Chevron* preserved have endorsed the major questions doctrine as a "safety valve" that "minimize[s] the long-term risk to *Chevron*" by allowing courts to avoid applying *Chevron* in cases where its tension with *Marbury* is most pronounced.[66]

Opponents of the major questions doctrine have predicted that it will incentivize judicial aggrandizement and policymaking from the bench.[67] Rather than reconcentrating power in Congress, the argument goes, the doctrine instead places courts in the pivotal position of determining which agency actions qualify as "major" and thus warrant scrutiny.[68] The resultant risk, as Justice Kagan wrote in her *West Virginia* dissent, is that "[t]he Court appoints itself . . . the

61. *See* Charlotte Twight, *From Claiming Credit to Avoiding Blame: The Evolution of Congressional Strategy for Asbestos Management*, 11 J. PUB. POL'Y 153, 169-74 (1991).

62. *See* Thomas A. Koenig & Ben R. Pontz, Note, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221, 232 (2023) (noting that "the major questions doctrine requires Congress to articulate consciously and clearly its desire for an agency to exercise [a given] power," reserving to Congress the power to "make [the] important calls").

63. 5 U.S. (1 Cranch) 137, 177 (1803).

64. Cass R. Sunstein, Essay, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (emphasis added); *see also* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2637 (2003).

65. *See* Richardson, *supra* note 53, at 423.

66. *See id.*

67. *See* Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 772 (2022); Chafetz, *supra* note 12, at 650-51.

68. *See* Squitieri, *supra* note 12, at 495.

decision-maker" on major policy matters despite lacking the expertise and accountability of either the legislative or the executive branch.[69]

Even if the major questions doctrine did shift the balance of power back toward Congress, it is not clear that Congress would be able to make use of that newfound responsibility. Congressional resources are finite, and legislating with specificity carries high transaction costs.[70] Politicians, in comparison to bureaucrats, lack "information and technical expertise about particular policies and their consequences"; they must therefore "pay to obtain needed information."[71] These constraints disincentivize Congress from revisiting and updating the statutes on which agencies rely, most of which were not drafted with the understanding that Congress had to clearly authorize major actions.[72] Further, the major questions doctrine is riddled with legal uncertainties.[73] How is Congress to divine, ex ante, when it must invest in particularly precise delegations? If Congress cannot predict, with reasonable certainty, what a court will consider "major" or what degree of specificity meets the threshold of "clear authorization," then any hope that the doctrine will inspire Congress to take up and speak clearly on major questions seems futile.[74] Even if the Court were to further clarify the doctrine, Congress is no expert on the subject matter of a given agency. As such, Congress is unlikely to be effective in laying out the various contingencies an agency might encounter and what the agency should do in each instance.[75]

Now consider the impact on agencies. To effectively implement a regulation, an agency requires the flexibility to adapt to new findings and problems that arise during the agency's work. If the major questions doctrine encourages Congress to be hyper-specific in prescribing courses of action, such over-specification can impair agencies' ability to engage in context-sensitive implementation, undermining a key basis for delegating in the first place.[76] Alternatively, if Congress continues to delegate vaguely despite the doctrine, an agency's options are slim. An agency can play it safe and adhere to past practices that courts have upheld. This path comes with the same loss of

69. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting).

70. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96 (1985).

71. John D. Huber & Charles R. Shipan, *The Costs of Control: Legislators, Agencies, and Transaction Costs*, 25 LEGIS. STUD. Q. 25, 27 (2000).

72. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1080, 1084 (2023).

73. *See infra* Part I.C; Chafetz, *supra* note 12, at 650.

74. *See* Chafetz, *supra* note 12, at 650 ("Congress has no way of knowing whether eating an ice cream cone is major or not until it sees what five justices have to say about it.").

75. *See* Deacon & Litman, *supra* note 72, at 1081.

76. *See id.* at 1081-82, 1084.

flexibility and responsiveness to novel concerns that adheres in the case where Congress legislates with specificity. Alternatively, an agency can act in a statutory grey area and risk its action being set aside as implicating a major question. This path comes with protracted litigation and the costs of implementing a policy that may ultimately be invalidated. Given this calculus, the most probable outcome is deregulation. Because public confidence in the administrative state depends on its ability to make and execute beneficial policies, institutional legitimacy is also likely to suffer.[77]

### C. Unanswered Questions and Predictions for the Future

One of the most salient criticisms of the major questions doctrine is its perceived unworkability. The doctrine has been labeled "radically indeterminate,"[78] with a number of scholars arguing that the Court's recent cases provide insufficient guidance to lower courts seeking to implement the doctrine.[79] Two particular areas of uncertainty stand out. First, the terms "major question" and "clear congressional authorization," which make up the pillars of the *West Virginia* test,[80] are open-ended. Second, it is unclear what the major questions doctrine signals about the future of related administrative law doctrines, particularly *Chevron* deference and the nondelegation doctrine.

Justice Gorsuch's concurrence in *West Virginia* attempted to provide guidance for applying the major questions test. The first step of the two-part inquiry is to determine whether the question before the Court is a "major" one.[81] Justice Gorsuch listed three categories of 'majorness': political significance, economic significance, and impact on federalism. First, a question is major "when an agency claims the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country.'"[82] In addition or alternatively, a question is major when an agency "seeks to regulate 'a significant portion of the American economy' or require 'billions of dollars in spending' by private persons or entities."[83] A question

77. *See id.* at 1092-93.

78. *Id.* at 1014.

79. *See, e.g.*, Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2021-2022 CATO SUP. CT. REV. 37, 38 (2022); Beermann, *supra* note 27, at 1303.

80. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

81. *See id.* at 2620-21 (Gorsuch, J., concurring).

82. *Id.* at 2620 (citation omitted) (first quoting Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022); then quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

83. *Id.* at 2621 (citation omitted) (first quoting *id.* at 2608 (majority opinion); then quoting King v. Burwell, 576 U.S. 473, 485 (2015)).

may also be major "when an agency seeks to 'intrud[e] into an area that is the particular domain of state law.'"[84]

There are a number of indeterminacies at the first step of the inquiry alone. As an initial matter, it is unclear whether a combination of these factors is required to find that a question is major, or if one alone can suffice. The conjunctive nature of the phrase "vast economic and political significance"[85] implies the former,[86] but some have suggested Justice Gorsuch's three factors are alternative and individually sufficient conditions for "majorness."[87] Complicating the inquiry further, Justice Barrett has commented that "the doctrine is not an on-off switch that flips when a critical mass of factors is present."[88]

Additionally, a court may contemplate each category of 'majorness' in one or more ways. For example, political significance may be measured from the perspective of the public, by looking to metrics such as the "number of comments submitted during a regulation's notice-and-comment procedures" or whether states have different practices concerning the policy at hand.[89] Alternatively, it may be construed through a separation of powers lens, by examining whether "Congress has debated the issue or has considered and rejected related legislation."[90] As a worst-case scenario, whether a question is deemed major may turn on a judge's personal policy preferences or subjective assessment of whether an issue feels polarizing.[91]

Even economic significance, a seemingly more objective criterion, may be interpreted in several ways. A court may emphasize the regulation's overall impact on the economy, the cost to regulated parties, the size and importance of the regulated industries, or how the policy's price tag compares to executive branch pronouncements on what it considers "major."[92] Courts could, and

84. *Id.* (alteration in original) (quoting Ala. Ass'n of Realtors v. Dept. of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

85. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

86. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012) (explaining the "Conjunctive/Disjunctive Canon" of interpretation).

87. *See, e.g.*, Capozzi, *supra* note 27, at 221, 228 (conceptualizing politically significant actions and economically significant actions as two different "categories of 'major' questions").

88. Biden v. Nebraska, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring).

89. Capozzi, *supra* note 27, at 232.

90. *Id.*

91. Indeed, some scholars have argued that the major questions inquiry is an inherently political exercise. *See* Squitieri, *supra* note 12, at 504.

92. *See* Capozzi, *supra* note 27, at 229-30.

perhaps should, also account for the benefits of a given regulation.[93] However, they may be unlikely to do so given that such a factor has not featured in the Supreme Court's major questions analysis. In *West Virginia v. EPA*, for example, the Court highlighted the compliance costs of the Clean Power Plan.[94] But the Court did not inquire into whether the Plan's projected benefits—between thirty-two and fifty-four billion dollars—might offset those costs.[95]

Once a court finds that an agency acted on a major question, the agency must show clear congressional authorization for that action. Justice Gorsuch analogized this concept to the "clear-statement rules" that the Court has long applied.[96] Some scholars, however, have pointed to the majority's nonadoption of that term as a sign that the Court intends something different.[97] The Gorsuch concurrence provided four red flags that indicate insufficient authorization: (1) the provision on which the agency relied is an ancillary part of the statute or uses indirect language; (2) the agency is using an old statute in a new way; (3) the agency's current and past interpretations of that statute are divergent; and (4) there is a disjuncture between the agency's expertise and the power it asserts.[98]

In addition to the ambiguities inherent in the major questions test, it is also uncertain how exactly the major questions doctrine fits into the universe of administrative law. Is it a tool of statutory interpretation that can be used to bolster a traditional challenge to regulatory action, or is it a standalone, independent barrier to action? And how does it relate to other doctrines? Two particular doctrines and their interaction with the major questions doctrine have been the subjects of much scholarly speculation: *Chevron* deference and the nondelegation doctrine.

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93. *See* TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON, ANNE JOSEPH O'CONNELL & ELOISE PASACHOFF, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1360 (13th ed. 2023).

94. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022).

95. *See id.* at 2638 n.6 (Kagan, J., dissenting). Current White House guidance on identifying "significant" regulations subject to review by the Office of Information and Regulatory Affairs similarly instructs agencies to measure the threshold "in terms of gross, rather than net, effects." Memorandum from Richard L. Revesz, Admin., Off. of Info. and Regul. Affs, to Regul. Pol'y Officers at Exec. Dep'ts and Agencies 3 (Apr. 6, 2023), https://perma.cc/63FY-K3ZU ("If an action, for example, had $250 million in benefits and $100 million in costs, for a net benefit of $150 million, it would still be significant . . . because there is a category of gross effect (benefits) exceeding $200 million.").

96. *West Virginia*, 142 at 2616-17 (Gorsuch, J., concurring).

97. *See* Natasha Brunstein & Donald L.R. Goodson, *To Be Clear, the Major Questions Doctrine Is Not a Clear-Statement Rule*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 21, 2022), https://perma.cc/KEN8-NL59.

98. *See West Virginia*, 142 S. Ct. at 2622-23 (2022) (Gorsuch, J., concurring).

In *Chevron, U.S.A., Inc. v. National Resources Defense Council*, the Supreme Court established a regime of deference to agencies on questions of law, including questions about whether a given action falls within an agency's statutory jurisdiction.[99] As a threshold question, courts consider whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority."[100] If the answer to these questions is "yes," courts then ask whether the provision on which the agency relied is ambiguous, using "ordinary tools of statutory construction."[101] If Congress's intent is clear, then a court must enforce it.[102] But if there are multiple plausible readings of a statute, then the agency's interpretation, if reasonable, warrants deference.[103]

*Chevron* deference appears to have fallen out of favor with the Supreme Court; the Court has not deferred to an agency's statutory interpretation pursuant to *Chevron* since 2016.[104] However, because the Court has not formally overruled the doctrine, lower courts have continued to apply it.[105] The major questions doctrine takes the Court's eschewal of *Chevron* even further. Rather than deference, the doctrine calls for "skepticism" of major agency actions,[106] representing a wholesale inversion of *Chevron*.[107] In a major questions case, even an agency's reasonable interpretation of its statutory authority will not be enough to rescue its action.[108] While the long-term status of *Chevron* remains unclear, some have speculated that the emergence of the major questions doctrine may further precipitate *Chevron*'s demise.[109] Others, however, have proposed that the major questions doctrine will function as a

99. 467 U.S. 837 (1984). The principle underlying *Chevron* is that agencies, "charged with the administration of the statute[s] in light of everyday realities," are well-positioned to resolve questions "left open by Congress." *Id.* at 865-66.

100. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

101. *See* City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

102. *See id.*

103. *See id.* at 296, 307.

104. *See* BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R44954, CHEVRON DEFERENCE: A PRIMER 17 (2023), https://perma.cc/J5LE-7ZWN.

105. *See* Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 445, 508 (2021).

106. West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

107. *See* Deacon & Litman, *supra* note 72, at 1012.

108. *See West Virginia*, 142 S. Ct. at 2609 ("[S]omething more than a merely plausible textual basis for the agency action is necessary.").

109. *See* David Freeman Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (July 6, 2022), https://perma.cc/V4YY-QJWE.

"safety valve" for *Chevron*, allowing courts to continue applying the latter doctrine, albeit selectively.[110]

The major questions cases have also reinvigorated the conversation around a related administrative law doctrine: the nondelegation doctrine. This doctrine requires that Congress set forth an "intelligible principle" that cabins agency discretion whenever it delegates statutory authority to an agency.[111] The doctrine has long been thought to be toothless. The Supreme Court has only twice invalidated agency action on nondelegation grounds and has not done so since 1935,[112] even though it confronted nondelegation arguments as recently as 2019.[113] The Court's major questions cases have only reinforced the narrative regarding the nondelegation doctrine's impotence. Indeed, the prevailing view is that the major questions doctrine's "clear congressional authorization" requirement effectively serves as a backdoor into the nondelegation doctrine, vitiating the need for a full-scale nondelegation revival.[114] However, some scholars have maintained that a nondelegation resurgence may be forthcoming.[115]

Despite the abundance of scholarship discussing the uncertainties of the major questions doctrine and predicting the doctrine's impact on related administrative law principles, no scholarship has yet analyzed how litigants and lower courts are beginning to answer these questions in practice. This Note fills that gap.

## II. Interpreting the Major Questions Doctrine: How Lower Courts and Litigants Have Responded to the Supreme Court's Directive

This Part analyzes complaints filed and cases decided in the year following the Supreme Court's establishment of the major questions doctrine in order to assess how first movers have begun to grapple with the doctrine. First, this Part explores the contexts in which major questions challenges have arisen and identifies common strategies by challenger plaintiffs and governmental defendants. It then analyzes how lower courts and litigants have attempted to

110. *See* Richardson, *supra* note 53, at 419-20.

111. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

112. *See* Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 523, 527, 529 (2023); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 429-30 (1935).

113. *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

114. *See* Sohoni, *supra* note 27, at 265-266; Thomas B. Griffith & Haley N. Proctor, Essay, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J.F. 693, 702-03 (2022) ("The major questions doctrine is a way to narrow the field in which the nondelegation doctrine remains underenforced . . . .").

115. *See, e.g.*, Nachmany, *supra* note 112, at 515-16.

define a "major question" and which factors in the inquiry have carried the day. Finally, it examines whether and how lower courts have cited *Chevron* in major questions cases and what role, if any, the nondelegation doctrine has played.

### A. A Lay of the Land: Substance and Strategy in Major Questions Cases

The major questions doctrine has the potential to reach "all corners of the administrative state."[116] In the year following the Court's adoption of the doctrine in *West Virginia v. EPA*, federal courts resolved dozens of legal challenges that raised major questions issues. The government prevailed approximately forty percent of the time.[117] The challenges have spanned a vast expanse of policy areas, including but not limited to: environmental regulation,[118] public health,[119] education,[120] immigration,[121] data privacy,[122]

116. West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

117. *See infra* note 286 and accompanying text.

118. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 364-65 (D.C. Cir. 2022) (at-sea monitoring program to prevent overfishing), *cert. granted*, 143 S. Ct. 2429 (2023); United States v. Empire Bulkers Ltd., No. 21-126, 2022 WL 3646069, at *2 (E.D. La. Aug. 24, 2022) (recordkeeping requirement for discharges by oceangoing ships); Amended Complaint at 23, True Oil, LLC v. Bureau of Land Mgmt., No. 22-CV-188, 2023 WL 8459175 (D. Wyo. Oct. 30, 2023), ECF No. 6 [hereinafter Amended Complaint, *True Oil*] (drilling permit requirement); Complaint at 2, Heritage Found. v. SEC, No. 23-cv-00238 (D.D.C. filed Jan. 27, 2023), ECF No. 1 [hereinafter Complaint, *Heritage Found.*] (SEC climate disclosure rule); Complaint at 1, 11, 14, August Mack Env't, Inc. v. EPA, No. 23-cv-00036 (N.D. W. Va. filed Apr. 19, 2023), ECF No. 1 (access to funds for hazardous waste site cleanups).

119. *See* Louisiana v. Becerra, 629 F. Supp. 3d 477, 482, 492 (W.D. La. 2022) (vaccine and mask mandate), *vacated as moot*, 2023 WL 8368874 (5th Cir. Aug. 29, 2023); Complaint at 2, 46-48, UCB, Inc. v. Becerra, No. 22-cv-02893 (D.D.C. filed Sept. 23, 2022), ECF No. 1 [hereinafter Complaint, *UCB*] (covered entity discount requirements for pharmaceutical manufacturers).

120. *See* Sweet v. Cardona, 641 F. Supp. 3d 814, 819 (N.D. Cal. 2022) (student loan debt settlement agreement), *appeal filed sub nom.* Sweet v. Everglades Coll., Inc., No. 23-15049 (9th Cir. Jan. 17, 2023); Complaint at 1-2, Career Colls. & Schs. of Tex. v. Dep't of Educ., 681 F. Supp. 3d 647 (W.D. Tex. 2023), ECF No. 1 [hereinafter Complaint, *Career Colls. & Schs.*] (rule expanding grounds for relief for student loan borrowers); Complaint at 2, Sofi Bank, N.A. v. Cardona, No. 23-cv-00599 (D.D.C. filed Mar. 3, 2023), 2023 WL 2389587 (student loan repayment moratorium); Complaint at 2-3, 2U, Inc. v. Cardona, No. 23-cv-00925 (D.D.C. filed Apr. 4, 2023), ECF No. 1 [hereinafter Complaint, *2U*] (mandatory guidance to higher education institutions on third-party contracts).

121. *See* Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 168 (D.C. Cir. 2022) (Optional Practical Training rule extending F-1 visas for STEM graduates), *cert. denied*, 144 S. Ct. 78 (2023) (mem.).

122. *See* FTC v. Kochava Inc., 671 F. Supp. 3d 1161, 1167, 1179-80 (D. Idaho 2023) (enforcement action for alleged violations of user privacy).

labor and employment,[123] election law,[124] public safety and national security,[125] economic affairs,[126] and anti-discrimination law.[127]

Several measures have faced repeated challenges on major questions grounds. These actions are: (1) the DOE student loan debt forgiveness plan;[128]

123. *See* Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023) (federal contractor minimum wage increase), *appeal filed sub nom.* Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023).

124. *See* Complaint at 23, Ready for Ron v. FEC, No. 22-3282, 2023 WL 3539633 (D.D.C. May 17, 2023), ECF No. 1 [hereinafter Complaint, *Ready for Ron*] (alleging that the major questions doctrine applies to an FEC advisory opinion).

125. *See* VanDerStok v. Garland, 625 F. Supp. 3d 570, 574 (N.D. Tex. 2022) (rule redefining "firearm"); Complaint at 2, 10, Watterson v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 23-cv-00080, 2024 WL 897595 (E.D. Tex. Mar. 1, 2024), ECF No. 1 [hereinafter Complaint, *Watterson*] (rule redefining "rifle"); Complaint at 1-2, Britto v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 23-cv-00019, 2023 WL 7418291 (N.D. Tex. Nov. 8, 2023), 2023 WL 1433440 [hereinafter Complaint, *Britto*] (same); Kovac v. Wray, 660 F. Supp. 3d 555, 563 (N.D. Tex. 2023) (terrorist watchlist), *appeal filed*, No. 23-10284 (5th Cir. Mar. 22, 2023).

126. *See* West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1131-32, 1147 (11th Cir. 2023) (stimulus package tax offset provision); Complaint at 2, Avocet Ventures, LP v. Small Bus. Admin., No. 22-cv-01070 (N.D. Tex. filed Dec. 2, 2022), ECF No. 1 [hereinafter Complaint, *Avocet*] (rule barring lenders from receiving certain loans guarantees and forgiveness); Utah v. Walsh, No. 23-CV-00016, 2023 WL 6205926, at *2 (N.D. Tex. Sept. 21, 2023) (rule embracing environmental, social, and governmental considerations by ERISA fiduciaries), *appeal filed sub nom.* Utah v. Su (5th Cir. Oct. 30, 2023).

127. *See* CFPB v. Townstone Fin., Inc., No. 20-cv-4176, 2023 WL 1766484, at *5 (N.D. Ill. Feb. 3, 2023) (nondiscrimination requirement for credit transactions), *appeal filed*, No. 23-1654 (7th Cir. Apr. 4, 2023); Tennessee v. U.S. Dep't of Agric., No. 22-cv-257, 2022 WL 5336196, at *1 (E.D. Tenn. Aug. 10, 2022) (nondiscrimination requirement for Supplemental Nutrition Assistance Programs); Complaint at 74, Faith Action Ministry All., Inc. v. Fried, No. 22-cv-01696 (M.D. Fla. filed July 27, 2022), ECF No. 1 [hereinafter Complaint, *Faith Action Ministry All.*] (nondiscrimination requirement for federal school lunch programs); Complaint at 30, Texas v. Becerra, No. 22-cv-00419, 2024 WL 1221168 (S.D. Tex. Mar. 21, 2024), 2022 WL 17735745 [hereinafter Complaint, Texas v. Becerra] (nondiscrimination requirement for federally funded foster care and other social services); Texas v. U.S. Dep't. of Health & Hum. Servs., 681 F.Supp.3d 665, 672 (W.D. Tex. 2023) (nondiscrimination requirement compelling pharmacies receiving Medicare and Medicaid funds to distribute abortifacients).

128. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023); Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2348 (2023); Latta v. U.S. Dep't of Educ., 653 F. Supp. 3d 435, 437 (S.D. Ohio 2023); Brown Cnty. Taxpayers Ass'n v. Biden, No. 22-C-1171, 2022 WL 5242626, at *1 (E.D. Wis. Oct. 6, 2022); Garrison v. U.S. Dep't of Educ., 636 F. Supp. 3d 935, 937 (S.D. Ind. 2022); Complaint at 27, Cato Inst. v. U.S. Dep't of Educ., No. 22-cv-04055 (D. Kan. filed Oct. 18, 2022), 2022 WL 11767310 [hereinafter Complaint, *Cato Inst.*]; Complaint at 9, 15, Badeaux v. Biden, No. 22-cv-04247 (E.D. La. filed Oct. 27, 2022), ECF No. 1 [hereinafter Complaint, *Badeaux*].

(2) an EPA rule broadening the definition of "waters of the United States";[129] (3) President Biden's federal contractor masking and vaccine mandate;[130] and (4) a series of violation letters sent by the Health Resources and Services Administration (HRSA) to pharmaceutical companies for failing to offer statutorily required discounts to covered entities.[131]

In addition to the expanse of policy issues that have generated major questions challenges, such challenges have also arisen in response to different kinds of executive actions. While the prototypical major questions case is a challenge to an agency rule regulating private conduct, the doctrine has also been invoked in at least three other contexts. The first of these, as illustrated by the HRSA violation letters, is the threat or actual initiation of an enforcement action against a private entity. The second, as exemplified by the student loan debt forgiveness cases, is an agency policy that does not regulate private conduct but instead bestows a public benefit. The third, as demonstrated by the federal contractor vaccine mandate, is not an agency action at all, but a presidential one.

In challenging action by the federal government, plaintiffs have sometimes employed the major questions doctrine as a standalone claim.[132] More frequently, however, plaintiffs have used the doctrine as a means of bootstrapping a claim under the Administrative Procedure Act (APA).[133] The APA enumerates certain circumstances in which courts are empowered to

129. *See* Texas v. EPA, 662 F. Supp. 3d 739, 748 n.3 (S.D. Tex. 2023); Complaint at 36-37, Kentucky v. EPA, No. 23-cv-00007, 2023 WL 2733383 (E.D. Ky. Mar. 31, 2023), 2023 WL 2223481 [hereinafter Complaint, Kentucky v. EPA]; West Virginia v. EPA, 669 F. Supp. 3d 781, 791 (D.N.D. 2023); Complaint at 4-5, Am. Farm Bureau Fed'n v. EPA, No. 23-cv-00020 (S.D. Tex. filed Jan. 18, 2023), ECF No. 1 [hereinafter Complaint, *Am. Farm Bureau*].

130. *See* Louisiana v. Biden, 55 F.4th 1017, 1019 (5th Cir. 2022); Kentucky v. Biden, 57 F.4th 545, 589 (6th Cir. 2023); Mayes v. Biden, 67 F.4th 921, 926 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023); Georgia v. President of the U.S., 46 F.4th 1283, 1289, 1295 (11th Cir. 2022).

131. *See* Complaint at 3, 48, Merck Sharp & Dohme LLC v. U.S. Dep't of Health & Hum. Servs., No. 22-cv-1986 (D.D.C. filed July 8, 2022), ECF No. 1 [hereinafter Complaint, *Merck*]; Complaint at 5, 55, Amgen Inc. v. U.S. Dep't of Health & Hum. Servs., No. 22-cv-03763 (D.D.C. filed Dec. 19, 2022), ECF No. 1 [hereinafter Complaint, *Amgen*]; Complaint, *UCB*, *supra* note 119, at 2, 47.

132. *See, e.g.*, Amended Complaint, *True Oil*, *supra* note 118, at 23-26; Complaint at 44, West Virginia v. EPA, 669 F. Supp. 3d 781 (D.N.D. 2023), ECF No. 1 [hereinafter Complaint, West Virginia v. EPA (D.N.D. 2023)]; Complaint, *Am. Farm Bureau*, *supra* note 129, at 38-39.

133. *See, e.g.*, Complaint, *Faith Action Ministry All.*, *supra* note 127, at 72-74; Complaint, *Merck*, *supra* note 131, at 48; Complaint, *Cato Inst.*, *supra* note 128, at 25-27; Complaint, Texas v. Becerra, *supra* note 127, at 27-30; Amended Complaint at 26-28, Garrison v. U.S. Dep't of Educ., 636 F. Supp. 3d 935 (S.D. Ind. 2022), 2022 WL 20357644 [hereinafter Amended Complaint, *Garrison*].

"hold unlawful and set aside agency action."[134] The major questions doctrine is well suited for two APA hooks in particular. First, under Section 706(2)(B), litigants have engaged a separation-of-powers version of the major questions doctrine to attempt to show that an agency action was "contrary to constitutional right, power, privilege, or immunity" because it violated the Legislative Vesting Clause.[135] In addition, under Section 706(2)(C), litigants have also used a canon-of-statutory-interpretation version of the doctrine to argue that an agency action was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[136] And of course, litigants have also often tacked on Section 706(2)(A) claims alleging that an agency action was generally arbitrary and capricious or "not in accordance with law," as is common practice in administrative law challenges.[137]

As this Note later explores, major questions challenges also often travel together with other administrative and constitutional law challenges, including arguments that a given governmental action is invalid under the nondelegation doctrine or the Tenth Amendment.[138]

In response, governmental defendants have levied several counterarguments. Given the high bar of "clear congressional authorization" that a defendant must meet if a court finds a major question, the key defenses have naturally focused on contesting that the major questions doctrine applies at all to the matter at hand. To this end, defendants have attempted to cabin the doctrine by capitalizing on the *West Virginia* majority's language describing the doctrine as reserved for "extraordinary cases."[139] In describing those extraordinary cases, defendants have not only disputed the applicability of the major question factors articulated in *West Virginia*; they have also sought to identify two carveouts in which the doctrine is per se inapposite.

First, governmental defendants have argued that the doctrine applies only to the regulation of private parties and not to the provision of public benefits.[140] If

134. 5 U.S.C. § 706(2).

135. *Id.* § 706(2)(B); U.S. CONST. art. I, § 1; *see, e.g.*, Complaint at 28-30, Latta v. U.S. Dep't of Educ., 653 F. Supp. 3d 435 (S.D. Ohio 2023), ECF No. 1 [hereinafter Complaint, *Latta*]; Complaint, *Britto*, *supra* note 125, at 17-19.

136. 5 U.S.C. § 706(2)(C); *see, e.g.*, Complaint at 24-25, Texas v. EPA, 662 F. Supp. 3d 739 (S.D. Tex. 2023), 2023 WL 362292 [hereinafter Complaint, Texas v. EPA]; Complaint, Kentucky v. EPA, *supra* note 129, at 36-37.

137. 5 U.S.C. § 706(2)(A); *see, e.g.*, Complaint, *2U*, *supra* note 120, at 31, 36; Complaint at 30-31, Ky. Chamber of Com. v. EPA, No. 23-cv-00008, 2023 WL 2733383 (E.D. Ky. Mar. 31, 2023), ECF No. 1 [hereinafter Complaint, *Ky. Chamber of Com.*].

138. *See infra* notes 209-12 and accompanying text; Part II.C.2.

139. *See, e.g.*, Petition for Writ of Certiorari at 25, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022)).

140. *See, e.g.*, *id.*

the government is merely exempting private parties from "otherwise applicable requirements" by, for example, forgiving debt that it would otherwise mandate be paid, then there is arguably no assertion of regulatory authority at all, let alone a transformative one warranting judicial intervention.[141]

Second, governmental defendants have contended that the major questions doctrine applies only to agency actions and does not apply to actions taken by the president.[142] If, the argument goes, the major questions doctrine is about ensuring that significant political and economic choices are made by a democratically accountable decisionmaker, then a president, by virtue of his or her election to office, does not trigger the concerns underlying the doctrine.[143] If, as some litigants have argued, the major questions doctrine is properly housed within the APA,[144] the argument that the doctrine does not apply to presidential actions finds further support: The Supreme Court held in *Franklin v. Massachusetts* that the president is not among the governmental authorities subject to the APA.[145]

The Supreme Court declined to adopt a public benefits exception to the major questions doctrine in *Biden v. Nebraska*.[146] It reasoned that both the imposition of regulations and the conferral of benefits raise separation of powers concerns.[147]

As to the proposed exception for presidential actions, the circuit courts of appeals appear divided. The Fifth, Sixth, and Eleventh Circuits have all applied the major questions doctrine to presidential action in the context of President Biden's use of the Procurement Act to promulgate a federal contractor vaccine mandate.[148] The Fifth Circuit, the only one to provide a reason for applying the doctrine, stated that the President should be treated the same as an agency for the purposes of the major questions doctrine because "Article II of the Constitution 'makes a single President responsible for the actions of the Executive Branch.'"[149] By contrast, the Ninth Circuit declined to apply the major questions doctrine in a similar challenge to the federal contractor

141. *Id.*

142. *See, e.g.*, Brief for Appellants at 29-30, Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022) (No. 21-14269), 2022 WL 180383.

143. *See id.*

144. *See infra* Part II.A.

145. *See* 505 U.S. 788, 800-01 (1992).

146. *See* 143 S. Ct. at 2375.

147. *See id.*

148. *See* Louisiana v. Biden, 55 F.4th 1017, 1031 n.40 (5th Cir. 2022); Kentucky v. Biden, 23 F.4th 585, 606-08 (6th Cir. 2022), *aff'd as modified by* 57 F.4th 545 (6th Cir. 2023); *Georgia*, 46 F.4th at 1295-97.

149. *Louisiana*, 55 F.4th at 1031 n.40 (quoting Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020)).

vaccine mandate.[150] In addition to embracing the democratic accountability rationale that governmental defendants have proffered, the Ninth Circuit panel cited Supreme Court precedent evincing a presumption against subjecting presidential actions to increased scrutiny.[151] The Supreme Court has not yet resolved this circuit split.[152]

### B. Applying the Major Questions Inquiry

As discussed above, the open-ended nature of the Court's major questions cases has generated much speculation about how lower courts will interpret the two-step major questions inquiry.[153] It has also left open the question of which factors courts and litigants will put the most stock in moving forward.

#### 1. Defining 'majorness'

In articulating the first step of the major questions inquiry, scholars have placed differing emphasis on various factors that the Supreme Court has mentioned across its major questions cases. Some scholars have argued, for example, that the Court has relied more heavily on political as opposed to economic significance,[154] "allowing entities to unmake and amend laws by polarizing an issue and making it 'major.'"[155] Other scholars have seized on the "unheralded" and "transformative" language of the *West Virginia* majority to argue that the novelty of a policy compared to an agency's past practice will be the most important indicator of a major question moving forward.[156] But what of the federalism factor in Justice Gorsuch's concurrence?[157] This concurrence also states that the "list of triggers" it provides "may not be exclusive," leaving the door open for alternative pathways of showing a major question.[158]

150. *See* Mayes v. Biden, 67 F.4th 921, 932-34 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023).

151. *See id.* at 934 (citing Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992)).

152. Whether the major questions doctrine applies to presidential actions will likely remain unresolved until the issue reemerges in a different context; President Biden withdrew the federal contractor vaccine mandate, creating mootness problems for that litigation. *See, e.g.*, Donovan v. Vance, 70 F.4th 1167, 1172 (9th Cir. 2023) (dismissing an appeal on one such vaccine mandate challenge as moot).

153. *See supra* Part I.C.

154. *See* Deacon & Litman, *supra* note 72, at 1053-54 (describing the departure from past cases prioritizing economic significance); *id.* at 1056 (noting the "increased focused [sic] on the political significance or controversy of a given agency policy").

155. *See id.* at 1050-51.

156. *See* Brunstein & Goodson, *supra* note 4, at 79-80 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022)).

157. *See West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

158. *Id.*

In examining complaints filed and cases decided in the year since *West Virginia*, several patterns emerge. Of the four factors listed above, litigants have focused most on economic significance and political significance. Courts, by comparison, have generally not prioritized economic significance. Instead, courts' analyses have rested most heavily on the challenged actions' political significance, their novelty, and the estimated number of people they affect.

a. Political significance

Both courts and litigants have placed substantial weight on the political significance of the governmental action being challenged. In defining political significance, litigants have prioritized two criteria. First, in line with the *West Virginia* majority's focus on whether Congress has "considered and rejected" similar policies to the one at issue,[159] litigants have highlighted congressional inaction as evincing a major question.[160] Second, given the "earnest and profound debate" criterion enumerated in the Gorsuch concurrence,[161] litigants often allege that an action was generally controversial, without reference to any particular metric for measuring the extent of that controversy.[162]

Indeed, some litigants have appeared to suggest that any agency action on certain issues—such as climate change and Second Amendment rights—will inherently implicate a major question. For example, in *Utah v. Walsh*, complainants challenged the Department of Labor's "2022 Investment Duties Rule,"[163] which permitted Employee Retirement Income Security Act (ERISA) fiduciaries to consider climate change risks and other nonpecuniary factors when conducting risk-return analyses for potential investments.[164] The plaintiffs alleged that the executive branch had conceded that the Rule's purpose was to "address the 'climate crisis,'" emphasizing that the Supreme

159. *Id.* at 2614 (majority opinion) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000)).

160. *See, e.g.*, Complaint at 4, 6, 10, Brown Cnty. Taxpayers Ass'n v. Biden, No. 22-cv-01171, 2022 WL 5242626 (E.D. Wis. Oct. 6, 2022), 2022 WL 5025183 [hereinafter Complaint, *Brown Cnty.*]; Complaint, *Latta*, *supra* note 135, at 28-29; Complaint, *Britto*, *supra* note 125, at 19; Complaint, *Heritage Found.*, *supra* note 118, at 12.

161. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

162. *See, e.g.*, Amended Complaint, *True Oil*, *supra* note 118, at 25; Complaint, *Ready for Ron*, *supra* note 124, at 23; Complaint, Texas v. Becerra, *supra* note 127, at 29; Complaint, *Career Colls. & Schs.*, *supra* note 120, at 21.

163. *See* Complaint at 21-22, Utah v. Walsh, No. 23-CV-00016, 2023 WL 6205926 (N.D. Tex. Sept. 21, 2023), 2023 WL 662151 [hereinafter Complaint, *Walsh*].

164. *See* Max M. Schanzenbach & Robert H. Sitkoff, *ESG Investing After the DOL Rule on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,"* HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 2, 2023), https://perma.cc/RTB2-RR2J.

Court had already used the major questions doctrine to strike down action in the climate change context.[165] Similarly, in *Watterson v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, the plaintiffs challenged a rule revising the definition of "rifle" under the National Firearms Act and Gun Control Act, which effectively expanded the range of firearms regulated.[166] The complainants argued that because the rule implicated "decisions regarding public safety and the right to keep and bear arms," it was inherently major.[167] Arguments like these evince a kind of symmetry emerging in the debate around the major questions doctrine. While governmental defendants have argued that the doctrine is wholly inapplicable in certain contexts,[168] various plaintiffs have pushed to carve out contexts in which the doctrine must necessarily apply.

Lower courts have treated the political significance factor in a similar manner as litigants have. These courts have particularly focused on congressional inaction or active rejection of policies akin to the challenged action.[169] A least some lower courts also appear persuaded by arguments that certain contexts or actions are uniquely sensitive or intrusive. For example, in striking down the federal contractor vaccine mandate, the Fifth Circuit opined that "questions surrounding the vaccine and the pandemic generally are undoubtedly of 'vast economic and political significance.'"[170] Another court found that the government's maintenance of a terrorist watchlist implicated a major question because "the liberty intrusions that flow from the watchlist are significant."[171] The intrusions the court identified included: (1) the collection of a "vast array of identifying information about" persons on the list and the

165. *See* Complaint, *Walsh*, *supra* note 163, at 29 (quoting Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73823 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550)).

166. *See* Complaint, *Watterson*, *supra* note 125, at 20-21; *see also* WILLIAM J. KROUSE, CONG. RSCH. SERV., IF12364, GUN CONTROL: ATF FINAL "STABILIZING BRACE" RULE (2023), https://perma.cc/397W-PUV3; Perry Stein, *ATF Proposes Rules that Expand Who Must Conduct Gun Background Checks*, WASH. POST (Aug. 31, 2023), https://perma.cc/BW55-D2XD. In a different challenge to the same rule, a district court declined to find a major question. *See* Miller v. Garland, 674 F. Supp. 3d 296, 311-12 (E.D. Va. 2023), *appeal filed*, No. 23-1604 (4th Cir. June 6, 2023).

167. *See* Complaint, *Watterson*, *supra* note 125, at 39.

168. *See supra* Part II.A.

169. *See, e.g.*, Louisiana v. Biden, 55 F.4th 1017, 1032 (5th Cir. 2022); Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664-65 (N.D. Tex. 2022), *vacated and remanded on other grounds*, 143 S. Ct. 2343 (2023).

170. *Louisiana*, 55 F.4th at 1033 (quoting Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

171. Kovac v. Wray, 660 F. Supp. 3d 555, 565 (N.D. Tex. 2023), *appeal filed*, No. 23-10284 (5th Cir. Mar. 22, 2023). The court ultimately found clear congressional authorization for the watchlist. *See id.*

distribution of information to "thousands of other entities"; (2) the performance of full body and luggage searches by the TSA; (3) the interrogation of airline passengers; and (4) the potential for immigration consequences.[172]

Whereas this court focused on the actual consequences of governmental action, other courts have also warned of the hypothetical consequences of permitting the government to act in a given area. For example, in invalidating various vaccine mandates on major questions grounds, several courts emphasized that any such mandate "impose[s] a healthcare decision."[173] Resistance to governmental action in the healthcare context appears rooted, at least in part, in a slippery-slope concern: that the executive branch could later require regulated persons to "take daily vitamins, live in smoke-free homes, exercise three times a week, or even, at the extremity, take birth control."[174] This logic is reminiscent of what has been termed "the broccoli horrible."[175] That principle, which Chief Justice Roberts applied in assessing the constitutionality of the Affordable Care Act, is that governmental power should be construed to avoid a world in which the government can use health-related justifications to go so far as to, for example, "order[] everyone to buy vegetables."[176] It may be the case that at least some courts view the healthcare context as particularly susceptible to this kind of boundless intrusion.

b. Economic significance

Realizing some scholarly predictions,[177] courts in the year after *West Virginia* tended to deprioritize economic significance when considering whether a question was major. Indeed, only three courts focused on that factor at all.[178] These courts only found a major question in one

172. *See id.*

173. *Louisiana*, 55 F.4th at 1019; *see also* Louisiana v. Becerra, 629 F. Supp. 3d 477, 493 (W.D. La. 2022) (distinguishing the vaccine mandate for Head Start programs from other lawful measures because the mandate "impose[s] specific medical treatments"), *vacated as moot*, 2023 WL 8368874 (5th Cir. Aug. 29, 2023).

174. Louisiana v. Biden, 55 F.4th at 1032.

175. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 615 (2012) (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part).

176. *See id.* at 553-54 (opinion of Roberts, C.J.) (raising this issue in the context of the individual mandate provision of the Affordable Care Act).

177. *See supra* note 154 and accompanying text.

178. *See* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022) (applying the economic significance factor in the context of a student loan debt forgiveness challenge), *vacated and remanded on other grounds*, 143 S. Ct. 2343 (2023).; Texas v. Becerra, 667 F. Supp. 3d 252, 279 n.14 (N.D. Tex. 2023) (reasoning that the Head Start vaccine mandate's $100 billion impact suggested the major questions doctrine might apply), *appeal filed*, No. 23-10564 (5th Cir. May 30, 2023); Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023) (noting that the $1.7 billion dollar

*footnote continued on next page*

instance.[179] In *Brown v. United States Department of Education*, the District Court for the Northern District of Texas found that the Biden administration's student loan debt forgiveness plan was economically significant because its "more than $400 billion" cost was "20 times more than the amount in *Alabama Association of Realtors*."[180] By contrast, the D.C. Circuit, the only federal court of appeals of the three, swiftly declined to find economic significance in either case where it raised the issue.[181] In one case, it simply noted that the challenged governmental actions—two EPA rules phasing out certain greenhouse gases—were "less . . . expensive than other regulations" that the Supreme Court had invalidated on major questions grounds.[182] In the other, the court relied on the fact that the agency's action—establishing a fishery management program—was cabined to one industry and that the agency "claim[ed] no broader power to regulate the national economy."[183] In articulating why economic factors might not carry the day, one court put the matter as follows: "[D]etermining whether a case contains a major question is not merely an exercise in checking the bottom line."[184]

In comparison, for litigants, economic significance was one of the two most heavily relied-upon factors. Litigants have defined economic significance in three ways. First, given Justice Gorsuch's criterion of "billions of dollars in spending,"[185] litigants have focused on putting a price tag on the challenged

impact of the federal contractor minimum wage rule was "far less" than the $1 trillion impact at issue in *West Virginia v. EPA*), *appeal filed sub nom.* Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023).; Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA, 71 F.4th 59, 67 (D.C. Cir. 2023) (finding that the major questions doctrine did not apply to an EPA rule imposing a hydrofluorocarbon cap-and-trade program because this rule was "less . . . expensive than other regulations" in the Supreme Court's major questions cases); Loper Bright Enters. v. Raimondo, 45 F.4th 359, 364-65 (D.C. Cir. 2022) (finding that a fishery management program did not implicate a major question because the instituting agency "claim[ed] no broader power to regulate the national economy"), *cert. granted*, 143 S. Ct. 2429 (2023).

179. *See Brown*, 640 F. Supp. 3d at 665.

180. *Id.* at 664.

181. *See Heating*, 71 F.4th at 67 (declining to apply the major questions doctrine in part because the EPA rule at issue was less costly than other actions where the Supreme Court had found a major question); *Loper Bright*, 45 F.4th at 364-65 (acknowledging that "Congress must clearly indicate its intention" when an action yields "major and far-reaching economic consequences" but finding this rule did not apply where the agency had not attempted to "regulate the national economy").

182. *Heating*, 71 F.4th at 67.

183. *See Loper Bright*, 45 F.4th at 365.

184. Sweet v. Cardona, 641 F. Supp. 3d 814, 824 (N.D. Cal. 2022), *appeal filed sub nom.* Sweet v. Everglades Coll., Inc., No. 23-15049 (9th Cir. Jan. 17, 2023).

185. West Virginia v. EPA, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., concurring) (quoting King v. Burwell, 576 U.S. 473, 485 (2015)).

action from the *taxpayer* perspective. The cost estimates that litigants cited ranged from approximately $500 billion to over $1 trillion,[186] though some litigants have pointed out that the Supreme Court found an agency action costing $50 billion to have vast economic significance.[187] Notably, these estimates well exceed the price tag that the executive branch itself assigns, albeit in a different context, to economically "significant" regulations. Indeed, current White House guidance instructs that $200 million is the threshold for identifying significant regulations,[188] for which agencies are required to conduct cost-benefit analyses subject to review by the Office of Information and Regulatory Affairs.[189]

Second, litigants have also focused on "compliance costs," or the cost of the policy from the perspective of *regulated entities*.[190] However, while one complaint framed these costs in terms of a dollar amount,[191] a number of litigants have instead argued that other burdens qualify. For example, some litigants have focused on the risk that noncompliant parties may incur severe civil or criminal penalties.[192] In *American Farm Bureau v. EPA*, for example, a number of national organizations challenged an EPA rule that revised the definition of "waters of the United States" and consequently broadened the area subject to the Clean Water Act's permitting requirements for pollutant discharge.[193] The plaintiffs' major questions argument hinged principally on an objection to the rule's permit-or-pay scheme, which "require[ed] land owners and users to obtain permits or face severe civil and criminal liability for ordinary uses of their land."[194] Such arguments play to concerns the

186. *Compare* Amended Complaint, *Garrison*, *supra* note 133, at 7, *with* Complaint, *Brown Cnty.*, *supra* note 160, at 1.

187. *See* Complaint, *Career Colls. & Schs.*, *supra* note 120, at 21 (citing Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

188. *See* Exec. Order No. 14094, § 1(b), 88 Fed. Reg. 21879, 21879 (Apr. 11, 2023); Richard L. Revesz, *Strengthening Our Regulatory System for the 21st Century*, WHITE HOUSE (Apr. 6, 2023), https://perma.cc/4TQY-QEP4.

189. *See* MAEVE P. CAREY, CONG. RSCH. SERV., IF12058, COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING (2022), https://perma.cc/X28L-ZAL2.

190. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022).

191. *See* Amended Complaint, *True Oil*, *supra* note 118, at 25-26.

192. *See, e.g.*, Complaint, *Britto*, *supra* note 125, at 2 (maintaining that a rule expanding the regulation of firearms violated the major questions doctrine because it "imposes potential criminal liability on millions of Americans"); Complaint, Kentucky v. EPA, *supra* note 129, at 36-37 (invoking the risk of "civil and/or criminal penalties" in the context of a "waters of the United States" controversy); Complaint, Texas v. EPA, *supra* note 136, at 24 (alleging that the "waters of the United States" rule presented a "costly . . . regulatory framework" that subjected regulated parties to the possibility of "daily civil and/or criminal penalties").

193. Complaint, *Am. Farm Bureau*, *supra* note 129, at 1-2.

194. *Id.* at 39.

Supreme Court has previously raised about the scope of executive power in both major questions and nondelegation cases.[195]

Finally, in line with Justice Gorsuch's "significant portion of the American economy" criterion,[196] litigants have claimed that the policy would generally "impose changes on massive swathes of the American economy."[197] For example, in another controversy over the EPA's definition of "waters of the United States," Texas focused on the fact that the agency's rule affected not one industry but multiple: "agricultural development, construction and maintenance of infrastructure, energy development, and management of State-owned lands to name a few."[198] Taking a different tactic, plaintiff-states challenging a Department of Labor rule allowing ERISA fiduciaries to consider nonpecuniary factors in making investment decisions focused on the fact that the single sector affected—that of employee benefit plans—covered "over half of the GDP of the entire United States."[199]

c. Novelty, federalism, and other factors

Despite litigants' focus on political and economic significance, novelty and federalism have also received airtime in a plurality of complaints filed. While courts have also emphasized novelty, they have not particularly focused on federalism, instead directing their attention to the number of people affected by the challenged policy.

Litigants have defined federalism in the way that it is traditionally understood: the prohibition of federal "intru[sion] into an area that traditionally belongs to the State[s]."[200] Complainants have invoked federalism

195. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (reasoning that the "impos[ition] [of] criminal penalties" on those who violated the CDC's eviction moratorium "amplified" the moratorium's "unprecedented" nature); Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (observing that the Sex Offender Registration and Notification Act "back[ed] up [its] requirements with new criminal penalties"); *id.* at 2131 (Gorsuch, J., dissenting) (expressing skepticism of delegations that effectively "endow the nation's chief prosecutor with the power to write his own criminal code").

196. West Virginia v. EPA, 142 S. Ct. 2587, 2621 (Gorsuch, J., concurring) (quoting *id.* at 2608 (majority opinion)).

197. Complaint, *Heritage Found.*, *supra* note 118, at 13 (quoting Paul Atkins & Paul Ray, Opinion, *The SEC's Climate Rule Won't Hold Up in Court*, WALL ST. J. (July 12, 2022, 6:05 PM ET), https://perma.cc/3JPF-MPHW); *see also* Complaint, Texas v. EPA, *supra* note 136, at 24 (noting that the action affected "large, crucial portions of the economy"); Complaint, *Walsh*, *supra* note 163, at 29.

198. Complaint, Texas v. EPA, *supra* note 136, at 24.

199. Complaint, *Walsh*, *supra* note 163, at 29.

200. Complaint, *Watterson*, *supra* note 125, at 39.

concerns in response to federal regulations pertaining to firearms,[201] land and water use,[202] anti-discrimination law,[203] and abortion.[204]

Courts, on the other hand, have given far less weight to federalism issues, with only three courts in the sample citing that factor.[205] The one court that found a major question based on federalism principles did so where an agency's rule interpreted the scope of a statute "affect[ing] the states' sovereign authority to tax."[206] By contrast, courts rejecting major questions challenges grounded in federalism concerns found that the executive branch was either exercising "proprietary authority in an area" where it "enjoys inherent powers,"[207] or engaging in action that "d[id] not qualify as an expansion of the agency's regulatory authority."[208]

It is unclear exactly why most lower courts have not associated the major questions doctrine with federalism principles. One hypothesis may be that, despite Justice Gorsuch's defense of the major questions doctrine as a necessary safeguard for federalism,[209] the Tenth Amendment already provides an alternative vehicle for resolving those concerns. Indeed, a number of complaints raising major questions issues have also included separate challenges under the Tenth Amendment.[210] Some evidence rebuts this hypothesis, however: Tenth Amendment challenges raised in major questions cases during the period studied were broadly unsuccessful, with courts either

201. *See id.*

202. *See* Complaint, *Am. Farm Bureau*, *supra* note 129, at 39; Complaint, Texas v. EPA, *supra* note 136, at 25; Amended Complaint, *True Oil*, *supra* note 118, at 25; Complaint, West Virginia v. EPA (D.N.D. 2023), *supra* note 132, at 48.

203. *See* Complaint at 45, Tennessee v. U.S. Dep't of Agric., 665 F. Supp. 3d 880 (E.D. Tenn. 2023), ECF No. 1 [hereinafter Complaint, Tennessee v. Dep't of Agric.].

204. *See* Amended Complaint at 10, Texas v. U.S. Dep't of Health & Hum. Servs., 681 F. Supp. 3d 665 (W.D. Tex. 2023), 2023 WL 7220881.

205. *See* West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1146 (11th Cir. 2023); Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023), *appeal filed sub nom.* Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023); Miller v. Garland, 674 F. Supp. 3d 296, 311-12 (E.D. Va. 2023), *appeal filed*, No. 23-1604 (4th Cir. June 6, 2023).

206. *Morrisey*, 59 F.4th at 1147.

207. *Walsh*, 2023 WL 120966, at *7.

208. *Miller*, 674 F. Supp. 3d at 312.

209. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

210. *See, e.g.*, Complaint, Kentucky v. EPA, *supra* note 129, at 32; Complaint, *Faith Action Ministry All.*, *supra* note 127, at 85; Complaint, *Ky. Chamber of Com.*, *supra* note 137, at 34; Complaint, *Career Colls. & Schs.*, *supra* note 120, at 30; Complaint, Tennessee v. Dep't of Agric., *supra* note 203, at 43.

rejecting those claims on the merits[211] or declining to address them for constitutional avoidance reasons.[212]

As to novelty, lower courts have construed that factor in relation to three primary comparators. First, in the textualist version of the inquiry, courts have compared the action taken to the language of the authorizing statute, asking whether the action differs in "scope and kind" from those that the statute contemplates in the abstract.[213] For example, in *Georgia v. President of the United States*, the Eleventh Circuit found that the federal contractor vaccine mandate implicated a major question because the Procurement Act, on which the action was based, contemplated "project-specific" measures aimed at "creating an 'economical and efficient system' for federal contracting."[214] A "general authority" to set "health standards for contractors' employees," the court reasoned, was "worlds away" from that piecemeal approach.[215]

Second, courts have analogized and distinguished the asserted power from past practices under the statutory authority.[216] For example, in *Louisiana v. Biden*, another challenge to the federal contractor vaccine mandate, the Fifth Circuit found a major question in part because, in its assessment, "a vaccine mandate is 'strikingly unlike'" past policies promulgated under the Procurement Act.[217] Specifically, such a mandate, as opposed to a sick leave policy, "cannot be undone at the end of the workday."[218] And whereas a nondiscrimination policy "govern[s] the conduct of *employers*, the vaccine

211. *See, e.g.*, Nat. Grocers v. Vilsack, 627 F. Supp. 3d 1130, 1152 (N.D. Cal. 2022) (noting that labeling requirements for genetically engineered seeds were "not an attempt by Congress to order the states to do something"), *appeal filed*, No. 22-16770 (9th Cir. Nov. 15, 2022).

212. *See, e.g.*, Louisiana v. Biden, 55 F.4th 1017, 1028-29 (5th Cir. 2022) (declining to "address the Tenth Amendment argument" because the major questions doctrine sufficed); Louisiana v. Becerra, 629 F. Supp. 3d 477, 485, 493 (W.D. La. 2022) (finding a major question and avoiding the Tenth Amendment claim), *vacated as moot*, 2023 WL 8368874 (5th Cir. Aug. 29, 2023).

213. United States v. Empire Bulkers Ltd., No. 21-126, 2022 WL 3646069, at *3 (E.D. La. Aug. 24, 2022); *see* Georgia v. President of the U.S., 46 F.4th 1283, 1296 (11th Cir. 2022) ("Like other enabling legislation, this statute is not an 'open book' to which contracting agencies may 'add pages and change the plot line.'" (quoting *West Virginia*, 142 S. Ct. at 2609)).

214. *Georgia*, 46 F.4th at 1296 (quoting 40 U.S.C. § 101).

215. *Id.*

216. *See* Louisiana v. Biden, 55 F.4th at 1030; Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023), *appeal filed sub nom.* Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023); Ready for Ron v. FEC, No. 22-3282, 2023 WL 3539633, at *10 (D.D.C. May 17, 2023).

217. 55 F.4th at 1030 (quoting Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022)).

218. *Id.* (quoting *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665).

mandate purports to govern the conduct of *employees*—and more than their conduct, purports to govern their individual healthcare decisions."[219]

Third, courts have compared the action to the status quo, asking whether the action will "fundamentally transform a domestic industry."[220] For example, in *Sweet v. Cardona*, the Northern District of California declined to find a major question where the Department of Education "reached a settlement with a class of student-loan borrowers whose complaint allege[d] that, for years, the Department of Education unlawfully delayed processing, or perfunctorily denied, hundreds of thousands of 'borrower-defense' applications—requests by students to discharge their loans in light of alleged wrongful acts and omissions of the schools they attended."[221] The court noted that, even though the "settlement will discharge over six billion dollars in loans," the relief was "inherently limited to the metes and bounds of this federal class-action litigation."[222]

Litigants' understandings of the novelty factor have tracked this model as well. In line with the textual approach, complainants have alleged that a governmental action effects a "'radical or fundamental change' to a statutory scheme."[223] For example, in *Faith Action Ministry Alliance, Inc. v. Fried*, a Florida religious school challenged Department of Agriculture rules that, in accordance with Title IX, prohibited entities participating in a federally administered meal program from discriminating on the basis of gender identity and sexual orientation.[224] The complainant claimed this program violated the major questions doctrine because it "vastly change[d] . . . the rights and obligations set forth in Title IX."[225]

Litigants have also compared the challenged action to the agency's past practices, arguing the action was major either because it departed from the way an agency had previously operated a similar program,[226] or because it differed in nature from the kinds of actions the agency had historically taken under the

219. *Id.*

220. *See, e.g.*, Sweet v. Cardona, 641 F. Supp. 3d 814, 824 (N.D. Cal. 2022), *appeal filed sub nom.* Sweet v. Everglades Coll., Inc., No. 23-15049 (9th Cir. Jan. 17, 2023).

221. *Id.* at 819.

222. *Id.* at 824.

223. Complaint, *Britto*, *supra* note 125, at 18 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022)).

224. *See* Complaint, *Faith Action Ministry All.*, *supra* note 127, at 2-5; Press Release, Food & Nutrition Serv., USDA Promotes Program Access, Combats Discrimination Against LGBTQI+ Community (May 5, 2022), https://perma.cc/7JR9-C7Y2.

225. Complaint, *Faith Action Ministry All.*, *supra* note 127, at 74.

226. *See, e.g.*, Complaint, *Merck*, *supra* note 131, at 48 (noting that the agency's action "radically change[d] the way the . . . program work[ed]").

statute.[227] For example, in *UCB, Inc. v. Becerra*, a biopharmaceutical company challenged a Health Resources and Services Administration letter claiming that it had violated a statute requiring pharmaceutical manufacturers to provide certain drugs to certain pharmacies at discounted prices.[228] The company complained that the agency was using a 1992 statute to assert an "unheralded" power to "force manufacturers into an unlimited number of arrangements with contract pharmacies."[229]

Finally, litigants have emphasized the transformation that the challenged action would bring about in a particular industry or sector.[230] For example, in the above-mentioned challenge to Department of Agriculture antidiscrimination policies promulgated under Title IX, the plaintiff also argued that the agency had violated the major questions doctrine because its policies altered "the way that school programs and activities are operated in the country."[231]

Apart from these factors, lower courts have also focused on an additional indicator of "majorness": the number of people that the challenged action affects. Courts that have referenced the scale of a governmental action have found a major question where the action impacted "one-fifth of all employees in the United States"[232] or, on the lower end of the spectrum, one million Americans.[233] There is already some disagreement as to how low the threshold should go. One court found a potential reach of "1.8 million employees" insufficient because "the Supreme Court did not apply the major questions doctrine" to the vaccine mandate for healthcare facilities, which "affect[ed] more than 10 million workers."[234]

227. *See, e.g.*, Complaint at 10, Nebraska v. Biden, 636 F. Supp. 3d 991 (E.D. Mo. 2022), 2022 WL 4594457 (alleging that the agency "ha[d] never relied on the HEROES Act or any other statutory, regulatory, or interpretative authority" for a measure like the one it took (quoting Memorandum from Reed Rubinstein, Principal Deputy Gen. Counsel, Dep't of Educ., to Betsy DeVos, Sec'y of Educ. 6 (Jan. 12, 2021), https://perma.cc/856U-LJTV)).

228. *See* Complaint, *UCB*, *supra* note 119, at 8, 10.

229. *See id.* at 48 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022)).

230. *See, e.g.*, Complaint, *Faith Action Ministry All.*, *supra* note 127, at 74.

231. *Id.*

232. Louisiana v. Biden, 55 F.4th 1017, 1019 (5th Cir. 2022).

233. Kovac v. Wray, 660 F. Supp. 3d 555, 565 (N.D. Tex. 2023), *appeal filed*, No. 23-10284 (5th Cir. Mar. 22, 2023).

234. Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023), *appeal filed sub nom.* Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023).

2. The high bar of clear congressional authorization

Where a court finds a major question, an agency must demonstrate clear congressional authorization in order to act on that question. Further research is necessary to determine how courts are interpreting the clear-authorization requirement. In the more than two dozen cases in which federal lower courts grappled with major questions issues in the year following the Court's adoption of the doctrine, lower courts only found a major question in six instances.[235] Three of these cases concerned vaccine mandates.[236] The others related to the forgiveness of student loan debt,[237] the creation and maintenance of the terrorist watchlist,[238] and the enactment of an agency rule construing a tax offset provision.[239] The courts found clear congressional authorization in only one of these cases.[240]

Thus far, the opinions in the cases where courts found a major question do reflect engagement with one or more of the clear-authorization factors mentioned in Justice Gorsuch's *West Virginia* concurrence.[241] However, there may be reason to ask whether courts across the board are scrupulously applying those factors. For example, one court went so far as to seemingly imply that the clear-authorization showing can be met only if the statute expressly enumerates as a permissible course of action the action ultimately undertaken by the government.[242] Such a standard would be exceedingly stringent. In addition, while some decisions thoroughly analyzed clear authorization,[243] others referenced the concept only perfunctorily. For

235. Louisiana v. Biden, 55 F.4th at 1029, 1033; Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 665 (N.D. Tex. 2022), *vacated and remanded on other grounds*, 143 S. Ct. 2343 (2023); Louisiana v. Becerra, 629 F. Supp. 3d 477, 492 (W.D. La. 2022), *vacated as moot*, 2023 WL 8368874 (5th Cir. Aug. 29, 2023); Georgia v. President of the U.S., 46 F.4th 1283, 1295-96 (11th Cir. 2022); West Virginia *ex rel.* Morrisey v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1146 (11th Cir. 2023); *Kovac*, 660 F. Supp. 3d at 569.

236. Louisiana v. Biden, 55 F.4th at 1033 (federal contractor vaccine mandate); *Georgia*, 46 F.4th at 1296 (same); Louisiana v. Becerra, 629 F. Supp. at 483 (Head Start Mandate).

237. *Brown*, 640 F. Supp. 3d at 664-65; *see supra* notes 178-80 and accompanying text.

238. *Kovac*, 660 F. Supp. 3d at 563, 569; *see infra* notes 249-58 and accompanying text.

239. *Morrisey*, 59 F.4th at 1146; *see infra* notes 244-48 and accompanying text.

240. *See infra* notes 249-58 and accompanying text. *Compare Kovac*, 660 F. Supp. 3d at 569 (finding clear congressional authorization), *with Morrisey*, 59 F.4th at 1146-47 (finding no clear congressional authorization), *and Brown*, 640 F. Supp. 3d at 652 (same).

241. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622-23 (2022) (Gorsuch, J., concurring); *supra* notes 82-84 and accompanying text.

242. *See Brown*, 640 F. Supp. 3d at 665 ("If Congress provided clear congressional authorization for $400 billion in student loan forgiveness via the HEROES Act, it would have mentioned loan forgiveness." (emphasis omitted)).

243. *See, e.g., id.* at 665-67 (providing three explanations for why the federal contractor vaccine mandate lacked clear congressional authorization); Louisiana v. Becerra, 629 F.

*footnote continued on next page*

example, in *West Virginia ex rel. Morrisey v. United States Department of the Treasury*, thirteen states challenged a tax offset provision in the American Rescue Plan Act, a COVID-19 stimulus package, as ambiguous under the Spending Clause.[244] The Treasury Department argued that a rule it had enacted, which outlined a "step-by-step process" for states under the Act, cured any constitutional ambiguity.[245] The Eleventh Circuit disagreed. It held that the rule was invalid on major questions grounds and thus could not cure the defect.[246] In finding no clear congressional authorization, the court relied only on the fact that Treasury Department's organic statute authorized the agency to "issue such regulations as may be *necessary or appropriate* to carry out [the Act.]."[247] The court did not consider any other *West Virginia* factors, such as the provision's place in the statute, the Treasury Department's expertise or past interpretations of the statute, or whether the agency sought to use the statute in a novel way.[248] Instead, the court simply treated the language "necessary or appropriate" as per se insufficient.

Of the cases in which lower courts found a major question, the government prevailed in just one.[249] In that case, *Kovac v. Wray*, plaintiffs who believed they were on the terrorist watchlist challenged their subjection to rigorous airport screening.[250] They argued that "under the major-questions doctrine . . . Congress never authorized the Government to create or maintain [such] a watchlist."[251] The District Court for the Northern District of Texas agreed that the watchlist implicated a major question,[252] but it nonetheless found clear congressional authorization. The court focused its inquiry on five factors: (1) the linguistic clarity of the authorizing statute;[253] (2) the expertise possessed by the FBI, the Transportation Security Administration, and the

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Supp. 3d, 477, 492-94 (W.D. La. 2022) (applying four factors from Justice Gorsuch's *West Virginia* concurrence to assess congressional authorization), *vacated as moot*, 2023 WL 8368874 (5th Cir. Aug. 29, 2023); *Kovac*, 660 F. Supp. 3d at 564-69 (identifying and applying six factors relevant to clear congressional authorization).

244. 59 F.4th at 1131-32, 1135.

245. *Id.* at 1146 (quoting Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26786, 26807 (May 17, 2021) (to be codified at 31 C.F.R. pt. 35)).

246. *See id.* at 1146-47.

247. *Id.* at 1147 (citing 42 U.S.C. § 802(f)) (alteration in original) (emphasis added).

248. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622-23 (2022) (Gorsuch, J., concurring).

249. *See* Kovac v. Wray, 660 F. Supp. 3d 555, 566 (N.D. Tex. 2023), *appeal filed*, No. 23-10284 (5th Cir. Mar. 22, 2023).

250. *See id.* at 560.

251. *Id.* at 563.

252. *Id.* at 565.

253. *See id.* at 566.

Department of Homeland Security;[254] (3) the longstanding nature of the watchlist;[255] (4) the watchlist's compatibility with Congress's statutory mandate;[256] and (5) the watchlist's history of congressional approval.[257] Though not explicit in the court's analysis, it is worth noting that this case arose in the national security context, an area in which the courts routinely recognize expansive executive power.[258]

These results may reflect the sheer stringency that courts impute to the "clear congressional authorization" standard. Alternatively, they may indicate that courts give outsized effect to the major-question component of the test, in which case finding a major question is effectively outcome-determinative. But regardless of which step in the inquiry primarily performs the gatekeeping function, it appears, for the most part, that the government is slated for failure when its action is found to implicate a major question.

### C. Impact on Related Doctrines: *Chevron* and Nondelegation

Another unresolved question concerns the impact that the major questions doctrine will have on related administrative law principles. Current scholarship has focused on two areas in particular: *Chevron* deference and the nondelegation doctrine.[259] As discussed above, many scholars believe both doctrines have been or will soon be virtually abrogated.[260] Yet a closer examination of post-*West Virginia* lower court cases and complaints tells a more complex story. In cases where a major questions issue was on the table, lower courts cited to *Chevron* about half of the time.[261] But governmental defendants appear to be giving up on the doctrine, and even the courts that applied *Chevron* rarely deferred under that doctrine.[262] As for the nondelegation doctrine, the strategic choices of litigants suggest a belief that

254. *See id.* at 566-67.

255. *See id.* at 568.

256. *See id.*

257. *See id.* at 568-69.

258. *See* Shirin Sinnar, Response, *A Label Covering a "Multitude of Sins": The Harm of National Security Deference*, 136 HARV. L. REV. F. 59, 72 (2022).

259. *See, e.g.*, Sohoni, *supra* note 27, at 290-315 (discussing the relationship between the major questions and nondelegation doctrines); Engstrom & Priddy, *supra* note 109 (discussing the relationship between the major questions doctrine and *Chevron* deference).

260. *See supra* Part I.C.

261. *See infra* note 272 and accompanying text.

262. *See infra* notes 273-76 and accompanying text.

the doctrine may be revived.[263] However, courts appear largely unwilling to usher in such a revival.[264]

### 1. *Chevron* deference and the major questions cases

Long before the Supreme Court announced the major questions doctrine, scholars had asked whether *Chevron*'s time in the sun was coming to a close.[265] Yet despite the Supreme Court's quiet abandonment of *Chevron* deference—the Supreme Court has not deferred pursuant to *Chevron* since 2016[266]—lower courts have continued to cite the doctrine regularly. Large-scale empirical studies conducted in the years leading up to *West Virginia* found that circuit courts considering whether to apply *Chevron* ultimately applied the doctrine in the vast majority of cases (74.8% of the time in one study and 84.5% of the time in another).[267] To be sure, *Chevron*'s mileage appears to have decreased over time. Whereas a study using data from 2003 through 2013 found that agencies won in 71.4% of *Chevron* cases,[268] a study conducted using data from 2020 through 2021 revealed an agency win rate of only 57.0%.[269] But *Chevron*'s continuing influence in the lower courts has led many to conclude that, at least outside of the Supreme Court, the doctrine has remained "alive and well."[270]

Notwithstanding these facts, the rise of the major questions doctrine, which calls for "skepticism" of politically and economically significant agency actions, has fueled speculation that *Chevron*'s regime may be coming to an

263. *See infra* notes 296-97 and accompanying text.

264. *See infra* notes 293-95 and accompanying text.

265. *See, e.g.*, Michael Herz, Essay, Chevron *Is Dead: Long Live* Chevron, 115 COLUM. L. REV. 1867, 1879 (2015).

266. BARCZEWSKI, *supra* note 104, at 17.

267. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 5, 32 (2017) (analyzing 1,558 instances of judicial review of agency statutory interpretations in 1,327 circuit court opinions from 2003 through 2013); Cato Inst., Circuit Court of Appeals Opinions Analyzing and Applying Chevron in 2020-2021 (n.d.), https://perma.cc/DG2L-PNVU (analyzing 142 circuit court opinions from 2020 through 2021); Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 18, 2023), https://perma.cc/YV26-8RXV (discussing the studies).

268. Barnett & Walker, *supra* note 267, at 28.

269. McKinney, *supra* note 267.

270. Berit DeGrandpre, *What Overruling Chevron Could Mean for Environmental Law*, GEO. ENV'T L. REV.: BLOG (Nov. 6, 2023), https://perma.cc/9UWU-KBEB; *see also* Kristen E. Hickman & Aaron L. Nielson, Foreword, *The Future of* Chevron *Deference*, 70 DUKE L.J. 1015, 1017 (2021) ("[L]ower court judges regularly rely on *Chevron*—and the Supreme Court rarely reverses those decisions. *Chevron* continues to play a significant role in the law, even if it is rarely cited by the Justices." (footnote omitted)).

end.[271] But is there any support for this prediction in the major questions cases decided by lower courts thus far? Among first movers on the major questions doctrine, the answer appears to be yes.

Of the cases dealing with major questions issues in the year following *West Virginia v. EPA*, only about half of the decisions mentioned *Chevron* or the concept of deference at all.[272] In several instances, courts noted that agency defendants had not even attempted to argue that *Chevron* governed the action.[273] Within the subset of cases that cited *Chevron*, courts applied the doctrine in all but four cases—two-thirds of the time.[274] But some of those courts expressed hesitancy about doing so.[275] And lower courts ultimately

271. *See supra* Part I.C. The Supreme Court recently granted certiorari to address "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." Petition, *Loper Bright*, *supra* note 8, at i-ii; Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari). In the litigation below, this case had included a major questions challenge. However, the District of Columbia Circuit Court of Appeals rejected that challenge, and the petition for certiorari abandoned the issue. *Loper Bright*, 45 F.4th 359, 364-65 (D.C. Cir. 2022); *see* Petition, *Loper Bright*, *supra* note 8.

272. *See* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022), *vacated and remanded on other grounds*, 143 S. Ct. 2343 (2023); Sweet v. Cardona, 641 F. Supp. 3d 814, 823 (N.D. Cal. Nov. 16, 2022), *appeal filed sub nom.* Sweet v. Everglades Coll., Inc., No. 23-15049 (9th Cir. Jan. 17, 2023); Nat. Grocers v. Vilsack, 627 F. Supp. 3d 1130, 1148 (N.D. Cal. 2022), *appeal filed*, No. 22-16770 (9th Cir. Nov. 15, 2022); Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 192 (D.C. Cir. 2022), *cert. denied*, 144 S. Ct. 78 (2023) (mem.); *Loper Bright*, 45 F.4th at 365; VanDerStok v. Garland, 625 F. Supp. 3d 570, 582 (N.D. Tex. 2022); CFPB v. Townstone Fin., Inc., No. 20-cv-4176, 2023 WL 1766484, at *11 (N.D. Ill. Feb. 3, 2023), *appeal filed*, No. 23-1654 (7th Cir. Apr. 4, 2023); Jilin Forest Indus. Jinqiao Flooring Grp. Co. v. United States, 617 F. Supp. 3d 1343, 1355 (Ct. Int'l Trade 2023), *appeal filed*, No. 23-2245 (Fed. Cir. Aug. 7, 2023); Texas v. Becerra, 667 F. Supp. 3d 252, 269 (N.D. Tex. 2023), *appeal filed*, No. 23-10564 (5th Cir. May 30, 2023); Texas v. EPA, 662 F. Supp. 3d 739, 752 (S.D. Tex. 2023); Ready for Ron v. FEC, No. 22-3282, 2023 WL 3539633, at *7 (D.D.C. May 17, 2023); Miller v. Garland, 674 F. Supp. 3d 296, 305 n.2 (E.D. Va. 2023), *appeal filed*, No. 23-1604 (4th Cir. June 6, 2023).

273. *See, e.g.*, *Brown*, 640 F. Supp. 3d at 664 n.16; *Jilin*, 617 F. Supp. 3d at 1356; *VanDerStok*, 625 F. Supp. 3d at 582; *Miller*, 674 F. Supp. 3d at 305 n.2.

274. *See Brown*, 640 F. Supp. 3d at 664 n.16; *Jilin*, 617 F. Supp. 3d at 1356; Texas v. EPA, 662 F. Supp. 3d at 752-53; *Miller*, 674 F. Supp. 3d at 305 n.2.

275. *See, e.g.*, Texas v. Becerra, 667 F. Supp. 3d at 269 n.8 (noting that "the *Chevron* framework may have fallen out of favor" but nonetheless "appl[ying] its framework out of an abundance of caution"); Texas v. EPA, 662 F. Supp. 3d at 752 n.4 (acknowledging that "*Chevron* has 'become something of the-precedent-who-must-not-be-named'" but finding the doctrine "relevant" because the Supreme Court had not yet overruled it (quoting Mexican Gulf Fishing Co. v. U.S. Dep't of Com., 60 F.4th 956, 963 n.3 (5th Cir. 2023))).

accorded formal deference to the government's statutory interpretations in just three cases.[276]

There appears to be some confusion among lower courts about how, if at all, the major questions doctrine fits into the *Chevron* inquiry.[277] When courts have discussed the two doctrines in the context of one another, the more common approach was to treat the former doctrine as a threshold step for assessing whether to depart from the familiar deference regime.[278] Despite litigants and courts often describing the major questions doctrine as a "doctrine of statutory interpretation,"[279] only one court appears to have considered the doctrine at the first step in the *Chevron* inquiry,[280] which instructs courts to use "ordinary tools of statutory construction" to determine whether a statute is ambiguous.[281]

In the year following the Supreme Court's establishment of the major questions doctrine, federal lower courts decided over thirty cases that raised major questions issues.[282] Some of these cases were disposed of on unrelated

276. *See Wash. All. of Tech. Workers*, 50 F.4th at 193; *Loper Bright*, 45 F.4th at 369; *Ready for Ron*, 2023 WL 3539633, at *7 (concluding that "*Chevron* applie[d]" but finding the agency's interpretation persuasive "irrespective of *Chevron*"). It may also be plausible to view the court in *Sweet v. Cardona* as having deferred under *Chevron*, though the court did not cite *Chevron*. *See* 641 F. Supp. 3d 814, 823-24 (N.D. Cal. 2022) (reiterating that "[c]ourts generally will defer to an agency's construction of the statute it is charged with implementing" and finding the agency's interpretation reasonable (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985))), *appeal filed sub nom.* Sweet v. Everglades Coll., Inc., No. 23-15049 (9th Cir. Jan. 17, 2023).

277. *See Brown*, 640 F. Supp. 3d at 664 n.16 (issuing a decision "regardless of how the major-questions doctrine fits into the *Chevron* framework").

278. *See, e.g.*, *id.* at 664-65; *Loper Bright*, 45 F.4th at 364-65.

279. Complaint, *Faith Action Ministry All.*, *supra* note 127, at 74; *see, e.g.*, Texas v. EPA, 662 F. Supp. 3d at 748 n.3 (categorizing the major questions doctrine as "a tool for deciding whether an agency exceeded its statutory authority [rather] than as a stand-alone claim"); Georgia v. President of the U.S., 46 F.4th 1283, 1295 (11th Cir. 2022) (labeling the doctrine a "principle of statutory interpretation").

280. *Ready for Ron*, 2023 WL 3539633, at *10 (discussing the major questions doctrine, along with two other "substantive canons," in the context of whether the Federal Election Campaign Act's "definition of 'contribution' is ambiguous"). For a more in-depth discussion about the relationship of the major questions doctrine to the steps in the *Chevron* test, see RAKOFF ET AL., note 93 below, at 1367-69.

281. City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

282. The methodology used for this Note was a keyword search for "major questions" cases decided from June 30, 2022, through June 29, 2023, filtered for relevance. Another study released after this Note was written examines all cases citing *West Virginia v. EPA* and focuses on matching the outcomes in those cases with the political affiliation of the presiding judges. *See* Brunstein, *supra* note 21.

grounds, including for procedural deficiencies[283] and justiciability problems.[284] In other cases, courts simply raised the major questions doctrine to illustrate an ancillary point.[285] Of the twenty-five cases in which courts squarely addressed major questions issues on the merits, the government prevailed in ten—forty percent of the time.[286] Whether this finding is indicative of what is to come remains to be seen. In any case, further research is warranted to determine if lower courts are decreasing their reliance on *Chevron* because of the major questions doctrine and whether such a departure poses an actual barrier to success for governmental entities.

### 2. The major questions doctrine as a nondelegation substitute

As for nondelegation, the prevailing scholarly prediction is that this doctrine will be displaced by the major questions doctrine.[287] The major questions doctrine's "clear congressional authorization" requirement arguably serves the function of a stronger "intelligible principle" test, since both standards mandate that an agency action be based on a sufficiently specific congressional delegation. And because the major questions doctrine functions on an "agency-by-agency, rule-by-rule basis," it does not necessarily disrupt governmental operations to the same degree as the nondelegation doctrine.[288]

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283. *See, e.g.*, Env't One Corp. v. United States, 627 F. Supp. 3d 1349, 1359 n.13 (Ct. Int'l Trade 2023) ("Plaintiff's desire to invoke the 'major questions doctrine' does not obviate the jurisdictional or claim deficiencies of its complaint.").

284. *See, e.g.*, Donovan v. Vance, 70 F.4th 1167, 1172 (9th Cir. 2023) ("[A]s to the claims alleging violations of . . . the major questions doctrine . . . we hold that this appeal is moot and dismiss.").

285. *See, e.g.*, Texas v. Becerra, 667 F. Supp. 3d 252, 279 n.8 (N.D. Tex. 2022) (referencing the development of the major questions doctrine as evidence that "the *Chevron* framework may have fallen out of favor"), *appeal filed*, No. 23-10564 (5th Cir. May 30, 2023).

286. For cases in which the government came out on top, see United States v. Empire Bulkers Ltd., No. 21-126, 2022 WL 3646069 (E.D. La. Aug. 24, 2022); Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966 (D. Ariz. Jan. 6, 2023), *appeal filed sub nom.* Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023); Sweet v. Cardona, 641 F. Supp. 3d 814 (N.D. Cal. Nov. 16, 2022), *appeal filed sub nom.* Sweet v. Everglades Coll., Inc., No. 23-15049 (9th Cir. Jan. 17, 2023); Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164, 194 (D.C. Cir. 2022), *cert. denied*, 144 S. Ct. 78 (2023) (mem.); United States v. Rhine, 652 F. Supp. 3d 38 (D.D.C. 2023); Kovac v. Wray, 660 F. Supp. 3d 555 (N.D. Tex. 2023), *appeal filed*, No. 23-10284 (5th Cir. Mar. 22, 2023); Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023); Ready for Ron v. FEC, No. 22-3282, 2023 WL 3539633 (D.D.C. May 17, 2023); Loper Bright Enters. v. Raimondo, 45 F.4th 359, 359-60 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023); and Miller v. Garland, 674 F. Supp. 3d 296 (E.D. Va. 2023), *appeal filed*, No. 23-1604 (4th Cir. June 6, 2023).

287. *See supra* note 114 and accompanying text.

288. *Id.* at 266.

The nondelegation doctrine, when applied, invalidates the statutory provision on which an agency relied, potentially upending all other agency actions that relied on that same provision.[289] The major questions doctrine may also be a more attractive tool for courts because the discretion to apply it is doctrinally baked in. While the nondelegation doctrine requires an "intelligible principle" for all agency actions taken pursuant to a congressional delegation of power,[290] only agency actions with "vast 'economic and political significance'" are subject to the major questions doctrine's "clear congressional authorization" requirement.[291] Thus, the threshold step of "majorness" provides courts flexibility in determining when to limit executive action.[292]

Perhaps for these reasons, lower courts have remained disinclined to usher in a nondelegation revival. Indeed, no court that considered a major questions challenge in the year following the doctrine's adoption embraced a nondelegation claim raised in the same suit.[293] This finding is consistent with studies conducted prior to the Supreme Court's adoption of the major questions doctrine, which found that federal courts invalidated governmental actions on nondelegation grounds at exceedingly low rates—as low as three

289. *See id.*

290. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) ("[Congress] may confer substantial discretion on executive agencies to implement and enforce the laws. . . . [A] statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise that authority] is directed to conform.'" (alteration in original) (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989))).

291. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (quoting *id.* at 2608-09 (majority opinion)).

292. This discretion may risk a different kind of danger than that posed by the nondelegation doctrine: While a court could employ its discretion under the major questions doctrine in a consistent manner, scholars have pointed out that the doctrine facilitates the selective, and potentially politically motivated, targeting of agency actions for invalidation. *See, e.g.*, Deacon & Litman, *supra* note 72, at 1083 (arguing that while the "major questions doctrine gives rise to the appearance of judicial humility," it in fact functions as a "powerful de-regulatory tool that may accomplish many of the goals of a revived nondelegation doctrine but in a more tailored and politically selective way").

293. *See, e.g.*, FTC v. Kochava Inc., 671 F. Supp. 3d 1161, 1179-80 (D. Idaho 2023); United States v. Empire Bulkers Ltd., No. 21-126, 2022 WL 3646069, at *4-5 (E.D. La. Aug. 24, 2022); Mayes v. Biden, 67 F.4th 921, 943 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023); Kovac v. Wray, 660 F. Supp. 3d 555, 568-69 (N.D. Tex. 2023), *appeal filed*, No. 23-10284 (5th Cir. Mar. 22, 2023); Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *11-12 (D. Ariz. Jan. 6, 2023), *appeal filed sub nom.* Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023); United States v. Rhine, 652 F. Supp. 3d 38, 55 (D.D.C. 2023); Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA, 71 F.4th 59, 63 (D.C. Cir. 2023).

percent of the time.[294] Of the handful of courts that have squarely addressed both types of claims at once, two found a major question while rejecting delegation claims,[295] lending a degree of credence to the theory that the former doctrine may be acting as a substitute for the latter.

However, such a pattern is not reflected in the strategic choices of litigants who have brought major questions challenges. Indeed, of the more than thirty complaints filed in the year after *West Virginia* that levied major questions challenges, nearly two-thirds also raised nondelegation issues.[296] In a majority of these complaints, plaintiffs either raised nondelegation issues earlier than major questions issues, used a major questions argument to strengthen a nondelegation claim, or framed a nondelegation doctrine violation as a standalone cause of action.[297] To the extent that these decisions were deliberate and reflect strategic priorities, it may be inferred that the development of the major questions doctrine has invigorated, rather than quashed, the sense among litigants that nondelegation claims may soon be viable.

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294. *See* Daniel Walters, *Decoding Nondelegation After* Gundy: *What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 443 (2022) (citing Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 635-36 (2015)). Some scholarship indicates that nondelegation claims have more force in state courts. *See id.* at 469.

295. *See Kovac*, 660 F. Supp. 3d at 565-66; Kentucky v. Biden, 23 F.4th 585, 607 & n.14 (6th Cir. 2022), *aff'd as modified by* 57 F.4th 545 (6th Cir. 2023). The Sixth Circuit decided the latter case before the Supreme Court formally adopted the major questions doctrine in 2022, but the Circuit reaffirmed its opposition to the federal contractor mandate in 2023, citing its prior decision. *See Kentucky*, 57 F.4th at 548.

296. *See* Complaint, Tennessee v. Dep't of Agric., *supra* note 203, at 45; Complaint, *Faith Action Ministry All.*, *supra* note 127, at 85; Complaint at 2, Kochava, Inc. v. FTC, No. 22-cv-00349, 2023 WL 3250496 (D. Idaho May 3, 2023), ECF No. 1 [hereinafter Complaint, *Kochava*]; Complaint, *UCB*, *supra* note 119, at 47; Amended Complaint, *Garrison*, *supra* note 133, at 28; Complaint, *Cato Inst.*, *supra* note 128, at 24; Complaint, *Badeaux*, *supra* note 128, at 14; Complaint, *Avocet*, *supra* note 126, at 24; Complaint, Texas v. Becerra, *supra* note 127, at 39; Complaint, *Amgen*, *supra* note 131, at 53-54; Intervenor Complaint at 23, VanDerStok v. BlackHawk Mfg. Grp. Inc., 659 F. Supp. 3d 736 (N.D. Tex. 2023), ECF No. 143 [hereinafter Intervenor Complaint, *VanDerStok*]; Complaint, *Am. Farm Bureau*, *supra* note 129, at 39-40; Complaint, *Watterson*, *supra* note 125, at 38; Complaint, *Britto*, *supra* note 125, at 20; Complaint, Kentucky v. EPA, *supra* note 129, at 36-37; Complaint, *Ky. Chamber of Com.*, *supra* note 137, at 33; Complaint, *Career Colls. & Schs.*, *supra* note 120, at 49; Complaint, West Virginia v. EPA (D.N.D. 2023), *supra* note 132, at 45; Complaint at 46, Louisiana v. EPA, No. 23-CV-00692, 2024 WL 250798 (W.D. La. Jan. 23, 2024), ECF No. 1.

297. The only complaints in which litigants adopted none of these strategies were: Complaint, *Career Colls. & Schs.*, *supra* note 120, at 20-21, 48-49; Complaint, Kentucky v. EPA, *supra* note 129, at 36-37; Intervenor Complaint, *VanDerStok*, *supra* note 296, at 23-24; Complaint, *Faith Action Ministry All.*, *supra* note 127, at 85; Complaint, *Kochava*, *supra* note 296, at 2 (merely mentioning both doctrines).

## Conclusion

The major questions doctrine has just begun to develop. In its inaugural year, litigants raised—and courts considered—the doctrine in contexts that run the gamut from environmental regulation and public health to national security and anti-discrimination law.[298] In these challenges, some courts and litigants have capitalized on the indeterminacy of the major questions doctrine to argue that certain issues are so sensitive or polarizing that the major questions doctrine applies per se, irrespective of the nature and scope of the challenged action.[299] Conversely, federal government actors have argued that the doctrine is wholly inapposite in certain contexts, such as where the government confers a benefit to the public or the relevant actor is the president rather than an agency.[300] Although the Supreme Court has seemingly closed the door on a public benefits exception to the major questions doctrine,[301] scholars and practitioners should expect that the Court will eventually address the emerging circuit split around whether the major questions doctrine can limit presidential action.[302]

As for the major questions test, a great deal of uncertainty remains. Complaints filed reflect a "spaghetti-at-the-wall" strategy when it comes to articulating the factors in the major questions inquiry that should carry the day. Litigants have heavily relied on economic and political significance but have also frequently made federalism and novelty arguments.[303] Courts have been slightly more tailored in their approach, focusing on the number of individuals affected by a given policy, the policy's novelty, and its political significance.[304] Given courts' emphasis on the latter two considerations, scholars and practitioners should expect that major questions litigation will bear out predictions that the doctrine will legitimize politically targeted lawsuits and have an overall effect of deregulation.

Finally, the early major questions cases in the lower courts suggest an ever-decreasing reliance on the tradition of agency deference.[305] At the same time, courts have not gone so far as to embrace the more aggressive approach embodied by the nondelegation doctrine, despite litigants frequently pressing

298. *See supra* notes 118-27 and accompanying text.

299. *See supra* notes 162-71 and accompanying text.

300. *See supra* notes 140-52 and accompanying text.

301. *See supra* notes 140-41, 146-47 and accompanying text.

302. *See supra* notes 142-45, 148-52 and accompanying text.

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

304. *See id.*

305. *See supra* Part II.C.1.

such claims.[306] The Supreme Court is poised to decide the fate of *Chevron*.[307] If it decides to narrow *Chevron* rather than overrule it, it should clarify how *Chevron* relates to the major questions doctrine to provide greater clarity to courts and litigants regarding when a governmental action should be entitled to deference, reviewed de novo, or subjected to skepticism.

Whether the initial findings presented in this Note represent patterns to be borne out in subsequent years remains to be seen. In any case, examining how first movers on the major questions doctrine have addressed its most challenging components provides insight into the current state of play and the potential pathways down which courts could take the doctrine in the future.

306. *See supra* Part II.C.2.

307. *See supra* note 8 and accompanying text.