



January 30, 2023

Attn: Vanessa A. Countryman, Secretary, Securities and Exchange Commission

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22)

Subj: Additional legal analysis after *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

The Institute for Policy Integrity at New York University School of Law¹ (Policy Integrity) respectfully submits the attached article to the Securities and Exchange Commission (SEC) regarding The Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22) (Proposed Rule). Policy Integrity is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. On June 17, 2022, Policy Integrity jointly submitted three comments on the Proposed Rule with the Environmental Defense Fund and Professor Madison Condon, including a comment discussing the regulatory precedents that lend support for the Proposed Rule.

After Policy Integrity submitted its comments, the Supreme Court decided *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). As explained in the attached article, in *West Virginia*, the Court applied a two-prong framework for determining when the major questions doctrine applies that asks whether the agency action (a) is “unheralded” and (b) represents a “transformative” change in the agency’s authority. 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. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4300622. In its prior comment, Policy Integrity highlighted regulatory precedents reaching back nearly sixty years that show the Proposed Rule would be far from “unheralded.” This new article bolsters the relevance of these regulatory precedents as support for the Proposed Rule.

Respectfully,

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DRAFT

UNHERALDED AND TRANSFORMATIVE: THE TEST FOR MAJOR QUESTIONS AFTER *WEST VIRGINIA*

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Before the Supreme Court’s landmark decision in *West Virginia v. EPA*, the “major questions doctrine” was little more than a handful of cases that shared a few overlapping similarities. Although the Court explained in *West Virginia* that these “extraordinary” cases were all ones in which an agency had asserted “highly consequential power beyond what Congress could reasonably be understood to have granted,” the Court did not apply a consistent analysis across these earlier precedents. In other words, the doctrine lacked a framework to guide lower courts and litigants.

To our knowledge, no article written since *West Virginia* has explored whether the decision provides such a framework. In our view, it does. The Court applied a two-prong framework for determining when the major questions doctrine applies that asks whether the agency action (a) is “unheralded” and (b) represents a “transformative” change in the agency’s authority. *West Virginia* further holds that, if the doctrine applies, the reviewing court should greet the agency’s assertion of authority with “skepticism,” but the agency can overcome that skepticism by identifying “clear congressional authorization” for its action.

A close look at *West Virginia* and the alternative frameworks that parties and others urged on the Court in the *West Virginia* litigation also reveals a great deal about what the major questions doctrine is *not*. Most notably, many argued that the doctrine applies any time an agency’s action raises a question of economic and political significance, with litigants offering myriad, indeterminate factors of significance like cost, overall economic impact, number of affected persons, and degree of public and political attention. But the majority chose not to adopt a multifactor test. It instead applied a two-prong framework that appears designed to reduce, albeit not eliminate, difficult line-drawing questions over indeterminate measures of economic and political significance.

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Some litigants also argued that, once triggered, the doctrine operates as a clear-statement rule, and some scholars now characterize *West Virginia* as adopting this approach. But the phrase “clear-statement rule” is conspicuously absent from the majority opinion’s legal analysis, which instead repeatedly refers to “clear congressional authorization.” The omission signals that a majority of the Court is not willing to call the doctrine a clear-statement rule.

INTRODUCTION.....	2
I. THE ORIGINS OF THE MAJOR QUESTIONS DOCTRINE.....	5
II. WEST VIRGINIA’S ARTICULATION OF THE MAJOR QUESTIONS DOCTRINE	25
A. West Virginia’s <i>Two-Prong Test for Determining When a Case Is Extraordinary Enough to Trigger the Major Questions Doctrine</i>	27
B. West Virginia’s Requirement of “Clear Congressional Authorization” in <i>Extraordinary Cases</i>	36
III. THE ALTERNATIVES THAT WEST VIRGINIA COULD HAVE BUT DID NOT ADOPT	41
A. <i>The Court Did Not Adopt a Multifactor Test of Economic and Political Significance</i>	41
B. <i>The Court Did Not Incorporate State Interests as a Relevant Consideration in the Analysis</i>	47
C. <i>The Court Did Not Adopt a Clear-Statement Rule</i>	49
CONCLUSION	54

INTRODUCTION

It seems these days that everyone is writing about the major questions doctrine.¹ And for good reason: After the doctrine attracted increasing attention in the past decade, the Supreme Court expressly

¹ See, e.g., Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2022); Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J. L. & PUB. POL’Y 773, 773 (2022); J. Robert Brown, Essay, *Mother Nature on the Run: The SEC, Climate Change Disclosure, and the Major Questions Doctrine*, SAN DIEGO L. REV. (forthcoming 2023); Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine 1* (Nov. 29, 2022) (unpublished manuscript) (on file with authors); David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine? 1* (Dec. 6, 2022) (unpublished manuscript) (on file with author) [hereinafter Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*]; David M. Driesen, *The Political Economy of the Major Questions Doctrine 1* (Aug. 4, 2022) (unpublished manuscript) (on file with author).

relied on it for the first time in *West Virginia v. EPA*,² and by all accounts it is here to stay.

Much of the commentary before *West Virginia* focused on the major questions doctrine's lack of clarity.³ That, too, was for good reason: Before then, the Court had arguably applied—but not named—the doctrine in about half a dozen cases with a few overlapping similarities but little else to guide courts and litigants. At oral argument in *West Virginia*, the Justices seemed just as puzzled as anyone else: No topic elicited more questions than how best to understand and apply the major questions doctrine, with the parties offering a wide range of possibilities.⁴ The questioning revealed that the Justices lacked a coherent understanding of the doctrine but were seeking some structure to guide their analysis and the analysis of lower courts in future cases.

To our knowledge, no article written since the decision has explored whether *West Virginia* provides such guidance. In our view, it does. It uses a two-prong framework for determining when the major questions doctrine applies that asks whether the agency action (a) is “unheralded” and (b) represents a “transformative” change in the agency's authority.⁵ *West Virginia* further holds that, if the doctrine applies, the reviewing court should greet the agency's assertion of

² 142 S. Ct. 2587, 2595 (2022).

³ See, e.g., Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 45 (2010); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 448 (2016) (“More is unclear than clear about the bounds of the major questions doctrine at this stage. The doctrine is defined in the most general of terms, providing little guidance to courts or to federal agencies evaluating their statutory mandates.”); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2202 (2016) (“As it has developed so far, the protean major question exception has an air of judicial improvisation.”); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938–84, 1986–90 (2017); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 809–10 (2017); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2034–39 (2018); Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 487 (2021) (“An initial concern, applicable to both forms of the doctrine, is that the line between ‘major’ and ‘nonmajor’ questions is not exactly obvious.”); Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 1003 (2021); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317, 318 (2022); Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 195 (2022).

⁴ Transcript of Oral Argument at 7–8, 117–19, 122, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530).

⁵ *West Virginia*, 142 S. Ct. at 2610 (quoting *Util. Air Regul. Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014)).

authority with “skepticism,”⁶ but the agency can overcome that skepticism by identifying “clear congressional authorization” for its action.⁷

The framework used in *West Virginia* also differs markedly from the tests urged on the Court in the *West Virginia* litigation. Those differences shed yet more light on the framework in *West Virginia*, revealing at the very least what the major questions doctrine is *not*. Most notably, many involved in the *West Virginia* litigation argued that the doctrine applies any time an agency’s action raises a question of economic and political significance, with litigants offering myriad, indeterminate factors of significance like cost, overall economic impact, number of affected persons, and degree of public and political attention.⁸ At best, these framings amounted to “I know it when I see it.”⁹ The majority could have but chose not to adopt an amorphous multifactor test that looks at things like cost and public attention. Tellingly, Justice Gorsuch favored such a multifactor approach in his concurring opinion, but he garnered the support of Justice Alito and no one else.¹⁰ The majority instead adopted a two-prong framework that appears designed to reduce, albeit not eliminate, difficult line-drawing questions over indeterminate measures of economic and political significance by focusing on whether the agency action (a) is unprecedented and (b) fundamentally changes the statutory scheme of regulation.

Some litigants also argued that, once triggered, the doctrine operates as a clear-statement rule, and some scholars now characterize *West Virginia* as adopting this approach.¹¹ But the phrase “clear-statement rule” is conspicuously absent from the majority opinion’s legal analysis, which instead repeatedly says the agency’s action requires “clear congressional authorization.” This language appears to have been carefully chosen to avoid adopting a more aggressive canon of interpretation, which Justice Gorsuch favored in his concurring opinion.¹²

⁶ *Id.* at 2614.

⁷ *Id.* (quoting *UARG*, 573 U.S. at 324).

⁸ See *infra* Part II–III.

⁹ Then-Judge Kavanaugh made a similar observation while on the D.C. Circuit, noting that “determining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality.” *U.S. Telecom. Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

¹⁰ See *West Virginia*, 142 S. Ct. at 2616, 2620–24 (Gorsuch, J., concurring).

¹¹ See, e.g., Deacon & Litman, *supra* note 1, at 1; Sohoni, *supra* note 1, at 264; Driesen, Does the Separation of Powers Justify the Major Questions Doctrine?, *supra* note 1, at 18; Richardson, *supra* note 3, at 174, 182; Walker, *supra* note 1, at 781.

¹² See *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

The rest of this Article proceeds in three Parts. Part I explains how we got here, briefly tracing the origins of the major questions doctrine and where things stood by the time of the merits briefing in *West Virginia*. As many noted before *West Virginia*, although a doctrine was emerging from several of the Court's precedents, there was no consensus on when or how to apply it. Part II dissects the *West Virginia* majority opinion and explains the decision's two-prong framework for determining when the major questions doctrine applies. This Part also explains that, once a court finds that an agency action is unheralded and transformative, there is a presumption that the agency action is not authorized, but that presumption can be overcome if the agency persuades a skeptical court that the most correct reading of the statute authorizes its action. Part III explains how this framework differs from many of the ones advanced in arguments before the Court, including those embraced by Justice Gorsuch's concurring opinion. Most notably, the Court could have but did not adopt a multifactor test of economic and political significance that looks at things like cost, and it also avoided using the phrase "clear-statement rule" to describe the doctrine. The Article then concludes by briefly discussing how litigants and courts have misapplied *West Virginia's* framework in the immediate aftermath of the decision.¹³

I. THE ORIGINS OF THE MAJOR QUESTIONS DOCTRINE

The story of how the major questions doctrine came about has been told many times before.¹⁴ We do not break substantial new ground in recounting that story here, but it is necessary to understand the origins of the doctrine and how murky things were before *West Virginia* to appreciate the many different approaches the Supreme Court could have adopted in *West Virginia*.

According to most accounts, including *West Virginia's* own account,¹⁵ the major questions doctrine traces its roots to two cases decided more than twenty years ago: *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*¹⁶ and *FDA v. Brown & Williamson Tobacco Corp.*¹⁷ But the Court did not use the major questions

¹³ This Article expresses no normative judgments on the major questions doctrine, leaving that to the capable hands of many others. See generally Sohoni, *supra* note 1; Deacon & Litman, *supra* note 1; Richardson, *supra* note 3; Sunstein, *supra* note 3.

¹⁴ See, e.g., Emerson, *supra* note 3, at 2034–39; Monast, *supra* note 3, at 453–62; Brunstein & Revesz, *supra* note 3, at 324–35.

¹⁵ 142 S. Ct. at 2609.

¹⁶ See 512 U.S. 218, 229 (1994).

¹⁷ 529 U.S. 120, 133 (2000). See Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T L. & POL'Y F. 293, 295 (2020) ("The origins of the

doctrine label until *West Virginia*. In the nearly thirty years between *MCI Telecommunications Corp.* and *West Virginia*, the Court applied key aspects of the doctrine in only a handful of cases.¹⁸ Although the Court has since explained that these were all “extraordinary cases” of “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted,” they do not share a common test for when or how to apply the major questions doctrine.¹⁹ In fact, over the course of these nearly thirty years, the Court did not even attempt to articulate a test for the doctrine or apply it in a consistent manner.

The first major questions case, *MCI Telecommunications Corp. v. AT&T*, involved the Federal Communications Commission (“FCC”) and its interpretation of Section 203 of the Communications Act.²⁰ Section 203(a) requires every common carrier to file tariffs with the FCC,²¹ while Section 203(b) authorizes the FCC to “modify any requirement” under this section.²² Relying on this authority to modify, the FCC issued an order making tariff-filing requirements optional for all nondominant long-distance carriers.²³ This order made the requirement optional for every carrier in the industry aside from AT&T, the sole dominant carrier.²⁴ The Court struck down the order, finding that it was not in accord with the Communications Act.²⁵

The Court began its analysis by determining the meaning of the phrase “modify any requirement,” looking at dictionary definitions and neighboring statutory provisions.²⁶ It had “not the slightest

major questions doctrine can be traced to two core cases: *MCI Telecommunications Corp. v. American Telephone & Telegraph* and *FDA v. Brown & Williamson Tobacco*. . . . [T]hese two opinions embody the genesis (*MCI*) and common refrain (*Brown & Williamson*) that lead to the doctrinal incantation” (footnotes omitted); Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 485 (2016) (“[T]he doctrine’s genesis can be traced back to two principal cases—*MCI* and *Brown & Williamson*.”). Some suggest the doctrine goes back further to Justice Stevens’s plurality decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980). See, e.g., Sunstein, *supra* note 3, at 484–85, or even further, see, e.g., *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (suggesting the doctrine’s roots can be traced all the way back to *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825)).

¹⁸ See *West Virginia*, 142 S. Ct. at 2609.

¹⁹ See *id.* (citations omitted).

²⁰ See 512 U.S. 218, 218 (1994).

²¹ *Id.* at 224 (citing 47 U.S.C. § 203(a)).

²² *Id.* (citing 47 U.S.C. § 203(b)(2)).

²³ *Id.* at 224–26.

²⁴ *Id.* at 231.

²⁵ *Id.* at 218, 234.

²⁶ *MCI Telecomms. Corp.*, 512 U.S. at 225–29.

doubt”²⁷ that the word modify meant to “change moderately or in minor fashion”²⁸ and therefore did not authorize the FCC to make “basic and fundamental changes in the [statutory] scheme”²⁹ as it had done. In the Court’s view, a broad exemption from the tariff-filing requirement was such a change because “[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act.”³⁰

Because the FCC gave the statute a meaning that the statute could not bear, the Court declined to afford the agency deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*³¹ In what many others have since cited as key language for the major questions doctrine, the Court reasoned that “[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”³² The Court further remarked that the FCC had attempted a “fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist.”³³ In other words, the FCC’s interpretation was “effectively the introduction of a whole new regime of regulation.”³⁴

As applied in *MCI*, the major questions doctrine merely embodied common-sense assumptions about the manner in which Congress drafts statutes, i.e., the words one expects Congress would use to accomplish certain ends, and concern that an agency had claimed authority to make a fundamental change to a central part of a statute. But the Court expressed no concern about the significance of the rule’s effects.³⁵ That lack of concern may have been because the FCC’s rule was effectively a deregulatory action that would have imposed fewer requirements on regulated entities, so the Court would not have been concerned about compliance costs to the industry or administrative costs to the agency.³⁶

²⁷ *Id.* at 228.

²⁸ *Id.* at 225.

²⁹ *Id.*

³⁰ *Id.* at 229.

³¹ *Id.* (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

³² *MCI Telecomms. Corp.*, 512 U.S. at 231.

³³ *Id.* at 231–32.

³⁴ *Id.* at 234.

³⁵ *See id.* at 218, 225.

³⁶ *See id.* at 221.

The next foundational precedent for the major questions doctrine was *FDA v. Brown & Williamson Tobacco Corp.*³⁷ This case centered on the authority of the Food and Drug Administration (“FDA”) under the Food, Drug, and Cosmetic Act (“FDCA”).³⁸ To curtail the sale and distribution of cigarettes and smokeless tobacco to children and adolescents, FDA, for the first time in its history, took the position that it had jurisdiction to regulate tobacco products—a position that contradicted FDA’s policy dating back to its inception and even further back to its predecessor agency’s position since 1914.³⁹

The Court found that the statute prohibited FDA’s interpretation.⁴⁰ To begin with, a “core objective[]” of the FDCA is to “ensure that any product regulated by the FDA is ‘safe’ and ‘effective’ for its intended use.”⁴¹ And because the FDA had concluded that tobacco products were “dangerous to health,” if the FDA were to regulate cigarettes and smokeless tobacco, the FDCA would require the FDA to ban them.⁴² The FDA itself had acknowledged this necessary implication.⁴³ In addition, Congress legislated for decades against a “backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco” without a safe intended use.⁴⁴ Congress had even considered and rejected bills that would have given the FDA jurisdiction to regulate tobacco products, and Congress instead adopted a “distinct regulatory scheme” that “preclude[ed] any role for the FDA.”⁴⁵ Congress had also “foreclosed the [possibility of removing] tobacco products from the market” in a separate statutory provision: “[T]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.”⁴⁶ The Court emphasized that its conclusion that Congress’s regulatory scheme precluded FDA jurisdiction “[did] not rely on the fact that the FDA’s assertion of jurisdiction represents a sharp break with its prior

³⁷ See 529 U.S. 120, 123 (2000).

³⁸ *Id.* at 125–26.

³⁹ *Id.* at 127, 146 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44418 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897)).

⁴⁰ *Id.* at 126.

⁴¹ *Id.* at 133 (citations omitted).

⁴² *Id.* at 135, 137.

⁴³ *Brown & Williamson Tobacco Corp.*, 529 U.S. at 137.

⁴⁴ *Id.* at 144.

⁴⁵ *Id.*

⁴⁶ *Id.* at 137 (citing 7 U.S.C. § 1311(a)).

interpretation of the FDCA.”⁴⁷ Instead, “[t]he consistency of the FDA’s prior position [was] significant in this case for a different reason: it provide[d] important context to Congress’ enactment of its tobacco-specific legislation.”⁴⁸

At the end of this lengthy analysis of the statutory scheme, the Court turned to *Chevron*:

Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.⁴⁹

Given the “history” of the FDA’s regulations “and the breadth of the authority that the FDA has asserted,” the Court was “obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.”⁵⁰

The Court referenced *MCI* by observing that, “[a]s in *MCI*, [it was] confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁵¹ The Court then found that “Congress ha[d] directly spoken to the question at issue” and that the FDA’s interpretation would thus not receive deference under *Chevron*.⁵² While the *MCI* Court in *MCI* deemed the specific nature of the agency’s action at odds with the relevant statute, the *Brown & Williamson* Court deemed the general scale of that action incongruous with the statute.⁵³

As support for its holding, the *Brown & Williamson* Court cited a 1986 article written by then-Judge Stephen Breyer discussing the

⁴⁷ *Id.* at 156.

⁴⁸ *Id.* at 157.

⁴⁹ *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159 (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)) (citation omitted). For further discussion of then-Judge Breyer’s article, see *infra* notes 54–58 and accompanying text.

⁵⁰ *Id.* at 160.

⁵¹ *Id.*

⁵² *Id.* at 160–61.

⁵³ See *id.* at 120, 126, 161; *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 218–19 (1994).

questions of law best fit for agency deference. In that article, then-Judge Breyer stated:

[C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question. Is the particular question one that the agency or the court is more likely to answer correctly? Does the question, for example, concern common law or constitutional law, or does it concern matters of agency administration? A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration. A court may also look to see whether the language is "inherently imprecise," i.e., whether the words of the statute are phrased so broadly as to invite agency interpretation. It might also consider the extent to which the answer to the legal question will clarify, illuminate or stabilize a broad area of the law.⁵⁴

Then-Judge Breyer's framing suggests only that, in determining whether to defer to an agency on a question of law, courts may consider whether the question is of a type that Congress would have been more likely to answer for itself rather than delegate to an agency.⁵⁵ But then-Judge Breyer's common-sense considerations were just one tool in the interpretive toolbox. He went on to caution that,

Of course, reliance on any or all of these factors as a method of determining a "hypothetical" congressional intent on the "deference" question can quickly be overborne by any tangible evidence of congressional intent, for example, legislative history, suggesting that Congress did resolve, or wanted a court to resolve, the statutory question at issue.⁵⁶

⁵⁴ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370-71 (1986) (footnotes omitted).

⁵⁵ *Id.*

⁵⁶ *Id.* at 371 (footnotes omitted).

This framing is the same as the Court's in *MCI*.⁵⁷ As in *MCI*, then-Judge Breyer also expressed no concern about the significance of the rule's effects.⁵⁸

Next in line was *Whitman v. American Trucking Associations*, which concerned the Environmental Protection Agency ("EPA") and the National Ambient Air Quality Standards ("NAAQS") for particulate matter and ozone under the Clean Air Act ("CAA").⁵⁹ Section 109(b)(1) of the CAA requires EPA to set primary ambient air quality standards at a level "requisite to protect the public health" with "an adequate margin of safety."⁶⁰ Petitioners challenged the NAAQS on the grounds that EPA had failed to take costs into account.⁶¹ Although the statute does not direct EPA to consider costs, petitioners argued that the economic costs of setting stringent NAAQS would also impact "public health."⁶² The Court noted that Congress was "unquestionably aware" of this, but had specifically declined to include costs in the NAAQS-setting process and had explicitly permitted or required economic costs to be taken into account in other air quality standards provisions.⁶³ Subsequent CAA amendments also added even more provisions directing EPA to consider costs.⁶⁴ Accordingly, the Court upheld its prior holding⁶⁵ "refus[ing] to find implicit in ambiguous sections of the CAA an authorization to consider costs that ha[d] elsewhere, and so often, been expressly granted."⁶⁶ Petitioners, the Court explained, instead had to show a "textual commitment of authority to the EPA to consider costs in setting NAAQS under § 109(b)(1)."⁶⁷ "And because § 109(b)(1) and the NAAQS for which it provides are the engine that drives nearly all of Title I of the CAA, . . . that textual commitment must be a clear one."⁶⁸

Citing *MCI* and *Brown & Williamson*, the Court stated "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."⁶⁹ The Court ultimately concluded

⁵⁷ See *MCI Telecomms. Corp.*, 512 U.S. at 218–19.

⁵⁸ See *id.* at 233–34.

⁵⁹ 531 U.S. 457, 462–63, 476 (2001).

⁶⁰ *Id.* at 465 (citing 42 U.S.C. § 7409(b)(1)).

⁶¹ See *id.* at 457–58.

⁶² *Id.* at 465–66.

⁶³ *Id.* at 466.

⁶⁴ *Id.* at 466–67.

⁶⁵ See *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

⁶⁶ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001) (citation omitted).

⁶⁷ *Id.* at 468.

⁶⁸ *Id.* (citation omitted).

⁶⁹ *Id.* at 468 (citing *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

that “[t]he text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA,” thereby ruling against petitioners.⁷⁰ The *Whitman* Court here invoked the arguable major questions precedents as a presumption about how Congress drafts statutes. Unlike *MCI*, this was not a case about an agency claiming authority to make a fundamental change to a central part of a statute—here, it was petitioners that claimed that the agency had this authority.⁷¹ This case is also different from *Brown & Williamson* in that it does not cite and is not concerned about economic and political significance.⁷² In addition, in later cases, the Court would cite concerns about the “economic and political significance” of agency actions that impose *more* regulation.⁷³ Yet the *Whitman* Court’s holding that EPA could not take costs into account in setting the NAAQS would have been understood to have required more stringent regulation from EPA.⁷⁴

After *Whitman* came *Gonzales v. Oregon*.⁷⁵ In 1994, Oregon passed the Oregon Death with Dignity Act, becoming the first state to legalize physician-assisted suicide.⁷⁶ The drugs physicians prescribe for assisted suicide are regulated under the federal Controlled Substances Act (“CSA”), which requires physicians prescribing these drugs to obtain a registration from the Attorney General “in accordance with the rules and regulations promulgated by him.”⁷⁷ In 2001, the Attorney General issued an Interpretive Rule under the statute stating that using controlled substances to assist “suicide is not a “legitimate medical purpose” and therefore violates the CSA, regardless of state law authorizing such conduct.⁷⁸ Violating the CSA is a criminal offense, often a felony.⁷⁹

⁷⁰ *Id.* at 471.

⁷¹ *Id.* at 472.

⁷² See *Whitman*, 531 U.S. at 464–65.

⁷³ See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 302 (2014).

⁷⁴ See 531 U.S. at 486. The presumption that cost-conscious standards would necessarily be weaker than EPA’s ostensibly health-based standards has been refuted. See Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards and Cost-Benefit Analysis*, 46 ENV’T L. REP. NEWS & ANALYSIS 10,674, 10,674 (2016).

⁷⁵ See *Whitman*, 531 U.S. at 457; see also *Gonzales v. Oregon*, 546 U.S. 243, 243 (2006).

⁷⁶ *Gonzales*, 546 U.S. at 249 (citing OR. REV. STAT. § 127.800 et seq. (2003)).

⁷⁷ *Id.* at 251 (citing 21 U.S.C. § 822(a)(2)).

⁷⁸ *Id.* at 254 (citing Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607, 56608 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306)).

⁷⁹ *Id.* at 261.

The Court began its legal analysis by determining whether the Interpretive Rule was entitled to *Chevron* deference.⁸⁰ Looking at the CSA's text, the Court determined that Congress did not grant the Attorney General "broad authority" to carry out all provisions of the CSA.⁸¹ Rather, Congress had "painstakingly" delineated for the Attorney General's "limited powers, to be exercised in specific ways," namely to promulgate rules relating to registration and scheduling of drugs "for the efficient execution of [the Attorney General's] functions" under the statute.⁸² The Court found that the Attorney General claimed "extraordinary authority" at odds with these limited powers.⁸³ In particular, the Court was troubled by the scope of the Attorney General's potential power: "If the Attorney General's argument were correct, his power to deregister necessarily would include the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate. This power to criminalize . . . would be unrestrained" since the statute does not define any requirements for this decision-making.⁸⁴

The Court found that the Attorney General's Interpretive Rule was also inconsistent with the CSA because the Attorney General did not have sole authority under the CSA.⁸⁵ Instead, the Attorney General shared power under the statute with the Secretary of Health and Human Services, who has power over decision-making on medical judgments.⁸⁶ The Court found that the structure of the CSA revealed Congress's "unwillingness to cede medical judgments to an executive official who lacks medical expertise."⁸⁷ Citing *Whitman* and *Brown & Williamson*, the Court wrote:

The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague

⁸⁰ *Id.* at 244. The Court also analyzed whether the Interpretive Rule was entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), as an interpretation of a regulation, but the Court ultimately concluded that it was not entitled to such deference since the regulation was merely parroting the statute. *Id.* at 256–57.

⁸¹ *Gonzales*, 546 U.S. at 259.

⁸² *Id.* at 259, 262.

⁸³ *Id.* at 262.

⁸⁴ *Id.*

⁸⁵ *Id.* at 265.

⁸⁶ *Id.*

⁸⁷ *Gonzales*, 546 U.S. at 266.

terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”⁸⁸

In this determination the Court noted that “[t]he importance of the issue of physician-assisted suicide, which has been the subject of an ‘earnest and profound debate’ across the country . . . makes the oblique form of the claimed delegation all the more suspect.”⁸⁹ For all these reasons, the Attorney General’s Interpretive Rule was not entitled to *Chevron* deference and received only deference only under *Skidmore v. Swift & Co.*⁹⁰ The Court did not discuss the economic effects of the regulation itself, though it did cite the political significance of the public debate in discussing whether Congress was likely to have implicitly delegated this question.⁹¹ Unlike in prior cases, the *Gonzales* Court highlighted the Attorney General’s lack of expertise in the realm affected by the regulation.⁹² The Court’s emphasis on the Attorney General’s lack of expertise could also suggest that the regulation itself might have stood had the Secretary of Health and Human Services, who does have expertise in this realm, issued it.⁹³ The Court also seemed to be, for the first time, troubled that the Attorney General’s claimed authority “necessarily would include . . . greater power.”⁹⁴

The Court’s next foundational precedent for the major questions doctrine was *Utility Air Regulatory Group (UARG) v. EPA*.⁹⁵ At issue in this case was EPA’s interpretation of the CAA NAAQS provision,⁹⁶ under which states designate all areas as “‘attainment,’ ‘nonattainment,’ or ‘unclassifiable’ with respect to each NAAQS.”⁹⁷ Stationary sources in areas designated as attainment or unclassifiable are subject to the Prevention of Significant Deterioration (“PSD”) program, which requires new or modified “‘major emitting facilit[ies]” to qualify for and obtain a permit.⁹⁸ The Act defines a “‘major emitting

⁸⁸ *Id.* at 267 (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion[.]”).

⁸⁹ *Id.* at 267 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)) (citation omitted).

⁹⁰ *Id.* at 268–69.

⁹¹ *Id.* at 248–49, 268.

⁹² *Id.* at 269.

⁹³ See *Gonzales*, 546 U.S. at 269.

⁹⁴ *Id.* at 262.

⁹⁵ See 573 U.S. 302, 302 (2014).

⁹⁶ *Id.* at 308.

⁹⁷ *Id.*

⁹⁸ *Id.*

facility” as any stationary source with the potential to emit 250 tons per year (or 100 tons per year for some sources) of “any air pollutant.”⁹⁹ In addition to the PSD program, Title V imposes additional permitting requirements for “major source[s],” which are defined as “any stationary source with the potential to emit 100 tons per year of ‘any air pollutant.’”¹⁰⁰

Following the Court’s holding in *Massachusetts v. EPA* that greenhouse gases satisfied the CAA’s general statutory definition of “air pollutant,”¹⁰¹ EPA issued a decision that, “beginning on the effective date of its greenhouse-gas standard for motor vehicles, stationary sources would be subject to the PSD program and Title V [requirements] on the basis of their potential to emit greenhouse gases.”¹⁰² In doing so, EPA recognized that the “PSD Program and Title V were designed to regulate ‘a relatively small number of large industrial sources,’ and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and ‘unrecognizable to the Congress that designed’ them.”¹⁰³ To avoid this result, EPA issued a “Tailoring Rule” that raised the statutorily defined thresholds for greenhouse-gas emissions to 75,000 tons or 100,000 tons.¹⁰⁴

As in prior cases, the Court began by stating that it would assess whether EPA’s interpretations of the CAA were entitled to *Chevron* deference but ultimately concluded that they were inconsistent with the statute and therefore not entitled to deference.¹⁰⁵ In reviewing the substantive and procedural requirements of the PSD program and Title V, the Court concluded—as EPA had also acknowledged—that these requirements were designed to apply to a relatively small number of large sources.¹⁰⁶ But EPA’s interpretation, absent the Tailoring Rule, the Court observed, would lead to several drastic changes: Under the PSD program, “annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects

⁹⁹ *Id.* at 309, 310.

¹⁰⁰ *Id.* at 310 (citation omitted).

¹⁰¹ 549 U.S. 497, 528–29 (2007).

¹⁰² *Util. Air Reg. Grp.*, 573 U.S. at 312.

¹⁰³ *Id.* (citing Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31555, 31562 (Aug. 2, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71)).

¹⁰⁴ *Id.* at 312–13.

¹⁰⁵ *Id.* at 315, 321.

¹⁰⁶ *Id.* at 322–23.

to grind to a halt nationwide[;]"¹⁰⁷ and under Title V, "[t]he number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from \$62 million to \$21 billion; and collectively the newly covered sources would face permitting costs of \$147 billion."¹⁰⁸ Notably, much of the Court's discussion of economic effects in *UARG* did not involve absolute figures, but instead relative comparisons to existing regulations under the same program.¹⁰⁹

The Court then explained that EPA's interpretation was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."¹¹⁰ The Court continued:

When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."¹¹¹

This was the first time the Court expressly invoked concern in a foundational major questions case that the agency was relying on a "long-extant statute" to claim "unheralded power."¹¹²

The Court further noted that it was "confront[ing] a singular situation" that it found "outrageous": "[A]n agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it."¹¹³ Finally, the Court found that EPA's workaround to this statutory incompatibility—the Tailoring Rule—constituted an impermissible

¹⁰⁷ *Id.* at 322.

¹⁰⁸ *Id.* (citation omitted).

¹⁰⁹ See *Util. Air Reg. Grp.*, 573 U.S. at 324, 329–30.

¹¹⁰ *Id.* at 324.

¹¹¹ *Id.* (citation omitted).

¹¹² See *id.* at 324. *Brown & Williamson* arguably invokes a similar concern, but not using this exact language. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

¹¹³ *Util. Air Reg. Grp.*, 573 U.S. at 324 (citing Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31513, 31555 (Aug. 2, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71)).

“rewriting of the statutory thresholds” since EPA must always ““give effect to the unambiguously expressed intent of Congress.””¹¹⁴

Just one year later, the Court decided *King v. Burwell*.¹¹⁵ At issue in this case was the availability of tax credits under the Affordable Care Act (“ACA”).¹¹⁶ The ACA was comprised of three key reforms: It prohibited insurers from taking people’s health into account in selling them insurance; it required every person to maintain health insurance or otherwise make a payment to the Internal Revenue Service (“IRS”); and it created tax credits for people 100–400% of the federal poverty line to make insurance more affordable.¹¹⁷ These three reforms were closely intertwined: The coverage requirement would not work without the tax credits because, “without the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement.”¹¹⁸ The first reform prohibiting insurers from taking a person’s health into account in selling them insurance likewise depended on the existence of the coverage requirement and tax credits, without which insurers would have gone bankrupt due to people waiting to obtain insurance until after they were sick.¹¹⁹ The ACA also required that each State have an “Exchange” on which people can shop for insurance.¹²⁰ States had the opportunity to establish their own exchanges, but the ACA provided a federal fallback option if they failed to do so.¹²¹

The main issue in *King* was whether the tax credits were available in states that have a federal exchange.¹²² Although the ACA provided that tax credits would be “allowed” for any “applicable taxpayer,” it also provided that the amount of the credit depended on whether a taxpayer was enrolled in “an Exchange *established by the State*.”¹²³ To address this issue, the IRS promulgated a rule clarifying that the tax credits were available on both state and federal Exchanges.¹²⁴ The Court explained that while it would normally proceed under the *Chevron* framework, that approach “is premised on the theory

¹¹⁴ *Id.* at 325.

¹¹⁵ *See* 576 U.S. 473, 473 (2015).

¹¹⁶ *See id.* at 474–75.

¹¹⁷ *Id.* at 479, 482.

¹¹⁸ *Id.* at 482.

¹¹⁹ *See id.*

¹²⁰ *Id.* at 474, 483.

¹²¹ *King*, 576 U.S. at 482–83 (citing 42 U.S.C. § 18,031(b)(1)).

¹²² *Id.* at 483.

¹²³ *Id.* (citing 26 U.S.C. §§ 36B(b)–(c), 42 U.S.C. §§ 18,031(b)(1), 18,041(c)(1)).

¹²⁴ *Id.* (citing Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377, 30378 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1, 602)).

that a statute's ambiguity constitutes an implicit delegation," but "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."¹²⁵ The Court found that "this is one of those" extraordinary cases, writing:

The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.¹²⁶

The Court concluded that, in this case, "[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort."¹²⁷ The Court therefore determined that "[t]his is not a case for the IRS. It is instead [the Court's] task to determine the correct reading of [the statute]."¹²⁸

The Court went on to conduct its own statutory interpretation, looking primarily at the broader context of the statutory scheme.¹²⁹ The Court ultimately came to the same conclusion as the IRS: The statute provides that tax credits are available on both state and federal exchanges.¹³⁰ The Court reasoned that the ACA would not have operated as Congress designed without tax credits available on the federal exchange.¹³¹ Given the interplay between the coverage requirement and the availability of tax credits, without the tax credits, approximately 87% of people would be exempt from the coverage requirement.¹³² This combination of "no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral" where premium would increase by 35–47% and enrollment would decrease by approximately 70%.¹³³ And because,

¹²⁵ *Id.* at 485 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹²⁶ *Id.* at 485–86 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)) (citing *Util. Air Reg. Grp., v. EPA*, 573 U.S. 302, 324 (2014)).

¹²⁷ *King*, 576 U.S. at 486 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)).

¹²⁸ *Id.*

¹²⁹ *See id.* at 497.

¹³⁰ *Id.* at 474, 498.

¹³¹ *Id.* at 494–95.

¹³² *Id.* at 494.

¹³³ *See King*, 576 U.S. at 494.

under the ACA, insurance providers must treat the entire market as a single risk pool, premiums outside the Exchange would also rise.¹³⁴

The Court cited *Whitman* in favor of the same interpretation the IRS had issued: The Court explained that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions,” and to say that the tax credits do not apply on a federal exchange would mean that “Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code.”¹³⁵ “Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in [a] . . . prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit.”¹³⁶

What made *King* an extraordinary case was not the IRS’s interpretation, since the Court independently arrived at the same interpretation. And unlike *UARG*, *King* is not concerned with the economic and political significance of the rule itself.¹³⁷ In fact, as noted, *King* cites *Whitman* in favor of the same interpretation the IRS had issued to say that taking a *contrary* reading would have been inappropriate because Congress would not have made the “viability of the entire” Act turn on an “ancillary provision.”¹³⁸ Rather, *King* expresses concern about an agency exercising interpretive authority where it lacked special expertise to resolve a question central to how the statutory scheme operated.¹³⁹

From *MCI* to *King*, the Court decided only six cases that arguably involved the major questions doctrine, though none used that label. In fact, the Court during this time never used the phrase “major questions doctrine” at all. The first time “major questions doctrine” appeared in a Supreme Court opinion was when Justice Gorsuch used the phrase in his dissenting opinion in *Gundy v. United States*,¹⁴⁰ which is not typically viewed as a foundational precedent for the major questions doctrine.¹⁴¹

¹³⁴ *Id.*

¹³⁵ *Id.* at 497.

¹³⁶ *Id.*

¹³⁷ *Id.* at 474.

¹³⁸ *Id.* at 497.

¹³⁹ See *King*, 576 U.S. at 474; see also *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006).

¹⁴⁰ 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

¹⁴¹ In *Gundy*, the Court addressed whether a provision of the Sex Offender Registration and Notification Act (“SORNA”) violated the nondelegation doctrine. *Id.* at 2121. The provision at issue was 34 U.S.C. § 20913, which provides that “. . . [t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment” of SORNA. *Id.* at 2132 (quoting 34 U.S.C. § 20,913(d)). Under this authority, the Attorney General

Gundy appears to have marked a turning point for the major questions doctrine, or at least use of that label, moving it from the confines of mostly academic commentary to the holdings of multiple federal decisions. Before *Gundy*, only three federal decisions (all from lower courts) mention the phrase “major questions doctrine” at all.¹⁴² Since *Gundy*, the phrase has appeared in dozens of federal decisions (and counting).¹⁴³ For its part, the Court decided four arguably “major questions” cases in relatively rapid succession in the few years since *Gundy*, although the label remained absent from the majority opinions in the first three of those cases: *Alabama Association of Realtors v. Department of Health & Human Services (Alabama Realtors)*,¹⁴⁴ *Biden*

promulgated a rule that specified that SORNA’s registration requirements applied in full to all sex offenders convicted before SORNA’s enactment. *Id.* (citing Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81850 (Dec. 29, 2010) (to be codified at 28 C.F.R. pt. 72)). The plurality held that SORNA did not violate the nondelegation doctrine because Congress had sufficiently supplied an intelligible principle. *Id.* at 2123–24. In dissent, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, argued that SORNA violated the nondelegation doctrine and proposed a new three-part “guiding principles” test to replace the intelligible principal test. *Id.* at 2135–37 (Gorsuch, J., dissenting). In discussing the Court’s role in preventing Congress from improperly delegating legislative power, Justice Gorsuch referenced the major questions doctrine, describing it as follows:

[A]n agency can fill in statutory gaps where “statutory circumstances” indicate that Congress meant to grant it such powers. But we don’t follow that rule when the “statutory gap” concerns “a question of deep ‘economic and political significance’ that is central to the statutory scheme.” . . . Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.

Gundy, 139 S. Ct. at 2141–42 (footnotes omitted). Justice Kavanaugh later expounded on the relationship between the major questions doctrine and the nondelegation doctrine in a statement on the denial of certiorari in *Paul v. United States*, which cites Justice Gorsuch’s *Gundy* dissent. 140 S. Ct. 342, 342 (2019). Justice Kavanaugh explicitly linked the major questions doctrine and the nondelegation doctrine, contending that the Court has used the major questions doctrine in lieu of the nondelegation doctrine. *See id.*; *but see* Sohoni, *supra* note 1, at 291–92 (questioning the relationship given the lack of any express linkage between the major questions doctrine and nondelegation in the Court’s precedents).

¹⁴² *See* U.S. Telecomm. Ass’n v. FCC, 855 F.3d 381, 381 (D.C. Cir. 2017); Coal. for Responsible Regulation v. EPA, 2012 U.S. App. LEXIS 25997 (D.C. Cir. 2012); Int’l Refugee Assistance Project v. Trump, 883 F.3d 233, 233 (4th Cir. 2018).

¹⁴³ *See, e.g.*, Am. Lung Ass’n v. EPA, 985 F.3d 914, 958 (D.C. Cir. 2021); Bradford v. U.S. Dep’t of Lab., 2022 U.S. Dist. LEXIS 16184, at *12 (D. Colo. 2022).

¹⁴⁴ *See generally* 141 S. Ct. 2485 (2021) (per curiam).

v. Missouri,¹⁴⁵ *National Federal of Independent Business v. Department of Labor*,¹⁴⁶ and *West Virginia v. EPA*.¹⁴⁷

In *Alabama Realtors*, the Court struck down a nationwide eviction moratorium issued by the Centers for Disease Control and Prevention (“CDC”) for tenants with financial need in counties experiencing substantial or high levels of COVID-19.¹⁴⁸ The CDC had issued the moratorium pursuant to its power under section 361(a) of the Public Health Service Act, which authorizes the CDC “. . . to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases [interstate]”¹⁴⁹ The statute further provides that:

“For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.”¹⁵⁰

The Court first looked to the text of the statute and reasoned that the second sentence of the statute illustrating the types of measures the CDC could undertake—such as inspection, fumigation, and disinfection—made clear that the measures the CDC could take were those directly related to preventing the interstate spread of disease, while, according to the Court, an eviction moratorium was an indirect measure.¹⁵¹ Invoking precedents now viewed as major questions cases, the Court wrote: “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority under § 361(a) would counsel against the Government’s interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast “economic and political significance.”’”¹⁵²

¹⁴⁵ See generally 142 S. Ct. 647 (2022) (per curiam).

¹⁴⁶ 142 S. Ct. 661 (2022) (per curiam).

¹⁴⁷ 142 S. Ct. 2587, 2595 (2022). Other scholars have grouped these four decisions, the first three of which were per curiam decisions in emergency-relief cases, together. See Sohoni, *supra* note 1, at 262 (classifying these cases as a “quartet”).

¹⁴⁸ 141 S. Ct. 2485, 2485–86, 2490 (2021).

¹⁴⁹ *Id.* at 2487 (quoting 42 U.S.C. § 264(a)).

¹⁵⁰ 42 U.S.C. § 264(a).

¹⁵¹ *Id.* at 2488.

¹⁵² *Id.* at 2489 (citing *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))).

The Court highlighted that “[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, [fell] within the moratorium” and that “Congress ha[d] provided nearly \$50 billion in emergency rental assistance,” which the Court said was a “reasonable proxy of the moratorium’s economic impact.”¹⁵³ The Court also noted that “the Government’s read of § 361(a) would give the CDC a breathtaking amount of authority,” and that it was “hard to see what measures this interpretation would place outside the CDC’s reach.”¹⁵⁴ The Court also emphasized that, “[s]ince that provision’s enactment in 1944, no regulation premised on it ha[d] even begun to approach the size or scope of the eviction moratorium.”¹⁵⁵ For the first time, the Court looked to metrics like the number of people helped by the rule and a proxy for the dollar amount of the rule’s absolute economic impact.¹⁵⁶

In *Biden v. Missouri*, the Court addressed a rule from the Secretary of Health and Human Services that required that, in order to receive Medicare and Medicaid funding, participating facilities had to ensure that their staff were vaccinated against COVID-19 unless they had a medical or religious exemption in order to receive Medicare and Medicaid funding.¹⁵⁷ According to the Court, the statute “authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that ‘the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.’”¹⁵⁸ The Court found that the rule “fit[] neatly” within the language of the statute and in line with “longstanding practice” of Health and Human Services’ regulations under the statute.¹⁵⁹ The majority did not raise the major questions doctrine or strike down the regulation, which is perhaps why it is sometimes overlooked as a major questions case.¹⁶⁰

But Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett dissented, invoking key major questions precedents and writing that the Court “presume[s] that Congress does not hide ‘fundamental details of a regulatory scheme in vague or ancillary

¹⁵³ *Id.* (citation omitted).

¹⁵⁴ *Alabama Realtors*, 141 S. Ct. at 2489.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ 142 S. Ct. 647, 647, 650 (2022) (citing Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61555 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482–86, 491, 494)).

¹⁵⁸ *Id.* at 652 (quoting 42 U.S.C. § 1395x(e)(9)).

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 650–55; *see, e.g.,* Sohoni, *supra* note 1, at 262.

provisions.”¹⁶¹ Justice Thomas viewed the Secretary’s assertion of authority over “millions of healthcare workers” as “virtually unlimited.”¹⁶² He also maintained that the statutory provisions serving as the basis for this rule were “ancillary provisions” through which Congress would not have included a “fundamental detail” of the statutory scheme.¹⁶³ Justice Thomas concluded his dissent by again invoking language from key major questions cases, this time writing that the Court “. . . expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”¹⁶⁴

In *National Federation of Independent Business v. Department of Labor*, an opinion issued the same day as *Biden v. Missouri*, the Court stayed an emergency temporary standard from the Occupational Safety and Health Administration (“OSHA”), which mandated that employers with at least one hundred employees require those employees either be vaccinated against COVID-19 or take a weekly COVID-19 test and wear a mask at work.¹⁶⁵ The rule included several exceptions, including for employees in work conditions that have a lower rate of transmission and for religious objections and medical necessity.¹⁶⁶ OSHA promulgated the rule under the Occupational Safety and Health Act (“OSH Act”) of 1970.¹⁶⁷ The OSH Act mandates that OSHA issue

“[A]n emergency temporary standard to take immediate effect upon publication in the Federal Register if [OSHA] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”¹⁶⁸

¹⁶¹ *Biden*, 142 S. Ct. at 656 (Thomas, J., dissenting) (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

¹⁶² *Id.* (Thomas, J., dissenting).

¹⁶³ *Id.* (Thomas, J., dissenting).

¹⁶⁴ *Id.* at 658 (Thomas, J., dissenting) (quoting *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs. (Alabama Realtors)*, 141 S. Ct. 2485, 2489 (2021)).

¹⁶⁵ *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 671 (2022) (Breyer, J., dissenting) (citing COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61551–61553 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928)).

¹⁶⁶ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. at 61552.

¹⁶⁷ See *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 663 (citing 29 U.S.C. §§ 651, 651(b), 655(b), 652(8)).

¹⁶⁸ *Id.* at 671 (Breyer, J., dissenting) (citing 29 U.S.C. § 655(c)(1)).

The Court said that this was “a significant encroachment into the lives—and health—of a vast number of employees” and that it “. . . ‘expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.’”¹⁶⁹ The Court found that the OSH Act did not authorize OSHA’s emergency standard because it allowed OSHA to set only workplace safety standards, not broad public health standards.¹⁷⁰ General public health standards would “fall[] outside of OSHA’s sphere of expertise.”¹⁷¹ The Court found that it was “telling that OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation”¹⁷² “This ‘lack of historical precedent,’ coupled with the breadth of authority that [OSHA] now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.”¹⁷³ Here the Court was particularly bothered by OSHA’s lack of expertise in the realm affected by the regulation.¹⁷⁴ The Court was also troubled by OSHA’s issuing regulations that were unprecedented in the agency’s history.¹⁷⁵ Unlike in *UARG*, however, the Court was not concerned about whether this was a “long-extant statute.”¹⁷⁶ And unlike several other prior cases, the Court did not discuss whether the agency was relying on an “ancillary provision” in the statutory text.¹⁷⁷

* * *

This survey of the Court’s major questions precedents reveals the lack of a coherent framework for the major questions doctrine leading up to *West Virginia*. The major questions precedents do not all share a common test for when or how to apply the doctrine. Some reflect a common-sense assumption about how Congress drafts statutes, others reflect concern with what can perhaps be described as “outrageous” agency action.¹⁷⁸ And though there are some overlapping features, key considerations driving the Court’s decisions in each of

¹⁶⁹ *Id.* at 665 (citations omitted).

¹⁷⁰ *Id.* at 666.

¹⁷¹ *Id.* at 665.

¹⁷² *Id.* at 666.

¹⁷³ *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 666 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)) (footnote omitted).

¹⁷⁴ *See id.* at 665, 669; *see also* *Gonzales v. Oregon*, 546 U.S. 243 (2006) and *King v. Burwell*, 576 U.S. 473, 474 (2015).

¹⁷⁵ *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 666.

¹⁷⁶ *See Util. Air Reg. Grp., v. EPA*, 573 U.S. 302, 324 (2014); *see also Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 661–67.

¹⁷⁷ *See, e.g., King v. Burwell*, 576 U.S. 473, 479, 482 (2015); *see also Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 661–67.

¹⁷⁸ *See Util. Air Reg. Grp.*, 573 U.S. at 324.

the cases do not appear consistently in all the cases. For example, costs of the agency rule played no role in *MCI* or *Gonzales*;¹⁷⁹ they were only alluded to in *Brown & Williamson*;¹⁸⁰ they were referenced in *UARG*, but as a measure of the relative change resulting from the rule;¹⁸¹ and they were highlighted in *Alabama Realtors*, but as absolute metrics of the economic impact of the agency's action.¹⁸² Some factors like “earnest and profound debate” (*Gonzales*),¹⁸³ appear in a single case. In short, and as aptly summarized by then-Judge Kavanaugh while on the D.C. Circuit, the doctrine “ha[d] a bit of a ‘know it when you see it’ quality.”¹⁸⁴ That may be fine for everyday life, but, as the Court's experience with defining obscenity shows,¹⁸⁵ it does not make for an administrable doctrine for lower courts and litigants.

II. WEST VIRGINIA'S ARTICULATION OF THE MAJOR QUESTIONS DOCTRINE

That brings us to *West Virginia*. The dispute in this case involved EPA's authority under section 111(d) of the CAA to issue a regulation called the Clean Power Plan.¹⁸⁶ The CAA authorizes EPA to set a “standard of performance” for power plants' emission of certain

¹⁷⁹ See generally *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹⁸⁰ 529 U.S. 120, 137 (2000) (noting “[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States . . .”).

¹⁸¹ See *Util. Air Reg. Grp.*, 573 U.S. at 322.

¹⁸² See 141 S. Ct. 2485, 2489 (2021).

¹⁸³ 546 U.S. at 267.

¹⁸⁴ *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

¹⁸⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

¹⁸⁶ The CAA includes three major sets of provisions to comprehensively limit air pollution from existing stationary sources, including power plants: (1) sections 108 through 110 cover National Ambient Air Quality Standards that limit specified criteria pollutants, not including carbon dioxide; (2) section 112 targets hazardous air pollutants other than those already covered by a NAAQS; and (3) section 111(d) “cover[s] pollutants that are not regulated under either the criteria pollutant/NAAQS provisions or section 112.” Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661, 64711 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60); see also S. REP. NO. 91-1196, at 20 (1970) (explaining that Section 111(d) assures that there will be “no gaps” in authority to limit air pollution from stationary sources).

air pollutants including greenhouse gasses.¹⁸⁷ “That standard must . . . reflect the ‘best system of emission reduction that the Agency has determined to be ‘adequately demonstrated’ for the particular category” of power plant.¹⁸⁸ In the Clean Power Plan, EPA had determined that “the best system of emission reduction” for power plants under section 111(d) consisted of three building blocks: (1) improving the heat-rate efficiency of coal-fired plants, (2) substituting electricity produced from coal-fired plants with electricity produced by existing natural gas-fired plants, and (3) substituting electricity produced from both coal- and natural gas-fired plants with electricity produced by newly constructed renewables.¹⁸⁹ The second and third building blocks have generally been described as a purposeful “generation shifting” approach to determining the best system of emission reduction.¹⁹⁰

The Clean Power Plan never took effect, however, because the Supreme Court stayed the rule in 2016.¹⁹¹ Following a change in administration, EPA determined that it lacked authority to issue the Clean Power Plan, relying in part on the major questions doctrine, and it rescinded the rule in favor of a new regulation called the Affordable Clean Energy (“ACE”) Rule.¹⁹² The D.C. Circuit vacated the ACE Rule, concluding that the “so-called ‘major questions doctrine’” did not apply and that EPA had authority to issue the Clean Power Plan.¹⁹³ Judge

¹⁸⁷ The CAA creates a framework for federal-state collaboration. Under this framework, EPA sets “guidelines” “for the development of State plans” which “reflect[] the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities, and the time within which compliance with emission standards of equivalent stringency can be achieved.” 40 C.F.R. § 60.22(b)(5) (2022). States then submit plans containing the emissions restrictions to meet the standards set by EPA. 40 C.F.R. §§ 60.23, 60.24 (2022); 42 U.S.C. § 7411(d)(1). *See also* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, (2011).

¹⁸⁸ 142 S. Ct. 2587, 2599 (2022) (quoting §§ 7411(a)(1), (b)(1), (d)).

¹⁸⁹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64667.

¹⁹⁰ *See, e.g.*, Brunstein & Revesz, *supra* note 3, at 322–23. The Clean Power Plan’s purposeful use of generation shifting differs from other EPA regulations that may indirectly lead to generation shifting.

¹⁹¹ *West Virginia v. EPA*, 577 U.S. 1126, 1126 (2016).

¹⁹² Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32250 (Sept. 6, 2019) (to be codified at 40 C.F.R. 60). EPA primarily determined that the text of Section 111(d) unambiguously foreclosed the Clean Power Plan, with the major questions doctrine offered as an alternative basis for rescinding the Clean Power Plan. Final Brief for the U.S. Environmental Protection Agency and EPA Administrator Andrew Wheeler at 97, *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 966 (D.C. Cir. 2021) (No. 19-1140).

¹⁹³ *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 958–68 (D.C. Cir. 2021).

Walker dissented, arguing that the major questions doctrine did apply and that EPA lacked the requisite authority for the rule.¹⁹⁴

When the litigation landed at the Supreme Court, the question presented was whether EPA could rely on its authority in section 111(d) of the CAA to adopt the Clean Power Plan’s purposeful generation-shifting approach, with much of the briefing focused on whether the major questions doctrine applied.¹⁹⁵

Given the uncertainty in the case law recounted above, it is unsurprising that the Justices did not have a firm grasp on the major questions doctrine during oral argument. Justice Thomas kicked things off by asking what the “difference [was] between clear statement and major questions”¹⁹⁶ and “what factors would [the Court] take into account to determine which canon or which approach [it] should use?”¹⁹⁷ Justice Kavanaugh “repeate[d] two things from *UARG* and [asked] if [Solicitor General Prelogar] would caution [the Court] against using [them].”¹⁹⁸ Justice Barrett asked about “a formulation of the major questions doctrine” that just says “when you look at this scheme, this is a really big deal,” but then also queried, “How do we decide that?” And at one point, Chief Justice Roberts frankly acknowledged that “there’s some disagreement about how to apply” the doctrine.¹⁹⁹ This is just a sampling of the questions revealing that the Justices were well aware of the doctrine’s lack of clarity but were searching for better guidance for themselves and presumably lower courts, too.

A. *West Virginia’s Two-Prong Test for Determining When a Case Is Extraordinary Enough to Trigger the Major Questions Doctrine*

In many ways, *West Virginia* provides such guidance. It eschews an amorphous multifactor test of economic and political signifi-

¹⁹⁴ *Id.* at 995–1003 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹⁹⁵ *See, e.g.*, Brief for Petitioners at 14–26, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), (No. 20-1530); Brief for States and Municipalities in Opposition at 22–25, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), (No. 20-1530).

¹⁹⁶ Transcript of Oral Argument at 7:1–3, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

¹⁹⁷ *Id.* at 7:14–16.

¹⁹⁸ *Id.* at 98:20–22. The “two things from *UARG*” that Justice Kavanaugh referenced were that “Congress must ‘speak clearly if it wishes to assign an agency decisions of vast economic and political significance’” and “that the Court greets with ‘a measure of skepticism’ when agencies claim to have found in ‘a long-extant statute an unheralded power to regulate a significant portion of the American economy.’” *Id.* at 98:24–99:7.

¹⁹⁹ *Id.* at 83:25–84:1.

cance that looks at things like cost and public attention in favor of a more structured two-prong test that looks at whether the agency's action is unheralded and represents a transformative change in its authority. The structured two-prong test appears designed to reduce, albeit not eliminate, the “know it when you see it” problem that had characterized the major questions doctrine before *West Virginia*.²⁰⁰

The two-prong test is seen most clearly in the Court's legal analysis of the major questions doctrine, which is found entirely in Section III of *West Virginia*.²⁰¹ Section III is itself divided into three subsections, each with a different focus: Section III.A expressly endorses the major questions doctrine; Section III.B explains when it applies; and Section III.C addresses what happens when it applies.²⁰²

In Section III.A, the Court announced that henceforth two different analyses will apply to cases involving agency authority, depending on whether they are “ordinary” or “extraordinary.”²⁰³ More specifically, the Court observed that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”²⁰⁴ And if “the statute at issue is one that confers authority upon an administrative agency, that inquiry must be ‘shaped, at least in some measure, by the nature of the question presented’—whether Congress in fact meant to confer the power the agency has asserted.”²⁰⁵ “In the ordinary case,” the Court observed, “that context has no great effect on the appropriate analysis.”²⁰⁶ But the Court's “precedent teaches that there are ‘extraordinary cases’ that call for a different approach,” i.e., ones “in which the ‘history and the breadth of the authority that the [agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”²⁰⁷ The Court then briefly summarized past examples of such “extraordi-

²⁰⁰ See, e.g., *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 481 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“determining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality”).

²⁰¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–16 (2022).

²⁰² Section I.A of *West Virginia* provides legal background on the Clean Air Act; Section I.B provides factual background on the Clean Power Plan; Section I.C provides the case's procedural history; and Section II addresses standing. See *id.* at 2599–607.

²⁰³ 142 S. Ct. 2587, 2608 (2022).

²⁰⁴ *Id.* at 2607 (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

²⁰⁵ *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

²⁰⁶ *Id.*

²⁰⁷ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159–60).

nary” cases and expressly adopted the major questions “label” for these cases.²⁰⁸

But the most noteworthy part of the decision is Section III.B, which addresses why the Clean Power Plan triggered application of the major questions doctrine.²⁰⁹ “[T]his is a major questions case,” the Court explained, because EPA “claim[ed] to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’”²¹⁰ After the Court set up this two-prong framework in an introductory paragraph, it divided the rest of Section III.B into two distinct segments that tracked these two reasons why the Clean Power Plan was an extraordinary case: The Court first addressed why the Clean Power Plan was unprecedented; it next addressed why the Clean Power Plan represented a transformative change in EPA’s authority.²¹¹

Starting with the first prong, after Section III.B’s introductory paragraph, the Court devoted the next five paragraphs to the history of EPA’s exercises of authority under section 111 of the CAA.²¹² This history was especially relevant to determining whether the Clean Power Plan was extraordinary because, the Court explained, “just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”²¹³

Analyzing that history, the Court concluded that, “[p]rior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly.”²¹⁴ The Court next noted that the “Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says” is an analogous exercise of authority to the Clean Power Plan’s purposeful generation-

²⁰⁸ *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

²⁰⁹ *Id.* at 2612–14.

²¹⁰ *Id.* at 2610 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). It is unclear how, or even whether, the major questions doctrine applies to more recent statutes given *West Virginia*’s framing of the doctrine. One example of a major questions case involving that situation is *King v. Burwell* given that the Affordable Care Act was then just a few years old. But that case has never been easy to categorize or square with the rest of the major questions precedents. *See supra* notes 106–09 and accompanying text. And it is far from clear that the major questions doctrine should apply outside the context of “long-extant statute[s]” given *West Virginia*’s analysis and emphasis on history. 142 S. Ct. 2587, 2610 (2022).

²¹¹ *Id.* at 2610–13.

²¹² 142 S. Ct. at 2610–12.

²¹³ *Id.* at 2610 (quoting *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)).

²¹⁴ *Id.*

shifting approach.²¹⁵ According to the Court, however, the example offered—the 2005 Mercury Rule—was “no precedent for the Clean Power Plan,” but was instead “one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.”²¹⁶ The Court then turned to how “[t]his consistent understanding . . . tracked the seemingly universal view, as stated by EPA in its inaugural section 111(d) rulemaking, that ‘Congress intended a technology-based approach’ to regulation in that section.”²¹⁷ And the Court further remarked that “EPA nodded to this history in the Clean Power Plan itself,” but consciously “adopted what it called a ‘broader, forward-thinking approach to the design’ of Section 111 regulations.”²¹⁸ As noted, each of the points covered in this five-paragraph discussion of section 111(d)’s history addresses the same thing: Whether the exercise of agency authority at issue was “unheralded” or “unprecedented,”²¹⁹ which is also the first consideration identified in Section III.B’s introductory paragraph.²²⁰

²¹⁵ *Id.*

²¹⁶ *Id.* at 2610–11. Stated differently, according to the Court, the 2005 Mercury Rule’s emission limits were similar to previous Section 111(d) rules in that it was based on an assumption that sources would install pollution-reducing technology rather than an assumption that the sources would simply operate less often.

²¹⁷ *Id.* at 2611 (quoting Standards of Performance for New Stationary Sources, 40 Fed. Reg. 53340, 53343 (Nov. 17, 1975) (to be codified at 40 C.F.R. 60)).

²¹⁸ 142 S. Ct. 2610, 2611 (2022) (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Units, 80 Fed. Reg. 64661, 64703 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60)).

²¹⁹ *Id.* at 2612.

²²⁰ As used in *West Virginia*, “unheralded” means unlike anything the agency has done before. Obviously, the agency need not identify an identical regulatory precedent, because new regulations will rarely, if ever, be identical to previous ones as they would then be unnecessary. Rather, *West Virginia*’s analysis suggests that the relevant regulatory precedent must be an analogous exercise of authority. That said, it remains unclear exactly how close the fit must be between the agency action and relevant regulatory precedents. The *West Virginia* Court rejected several potentially analogous precedents because they were not issued under the same statutory provision as the challenged agency action (section 111(d)). *Id.* at 2611 n.11. But it is unclear if that reasoning applies in every case or only those involving statutes with structures similar to the CAA. The majority also rejected as a relevant precedent under the same provision the 2005 Clean Air Mercury Rule because, as noted above, the Court characterized it as a rule “that devised the enforceable emissions limit by determining the best control mechanisms available for the source” while, in contrast, “there [was] no control a coal plant operator [could] deploy to attain the emissions limits established by the [CPP].” *Id.* at 2610–11. From these statements, the best we can say at this point is that the relevant precedent must be an analogous exercise of agency authority. Stated differently, has the agency used similar tools to pursue similar ends? Given the central role that history now plays in the analysis, though, this is a topic that would benefit from further scholarly research to help courts and

The Court signaled that it had concluded this discussion of whether the agency action was “unheralded” and was moving on to the next prong of its analysis by observing that “[t]his view of EPA’s authority was *not only* unprecedented; it *also* effected a ‘fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation’ into an entirely different kind.”²²¹

The remainder of Section III.B, and thus the remainder of the Court’s analysis of whether the litigation over the Clean Power Plan constituted a “major questions case,” then focused on whether the Clean Power Plan represented a “transformative expansion of [EPA’s] authority”²²² or, stated somewhat differently, “effected a ‘fundamental revision[] of the . . . scheme of regulation.’”²²³

The Court first highlighted that the Clean Power Plan represented a “paradigm” shift in EPA’s authority, changing the agency’s “role” from “ensuring the efficient pollution performance of each individual regulated source” to “a very different kind of policy judgment: that it would be ‘best’ if coal made up a much smaller share of national electricity generation.”²²⁴ This “paradigm” shift would also allow EPA to “go further” and “forc[e] coal plants . . . to cease making power altogether.”²²⁵ The Court followed this point by addressing “[t]he Government’s attempts to downplay the magnitude of this ‘unprecedented power over American industry,’”²²⁶ namely that other parts of the statute limited EPA’s authority over the amount of generation shifting it could order so that it was not “exorbitantly costly” and did not “threaten the reliability of the grid.”²²⁷ According to the Court, these limits on EPA’s authority actually revealed the “breadth” of EPA’s assertion of authority, as they suggested that “Congress implicitly tasked [EPA], and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy.”²²⁸ But, the Court remarked, “[t]here is little reason to

litigants better understand how to think about and apply the “unheralded” prong of *West Virginia’s* framework. As others have also observed, agencies should think carefully about regulatory precedents throughout the rulemaking process. See Revesz & Sarinsky, *supra* note 1.

²²¹ 142 S. Ct. 2610, 2612 (2022) (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994)) (emphasis added).

²²² 142 S. Ct. 2610, 2610 (2022) (citing *Util. Air*, 573 U.S. 302, 324 (2014)).

²²³ *Id.* at 2612 (citing *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994)).

²²⁴ 142 S. Ct. 2610, 2612 (2022).

²²⁵ *Id.*

²²⁶ *Id.* (quoting *Indus. Union Dept. AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)).

²²⁷ *Id.* (quoting Brief for Federal Respondents at 42, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530)).

²²⁸ *Id.*

think Congress assigned such decisions to the Agency,” because EPA lacked “comparative” technical and policy expertise in electricity transmission, distribution, and storage.²²⁹ The Court also found it “‘highly unlikely that Congress would leave’ to ‘agency discretion’ the decision of how much coal-based generation there should be over the coming decades,” as such a decision is “one[] that Congress would likely have intended for itself,” and Congress would have been unlikely to confer that decision-making authority “in the previously little used backwater of Section 111(d).”²³⁰

The Court turned from here to observing that EPA’s exercise of authority in the CPP was also “surprising” and “raise[d] an eyebrow.”²³¹ And it countered the dissent’s use of *American Electric Power Co. v. Connecticut*, which described EPA as the country’s “primary regulator of greenhouse gas emissions,”²³² by noting it was “doubtful [the Court] had in mind [in that case] that [EPA] would claim the authority to require a large shift from coal to natural gas, wind, and solar,” namely because “EPA had never regulated in that manner.”²³³ Finally, the Court concluded, it “cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions ‘had become well known, Congress considered and rejected’ multiple times.”²³⁴

As with the Court’s discussion of “unheralded” power in the first half of its analysis in Section III.B, a consistent theme runs through each of the points in the second half: They all address indicators that the Clean Power Plan represented a “transformative expansion in [EPA’s] authority.”²³⁵ Most notably, the Court stressed that the CPP marked a “paradigm” shift from EPA’s “ensuring the efficient pollution performance of each individual regulated source” to “balancing the many vital considerations of national policy implicated in de-

²²⁹ *Id.* at 2612–13.

²³⁰ 142 S. Ct. 2610, 2612–13 (2022) (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994)).

²³¹ *Id.* at 2613 (quoting 142 S. Ct. at 2636 (Kagan, J., dissenting)).

²³² *Id.* at 2627 (quoting 564 U.S. 410, 428 (2011)).

²³³ *Id.* at 2613 (citing 564 U.S. 410 (2011)).

²³⁴ *Id.* at 2614 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)); *see also id.* at 2614 (citing the Waxman-Markey bill (American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. 1st Sess.; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009)) and other bills (Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H. R. 3242, 112th Cong., 1st Sess.)). Note, however, that the Waxman-Markey and other bills that the Court pointed to in *West Virginia* concerned economy-wide carbon-emissions trading and other broad-based policies that were separate from EPA’s authority under the CAA to regulate greenhouse gas emissions from power plants.

²³⁵ *Id.* at 2612.

cluding how Americans will get their energy,” despite EPA’s admitted lack of “comparative expertise” in “areas such as electricity transmission, distribution, and storage.”²³⁶ Even the Court’s observation that it could “not ignore” the similarity between the Clean Power Plan and failed legislative proposals gets at this question whether the agency action represented a “fundamental revision” in the scheme of regulation, because Congress, the theory goes, presumably would not have needed to revise the statutory scheme if the agency action was already authorized.²³⁷ The Court’s analysis further suggests that none of these indicators, like failed legislative proposals, is determinative on its own. Rather, the Court’s analysis indicates that the central question under the second prong is whether the agency action represents a “chang[e] from one sort of scheme of regulation into an entirely different kind,” but there are different potential indicators that a court can assess to determine if there has been such a change.²³⁸

There undoubtedly may be some overlap across the two prongs of the framework that the Court adopted in *West Virginia*.²³⁹ But the structure of the Court’s analysis indicates it views them as distinct inquiries. The Court’s analysis also suggests a conjunctive test, meaning both prongs are required to trigger the major questions doctrine, as it would have been unnecessary for the Court to separately address

²³⁶ 142 S. Ct. 2610, 2612-13 (2022).

²³⁷ That said, for many reasons, failed legislative proposals should not play a role in the analysis. Congress considers and rejects thousands of bills every year on practically every major issue, and, over the past 20 years, Congress has enacted only about 5% of the over 125,000 bills introduced. See *Bills by Final Status*, GOVTRACK (last visited Jan. 24, 2023), <https://www.govtrack.us/congress/bills/statistics>. And reliance on this type of extra-textual fact in the major questions analysis would create problematic inconsistencies with prevailing methods of statutory interpretation. For example, in *Bostock v. Clayton County*, the Court explained that post-enactment legislative failures offer a “particularly dangerous basis on which to rest an interpretation of an existing law” and rejected their use. 140 S. Ct. 1731, 1747 (2020).

²³⁸ One can well imagine a situation in which a challenger points to one or two of these indicators, but a court concludes that a transformative change in the agency’s authority has not occurred. For example, even if a challenger could point to a failed legislative proposal bearing some resemblance to the agency action, the court might nonetheless conclude that the action fits comfortably within the statutory scheme of regulation and effects no change in the agency’s authority over American industry.

²³⁹ For example, when responding to the dissent’s use of *American Electric Power Co.* for the proposition that “EPA . . . serves as the Nation’s ‘primary regulator of greenhouse gas emissions,’” 142 S. Ct. at 2627 (Kagan, J., dissenting), the majority found it “doubtful [the Court] had in mind that [EPA] would claim the authority to require a large shift from coal to natural gas, wind, and solar,” in part because “EPA had never regulated in that manner, despite having issued many prior rules governing power plants under Section 111,” 142 S. Ct. at 2613. The Court’s response equates to saying the Clean Power Plan was “unheralded,” yet it included this response in the second part of its major questions analysis. *Id.* at 2610.

both prongs if either one was sufficient on its own.²⁴⁰ The major questions doctrine thus does not apply if either prong fails. For example, if an agency can point to past analogous exercises of authority demonstrating that its action is not “unheralded,” the major questions doctrine does not apply. One can also imagine how the prongs may have more work to do depending on the circumstances. For example, if an agency can point to past examples of potentially analogous exercises of authority, much of the court’s analysis under the first prong will focus on how those past examples compare to the agency action at issue. Some of that analysis may inevitably bleed into the second prong’s analysis of whether the agency action at issue represents a transformative change in the agency’s authority, making some of the second prong’s analysis seem redundant. But the second prong may have more work to do if the agency cannot point to past examples of potentially analogous exercises of authority, as then the court’s analysis will turn entirely on whether the agency action at issue, even if unprecedented, represents a transformative change in the agency’s authority.

As discussed in greater detail below, what the Court said in Section III.B is nearly as telling as what it did not say: Nowhere in Section III.B, which, as noted, addresses why the major questions doctrine applies to the Clean Power Plan, does the Court mention rough metrics of economic or political significance, such as cost, number of jobs affected, or amount of overall public attention received or litigation spawned.²⁴¹ In fact, the Court did not directly talk about “significance” in Section III.B at all, and it referenced “the importance of the issue” only once, as an afterthought appended to its discussion of the relevance of failed legislative proposals.²⁴²

True, when the Court summarized the foundational precedents for the major questions doctrine in Section III.A, it observed that its

precedent teaches that there are “extraordinary cases” that call for a different approach—cases in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political signif-

²⁴⁰ See *id.* at 2607–14.

²⁴¹ The Court referenced some metrics of cost and economic impact in the factual background section of the majority opinion, but it did not reference them in its legal analysis. The closest the Court comes to discussing cost or economic impact in its legal analysis is a passing reference to the Clean Power Plan as representing “unprecedented power over American industry.” 142 S. Ct. at 2612 (quoting *Indus. Union Dept. AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)). But “unprecedented power” does not mean expensive power; it means power unlike power previously exercised by a federal agency.

²⁴² 142 S. Ct. at 2614 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

icance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority.²⁴³

But when it came time to actually determine whether “this is a major questions case” in Section III.B, the Court did not rest its analysis on some amorphous assertion of economic and political significance or march through a list of factors like compliance costs or number of people affected.²⁴⁴

As also discussed in greater detail below, the omission of rough metrics of economic and political significance cannot be attributed to an oversight as many if not most of these were factors EPA relied on when repealing the Clean Power Plan, that multiple litigants urged the Court to adopt as triggers for the major questions doctrine, and that Justice Gorsuch believed were “present here, making this a relatively easy case for the doctrine’s application.”²⁴⁵ They were also factors that had attracted criticism in scholarly writing²⁴⁶ and in briefing before the Court.²⁴⁷ The Court was therefore presumably well aware of the flaws with these rough metrics and the irrelevance of many if not most of them in the foundational precedents of the major questions doctrine.²⁴⁸

One can only assume that the Court has internalized some of these critiques and that *West Virginia* represents an effort to move away from an amorphous “I know it when I see it” test for determining

²⁴³ *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

²⁴⁴ It is also noteworthy that the Court *did* rely on absolute metrics of the economic impact of the agency’s action in *Alabama Realtors*, but when the Court described *Alabama Realtors* in *West Virginia*, it explained the decision as turning on “the sheer scope of the CDC’s claimed authority,’ its ‘unprecedented’ nature, and the fact that Congress had failed to extend the moratorium after previously having done so.” 142 S. Ct. at 2608 (quoting *Alabama Realtors*, 141 S. Ct. at 2488–90).

²⁴⁵ 142 S. Ct. at 2622 (Gorsuch, J., concurring).

²⁴⁶ *See, e.g.*, Brunstein & Revesz, *supra* note 3, at 337–347; 351–55.

²⁴⁷ Brief for Amicus Curiae Richard L. Revesz at 3–21, *West Virginia v. EPA*, 142 S. Ct. at 2587 (2022) No. 20-1530.

²⁴⁸ *See* Brunstein & Revesz, *supra* note 3, at 337 (“While the Court invoked the major questions doctrine in cases in which the agency’s action was economically significant, it never did so by relying on the action’s regulatory costs.”); *id.* at 346 (“The Court has never relied on the number of comments as a reason for invoking the major questions doctrine.”); *see also* Part I *supra* (explaining the factors the court has relied on in the decisions immediately preceding *West Virginia*). With respect to regulatory costs, the one exception may be *Alabama Realtors*, which, as discussed in Part I *supra*, highlighted the agency action’s “\$50 billion in emergency rental assistance.” 141 S. Ct. 2485, 2489 (2021). (And that decision came down after Brunstein & Revesz, *supra* note 3.)

when the major questions doctrine applies. For example, Professor Sunstein's pre-*West Virginia* essay on the major questions doctrine observed that "the distinction between major and nonmajor questions is not illusory," but the "relevant distinction is one of degree rather of kind . . . and courts have no simple way to separate major from nonmajor questions."²⁴⁹ He followed this observation by noting that, "[t]o administer the distinction, courts must engage in some difficult line-drawing exercises" and that "the idea of 'an enormous and transformative expansion in' regulatory authority does provide help."²⁵⁰ Perhaps the Court agreed, as *West Virginia* places "unheralded" and "transformative" at the center of the inquiry.²⁵¹

We do not mean to suggest that *West Virginia* clarifies all the uncertainty surrounding the major questions doctrine or produces a framework that is a model of administrability. But a close read of the decision reveals that the Court is at least attempting to create a framework that can better guide lower courts and litigants and ensure the doctrine applies only in "extraordinary" cases.²⁵²

B. West Virginia's Requirement of "Clear Congressional Authorization" in Extraordinary Cases

Having determined in Section III.B that the Clean Power Plan was unheralded and represented a transformative change in EPA's authority and that it therefore triggered the major questions doctrine, the Court turned in Section III.C to determining whether EPA had authority to issue the Clean Power Plan. The Court explained that, "[g]iven these circumstances," i.e., that the agency's action was both unheralded and transformative, its "precedent counsels skepticism toward" the agency's action.²⁵³ "To overcome that skepticism, the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner."²⁵⁴

²⁴⁹ Sunstein, *supra* note 3, at 487.

²⁵⁰ *Id.*

²⁵¹ Notably, the major questions decision just before *West Virginia* does the same thing. *See* 142 S. Ct. at 666 (noting the "lack of historical precedent," coupled with the breadth of authority that [OSHA] now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach").

²⁵² *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

²⁵³ *Id.* at 2614.

²⁵⁴ *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). The Court used the exact phrase "clear congressional authorization" in quotation marks three separate times in the opinion. *Id.* at 2609 (twice on same page); *id.* at 2614.

The Court proceeded from here to explain that the key word at issue—“system”—was “vague.”²⁵⁵ The Court looked at the definition of “system” and concluded that

As a matter of “definitional possibilities,” generation shifting can be described as a “system”—“an aggregation or assemblage of objects united by some form of regular interaction,”—capable of reducing emissions . . . [b]ut of course almost anything could constitute such a “system”; shorn of all context, the word is an empty vessel.²⁵⁶

“Such a vague statutory grant,” the Court wrote, “is not close to the sort of clear authorization required by our precedents.”²⁵⁷

But the Court did not stop there. In other words, the Court did not stop its hunt for “clear congressional authorization” after finding that the key statutory phrase at issue was, on its own, “vague.”²⁵⁸ The Court instead looked to other provisions of the Clean Air Act to see if context elucidated the meaning of “system” as used in section 111, and it concluded they did not.²⁵⁹ The Court then looked at statutory history to determine whether it clarified the meaning of “system,” and it concluded that contemporaneous amendments to other parts of the CAA actually demonstrated that Congress had not intended for “system” under section 111 to sanction the purposeful generation shifting in the Clean Power Plan, which the Court here described as a type of cap-and-trade regime.²⁶⁰ Finally, the Court addressed the Government’s argument that other parts of the CAA limited “system” in some way, suggesting the “unadorned” use of “best system of emission reduction” indicated a conscious intent not to limit the phrase.²⁶¹ The Court sidestepped that question by saying it need not decide the full meaning of “best system of emission reduction” as used in section 111 because it was enough to decide that “system” did not include the purposeful generation-shifting approach in the Clean Power Plan.²⁶²

The Court’s analysis of “clear congressional authorization” in Section III.C is admittedly more opaque than its analysis of the two

²⁵⁵ *Id.*

²⁵⁶ *West Virginia*, 142 S. Ct. at 2614.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 2614–15.

²⁶⁰ *Id.* at 2615.

²⁶¹ *Id.*

²⁶² *West Virginia*, 142 S. Ct. at 2615–16.

triggers for the major questions doctrine in Section III.B.²⁶³ But we can glean several key points from this analysis.

For starters, after *West Virginia*, we know that, once the major questions doctrine applies, *Chevron* deference does not apply and so a court must interpret the statute itself rather than defer to an agency's reasonable interpretation after an initial finding of ambiguity. This is in fact how some saw the major questions doctrine operating before *West Virginia*.²⁶⁴ It is also what the Court did in *King v. Burwell*.²⁶⁵ Many parts of the Court's analysis in *West Virginia* even track the analysis in *King*. In *King*, after first determining that the case was "extraordinary," the Court held it was "not a case for the" agency, but it was "instead [the Court's] task to determine the correct reading of" the statute.²⁶⁶ The Court also made clear that, "[i]f the statutory language is plain, [the Court] must enforce it according to its terms,"²⁶⁷ without skewing that analysis in any particular direction. "But oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'"²⁶⁸ The Court made a similar observation at the outset of its analysis in *West Virginia*, and later in the opinion determined for itself the "correct reading" of the statute, looking at context and statutory history.²⁶⁹

That said, the rest of *West Virginia*'s discussion of "clear congressional authorization" suggests that the major questions doctrine does more than simply displace deference to reasonable agency interpretations of ambiguous statutes.²⁷⁰ The Court's analysis arguably suggests the major questions doctrine also establishes a presumption that the agency action is not authorized any time a court determines that the action is unheralded and transformative.²⁷¹ But the agency

²⁶³ See *id.* at 2614–15.

²⁶⁴ See, e.g., Sunstein, *supra* note 3, at 475 (describing the major questions doctrine as then embodying two separate doctrines, one of which operated as a "*Chevron* carve-out").

²⁶⁵ See, e.g., *id.* at 482 (categorizing *King v. Burwell*, 576 U.S. 473 (2015), as embodying the "*Chevron* carve-out").

²⁶⁶ 576 U.S. at 485–86.

²⁶⁷ *Id.* at 486 (citing *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010)).

²⁶⁸ *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

²⁶⁹ 142 S. Ct. at 2607–08, 2614–15.

²⁷⁰ *Id.* at 2614–16.

²⁷¹ This rebuttable presumption is arguably a middle ground between Professor Sunstein's "weak" and "strong" versions of the major questions doctrine before *West Virginia*—the "weak" version was a "*Chevron* carve-out," while the "strong" was a "clear statement principle." See Sunstein, *supra* note 3, at 475, 477, 482. Professor Sohoni also uses presumption to describe the "clear congressional authorization" requirement. See Sohoni, *supra* note 1, at 267 ("Part I describes the evolution of the major questions exception into a new clear statement rule that operates as a presumption

can rebut that presumption by persuading a skeptical court that the most correct reading of the statute, using all the ordinary tools of statutory interpretation, permits the agency action.²⁷²

The rebuttable presumption adopted in *West Virginia* also aligns with the skepticism filter that Chief Justice Roberts, *West Virginia*'s author, alluded to in oral argument. After asking Solicitor General Prelogar how she would “articulate what the major questions doctrine is,”²⁷³ Chief Justice Roberts offered this potential framing:

[W]hy wouldn't you look at it . . . at the outset and say, as I think the Court did in [*Brown & Williamson*], you know, why is the FDA deciding whether . . . cigarettes are illegal or not, and then that is something that you look at while you're reading the particular statute and see if it's reasonable to suppose that. . . . [J]ust thinking back on *Alabama Realtors* or the OSHA vaccine case, I don't know how you would read those as not starting with the idea that . . . this is kind of surprising that the

against reading statutes to authorize major regulatory action.”). But she does not appear to view the presumption as rebuttable or akin to a skepticism filter; she instead views it as a clear-statement rule that “directs how Congress must draft statutes,” *id.* at 276, and that “demands not just that Congress speak, but that Congress yell,” *id.* at 283.

²⁷² At least one post-*West Virginia* appellate decision places the major questions doctrine firmly in the *Chevron* framework, coming in at step two of the inquiry. See *Texas v. United States*, 50 F.4th 498, 526–27 (5th Cir. 2022). That approach is consistent with *West Virginia* and the cases that preceded it. See, e.g., Sunstein, *supra* note 3, at 482 (describing the “*Chevron* carve-out”). But if the major questions doctrine merely comes in at step two of *Chevron*, courts currently lack an easy way to determine which way to go after step one. Even in “ordinary” cases in which *Chevron* still applies (until the Court holds to the contrary), courts may be forced to explain why the challenged agency action is not unheralded and does not represent a transformative change in its authority. In some settings, namely when the agency action is obviously well within the statutory scheme, a court may be able to do so briefly, as the D.C. Circuit did recently in *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 364–65 (D.C. Cir. 2022) (“Congress has delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no broader power to regulate the national economy. The court’s review thus is limited to the familiar questions of whether Congress has spoken clearly, and if not, whether the implementing agency’s interpretation is reasonable.”). In others, however, litigants will be forced to brief, and courts will be forced to address whether agency action is unheralded and transformative as a new step two or perhaps step one-and-a-half in the *Chevron* framework to determine whether a court can defer to the agency’s reasonable interpretation of an ambiguous statute or must interpret for itself whether there is “clear congressional authorization” for the action.

²⁷³ Transcript of Oral Argument at 82:7–8, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

CDC is, you know, regulating evictions and all that and then [you] look to see if there's something in there . . . that suggests, well, however surprised [you were] . . . that type of regulation . . . was appropriate.²⁷⁴

The Chief Justice's framing suggests that he views the major questions doctrine as requiring a closer read of the agency's interpretive arguments than may be called for when a court interprets a statute itself outside the context of agency authority—a closer read that greets the agency's arguments with a healthy dose of skepticism while remaining open to the possibility that the agency action is authorized.

Although *West Virginia* can be seen as adopting a rebuttable presumption (or skepticism filter) for extraordinary cases, when analyzing whether EPA had “clear congressional authorization,” the Court never said that Congress must use magic words or that courts should adopt one interpretation over another to avoid potential constitutional problems. The Court instead made clear that while a “colorable textual basis”²⁷⁵ may suffice in the ordinary case, it will not do in extraordinary ones. Rather, the Court approached EPA's assertion of authority with skepticism while remaining open to the possibility that “Congress could reasonably be understood to have granted” the authority EPA asserted.²⁷⁶ The Court then deployed ordinary tools of statutory interpretation to determine whether those tools clarified the term (“system”) or phrase (“best system of emission reduction”) that it had initially determined was vague. And the Court ultimately concluded that it was “not plausible that Congress gave EPA the authority to adopt on its own” the Clean Power Plan's purposeful generation-shifting approach, not that Congress failed to use the appropriate “clear statement” to confer this authority.²⁷⁷

Of course, after a court has already determined that an agency action is unheralded and represents a transformative change in its authority, chances are pretty good that a skeptical court will also find that the agency lacks clear congressional authorization for that action. But nothing in the Court's analysis indicates that an agency must point to magic words, clear statements, or really anything more than

²⁷⁴ *Id.* at 84:1–20.

²⁷⁵ 142 S. Ct. 2587, 2609 (2022).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 2616.

the “correct reading”²⁷⁸ of the statute to overcome the court’s skepticism.²⁷⁹

III. THE ALTERNATIVES THAT *WEST VIRGINIA* COULD HAVE BUT DID NOT ADOPT

The framework applied in *West Virginia* could have been very different. Many of those challenging the Clean Power Plan urged the Court to adopt more amorphous, expansive, or aggressive tests than it ultimately did.²⁸⁰ The Court was thus well aware of the different approaches it could have adopted. These alternatives that the Court could have but did not adopt—or what one might call implicitly rejected alternatives—shed further light on the decision, revealing at the very least what the major questions doctrine is *not*. As explained below, to determine whether the major questions doctrine applied, the Court opted not to adopt a multifactor test of economic and political significance and similarly did not incorporate state interests as a relevant consideration in the analysis.²⁸¹ The Court also could have but conspicuously chose not to describe the doctrine as a clear-statement rule.

A. *The Court Did Not Adopt a Multifactor Test of Economic and Political Significance*

Perhaps the most common test advanced in the *West Virginia* litigation was that the doctrine applied to any question of “vast economic political significance,” with proponents advancing a wide range of factors to determine “significance.”²⁸²

²⁷⁸ King v. Burwell, 576 U.S. 473, 486 (2015).

²⁷⁹ Parts of the Court’s opinion arguably suggest “clear congressional authorization” requires something more than just the “correct reading.” For example, the Court explained that the “vague statutory grant” in the term “system” was “not close to the sort of clear authorization required by our precedents.” 142 S. Ct. at 2614. But all that sentence says only that a lone ambiguous word does not suffice. The Court also dismissed Justice Kagan’s argument in dissent that the foundational major questions cases just followed “normal statutory interpretation.” 142 S. Ct. at 2609 (quoting *id.* at 2633 (Kagan, J., dissenting)). Here, too, the Court said only that the “approach under the major questions doctrine is distinct,” which is not the same as saying that something more than the “correct reading” of the statute is required.

²⁸⁰ See, e.g., Brief for Petitioners at 44, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530).

²⁸¹ See *infra* Sections III.A–III.B.

²⁸² See *infra* notes 285–88 and accompanying text.

This was the very test EPA applied in the ACE Rule under review in *West Virginia*.²⁸³ EPA borrowed that test from an opinion from then-Judge Kavanaugh while he was on the D.C. Circuit, explaining that,

[a]lthough the Court has not articulated a bright-line test, its cases indicate that a number of factors are relevant in distinguishing major rules from ordinary rules: “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”²⁸⁴

Applying that multifactor test, EPA determined the Clean Power Plan was “a major rule” because, “[a]t the time the CPP was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy, would have affected every electricity customer (i.e., all Americans), [and] was subject to litigation involving almost every State in the Union.”²⁸⁵

EPA was not alone in this framing of the major questions doctrine. In his dissent from the D.C. Circuit’s decision striking down the ACE Rule, Judge Walker explained: The Clean Power Plan implicated “a ‘decision[] of vast economic and political significance.’ That standard is not mine. It is the Supreme Court’s. And no cocktail of factors informing the major-rules doctrine can obscure its ultimate inquiry: Does the rule implicate a ‘decision[] of vast economic and political significance.’”²⁸⁶ Judge Walker then listed the Clean Power Plan’s “costs and benefits,” including industry’s expectation that “wholesale electricity’s cost [would] rise by \$214 billion” and EPA’s prediction that the “rule would cost billions of dollars and eliminate thousands of jobs,” on his way to concluding that the Clean Power Plan was a “deci-

²⁸³ Proof Brief for the U.S. Environmental Protection Agency and EPA Administrator Andrew Wheeler at 97–109, *Am. Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021) (No. 19-1140).

²⁸⁴ Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32250, 32529 (Sept. 6, 2019) (to be codified at 40 C.F.R. 60) (quoting *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

²⁸⁵ *Id.*

²⁸⁶ *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 1001 (D.C. Cir. 2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

sion[] of vast economic and political significance” that therefore triggered the major questions doctrine.²⁸⁷

Given the prominence of multifactor tests of economic and political significance in both the ACE Rule and Judge Walker’s dissent, it is no surprise that litigants, namely those on petitioners’ side, pushed the same approach in their merits briefing before the Court in *West Virginia*.²⁸⁸ For example, the brief for the state petitioners adopted EPA’s framing, which, as noted, borrowed from one of then-Judge Kavanaugh’s opinions while on the D.C. Circuit.²⁸⁹ The state petitioners argued that “[e]very factor for deciding whether a question is ‘major’” favors finding that the Clean Power Plan triggers the major questions doctrine.²⁹⁰ Pointing to then-Judge Kavanaugh’s opinion, the state petitioners further explained that these factors were “cost, overall economic impact, number of affected persons, and degree of public and political attention.”²⁹¹ The state petitioners then marched through six factors, devoting roughly seven of the eight pages covering the triggers for the major questions doctrine to these factors.²⁹² The state petitioners included within these factors “the money involved,” the “portion of the American economy” affected, and the “public attention” the Clean Power Plan garnered, focusing on the comments EPA received and the litigation the Clean Power Plan spawned.²⁹³ Concluding this discussion, the state petitioners argued, “[a]ll told, if the decision below does not involve a major question, it is hard to imagine what would,” because it “allow[ed] an agency without political accountability to impose measures that affect millions of Americans and impose hundreds of billions in costs.”²⁹⁴

More of the same came from others on petitioners’ side. For example, Westmoreland Mining Holdings LLC argued that the major questions doctrine applies any time “the agency claims authority over

²⁸⁷ *Id.* at 1000–02. These estimates were disputed, and, however accurate they may have been initially, proved to be off-base by the time the case reached the Supreme Court. *See, e.g.*, 142 S. Ct. at 2638–39 (Kagan, J., dissenting).

²⁸⁸ *See* Brief of West Virginia, et al., at 16, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530).

²⁸⁹ Brief of West Virginia, et al., at 20, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) No. 20-1530 (quoting *U.S. Telecomm. Ass’n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from denial of rehearing en banc)).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 20–26.

²⁹³ *Id.*

²⁹⁴ *Id.* at 26.

a matter of great significance.”²⁹⁵ But Westmoreland did not distill a list of relevant factors for determining “great significance.”²⁹⁶ It merely summarized some of the foundational precedents for the doctrine, asserting, in various forms, that the “question of the agency’s asserted authority was plainly a major one” in each.²⁹⁷

Last but not least, Justice Gorsuch favored a multifactor approach in his concurring opinion, too. “Turning from the doctrine’s function to its application,” he began, the Court’s “cases supply a good deal of guidance about when an agency action involves a major question.”²⁹⁸ According to Justice Gorsuch, there were at least three non-exclusive categories of “triggers” that provide “signs the Court has found significant in the past,” including (1) “when an agency claims the power to resolve a matter of great ‘political significance,’”²⁹⁹ “or end an ‘earnest and profound debate across the country,’”³⁰⁰ and (2) “when [an agency] seeks to regulate ‘a significant portion of the American economy,’”³⁰¹ “or require ‘billions of dollars in spending’ by private persons or entities.”³⁰² Later he contended there were yet more “suggestive factors,” such as whether the economic sector at issue was “among the largest in the U.S. economy.”³⁰³

The Justices in the *West Virginia* majority were therefore well aware that a multifactor test of economic and political significance was a possible framework for applying the major questions doctrine and also knew what many of those factors could be.³⁰⁴ As explained above, however, the Court did not adopt a multifactor test.³⁰⁵ What is more, the Court did not apply several of the factors that others, including EPA (in promulgating the ACE Rule) and Justice Gorsuch (in his concurring opinion), argued demonstrated the economic and politi-

²⁹⁵ Brief of Westmoreland Mining Holdings LLC, et al., at 23, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) No. 20-1530 Br. 24 (quoting *Alabama Realtors*, 141 S. Ct. 2485, 2489 (2021)).

²⁹⁶ *See id.*

²⁹⁷ *Id.* at 24.

²⁹⁸ 142 S. Ct. at 2620 (Gorsuch, J., concurring).

²⁹⁹ *Id.* (quoting *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 665 (2022)).

³⁰⁰ *Id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

³⁰¹ *Id.* (quoting 142 S. Ct. at 2608 (majority opinion)).

³⁰² *Id.* (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)). Justice Gorsuch also argued “the major questions doctrine may apply when an agency seeks to ‘intrud[e] into an area that is the particular domain of state law,” 142 S. Ct. at 2621, an additional factor addressed below.

³⁰³ *Id.* at 2622.

³⁰⁴ *See id.* at 2607–08.

³⁰⁵ *See id.* at 2607–16.

cal significance of the Clean Power Plan.³⁰⁶ Justice Gorsuch’s concurring opinion thus does not restate the majority opinion with helpful clarifying analysis; it changes the majority opinion’s approach.

To be sure, as noted above, when the Court summarized the foundational precedents for the major questions doctrine in Section III.A of the majority opinion, it observed that its

precedent teaches that there are ‘extraordinary cases’ that call for a different approach—cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’³⁰⁷

And the Court also referenced some metrics of the Clean Power Plan’s cost and economic impact in the factual background section of the majority opinion.³⁰⁸ But when it came time to actually determine whether “this is a major questions case” in Section III.B, the Court did not rest its analysis on some amorphous assertion of economic and political significance or march through the list of factors EPA had considered in the ACE Rule, that Judge Walker had cited in dissent, that the state petitioners urged in their brief, or that Justice Gorsuch referenced in his concurring opinion.³⁰⁹ The Court instead focused on two inquiries: (1) was the agency action unheralded, and (2) did it represent a transformative change in the agency’s authority.³¹⁰

That the Court did not rest its analysis on an amorphous assertion of economic and political significance is noteworthy, but few seem to have focused on this key difference between the majority opinion and the possible alternatives.

For example, Professor Sohoni rightly notes that the following sentence from *URG* appears in several of the major questions cases decided just before *West Virginia*: “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”³¹¹ But this sentence does not appear in that

³⁰⁶ See, e.g., Brief of West Virginia, et al., at 20–26, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530).

³⁰⁷ *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

³⁰⁸ See *supra* note 207 and accompanying text.

³⁰⁹ See 142 S. Ct. at 2610–14.

³¹⁰ *Id.* at 2608, 2610.

³¹¹ Sohoni, *supra* note 1, at 272 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

form in *West Virginia's* application of the major questions doctrine. It appears only in the procedural history when describing EPA's use of that sentence in the ACE Rule: "Under that doctrine, EPA explained, courts 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.'"³¹²

Not only is the full quoted sentence from *UARG* absent from *West Virginia's* legal analysis, but the introductory paragraph in Section III.B of *West Virginia* also mixes and matches two different quotations from *UARG* to form a different sentence: "Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"³¹³ The Court's departure from the *UARG* framing is also evident from the surrounding context in *UARG* because the second half of the sentence in *West Virginia* actually comes first in *UARG*:

EPA's interpretation is also unreasonable because it would bring about an enormous and *transformative expansion in EPA's regulatory authority* without clear congressional authorization. When an agency *claims to discover in a long-extant statute an unheralded power* to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.³¹⁴

In *West Virginia's* framing, examining whether the agency action represents a "transformative expansion in [the agency's] regulatory authority" takes the place of asking whether it "regulate[s] a significant portion of the American economy."³¹⁵

The Court then used its mixed-and-matched reformulation from *UARG* to guide its application of the major questions doctrine in *West Virginia*. To reiterate, and as documented above, the Court explained that "this [was] a major questions case" for two reasons: "EPA 'claim[ed] to discover in a long-extant statute an unheralded power'

³¹² 142 S. Ct. at 2605 (quoting Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32250, 32529 (Sept. 6, 2019) (to be codified at 40 C.F.R. 60)).

³¹³ 142 S. Ct. at 2610 (quoting *UARG*, 573 U.S. at 324).

³¹⁴ *UARG*, 573 U.S. at 324 (citation and quotation marks omitted) (emphasis added).

³¹⁵ *Id.* at 2608, 2610.

representing a ‘transformative expansion in [its] regulatory authority.’”³¹⁶ And the Court proceeded from there to address how “EPA had always set emissions limits under Section 111” before the Clean Power Plan, which addressed whether “[t]his view of EPA’s authority was . . . unprecedented,” before turning to whether “it also effected a ‘fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation’ into an entirely different kind,” which addressed whether it represented a “transformative expansion in [EPA’s] regulatory authority.”³¹⁷ The Court thus did not merely march through a medley of possible factors of economic and political significance. And it entirely omitted several of the most common factors urged in the litigation—namely, costs—from its analysis.³¹⁸

B. The Court Did Not Incorporate State Interests as a Relevant Consideration in the Analysis

In a similar vein, many involved in the *West Virginia* litigation also urged the Court to incorporate as a potential trigger for the major questions doctrine whether the agency action intruded into areas of state interests.

For example, aside from the factors noted above, EPA also determined that the Clean Power Plan was a “major rule” because it “would have disturbed the state-federal and intra-federal jurisdiction-

³¹⁶ 142 S. Ct. at 2610 (quoting *UARG*, 573 U.S. at 324). Justice Kagan made a similar observation in dissent. *Cf. also* 142 S. Ct. at 2638 (Kagan, J., dissenting) (“Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. See *ante*, at ---, ---, --- (labeling the Plan ‘transformative’ and ‘unprecedented’ and calling Section 111(d) an ‘ancillary’ ‘backwater’”). Although Justice Kagan described the “ancillary” nature of the provision as a distinct consideration from whether the agency’s action was “unheralded” or “transformative,” parts of *West Virginia’s* analysis suggest that it is a consideration that falls under the “transformative” prong.

³¹⁷ 142 S. Ct. at 2611–12.

³¹⁸ The Court referenced costs only in the factual background section, *see* 142 S. Ct. at 2604 (“EPA’s own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors.”), and procedural history section, *see id.* at 2605 (“[EPA’s] ‘generation-shifting scheme was projected to have billions of dollars of impact.’”) (quoting Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32250, 32529 (Sept. 6, 2019) (to be codified at 40 C.F.R. 60))).

al scheme.”³¹⁹ The D.C. Circuit doubted that “EPA’s federalism concerns could trigger the major questions doctrine” because there was a distinct “federalism clear-statement rule” addressing that issue.³²⁰ But that did not stop others from picking up on EPA’s suggestion. Westmoreland argued that “intrusion on ‘an area that is the particular domain of state law’” is a relevant factor in the analysis.³²¹ And Justice Gorsuch agreed, including intrusion into an area that is the particular domain of state law as third on his “list of triggers.”³²² Justice Gorsuch also thought intrusion on state interests was a factor “present here” that, along with his other factors, “ma[de] this a relatively easy case for the doctrine’s application.”³²³

Unlike EPA and Justice Gorsuch, however, the *West Virginia* majority did not include intrusion on state interests as a relevant consideration under the major questions analysis of the Clean Power Plan, suggesting a majority of the Court does not view that factor as relevant under the major questions doctrine at all.³²⁴ That may be a wise choice because, as noted, there is a distinct canon to address such intrusions.³²⁵ And many federal statutes, such as the Natural Gas Act

³¹⁹ Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. at 32529.

³²⁰ *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 965 (D.C. Cir. 2021).

³²¹ Brief of Westmoreland Mining Holdings LLC, et al., at 24, *West Virginia v. EPA*, 142 S. Ct. at 2587 (2022) No. 20-1530 Br. 24 (quoting *Alabama Realtors*, 141 S. Ct. at 2489).

³²² 142 S. Ct. at 2621.

³²³ *Id.*

³²⁴ Compare *id.* at 2607–16, with *id.* at 2620 (Gorsuch, J., concurring) (citing *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 669 (2022)).

³²⁵ State interests were arguably relevant in *Gonzales*, but as part of a separate federalism inquiry. 546 U.S. 243, 274 (2006) (“The Government’s interpretation of the prescription requirement also fails under the objection that the Attorney General is an unlikely recipient of such broad authority, given the Secretary’s primacy in shaping medical policy under the CSA, and the statute’s otherwise careful allocation of decisionmaking powers. Just as the conventions of expression indicate that Congress is unlikely to alter a statute’s obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States’ police power. It is unnecessary even to consider the application of clear statement requirements.”(citing *United States v. Bass*, 404 U.S. 336, 349 (1971); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544–546 (1994); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002)). And though *Alabama Realtors* references state interests, it did so briefly and also by referring to the distinct federalism canon. 141 S. Ct. 2485, 2489 (2022) (“The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship. Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the

and Federal Power Act, already have statutory divides between federal and state domain³²⁶ that could be muddled if intrusion on state interests were a relevant factor triggering application of the major questions doctrine.

C. The Court Did Not Adopt a Clear-Statement Rule

Another common refrain in the *West Virginia* litigation was that the major questions doctrine operates as a clear-statement rule, with litigants either explicitly referencing the exact phrase “clear-statement rule” or arguing that, once triggered, the major questions doctrine requires that the agency point to a clear statement in the relevant statute.³²⁷

For example, in the ACE Rule, EPA said the major questions doctrine meant the agency action “must be supported by a clear statement from Congress.”³²⁸ In the D.C. Circuit, Judge Walker contended that no one defending the CPP could “make a serious and sustained argument that § 111 . . . satisfies the major-rules doctrine’s clear-statement requirement.”³²⁹ The same was true in the merits briefing. The state petitioners argued that the major questions doctrine triggered a clear-statement requirement but avoided using the exact phrase clear-statement rule.³³⁰ The North American Coal Corporation was less shy, arguing that the major questions doctrine “is effectively a clear-statement rule.”³³¹

Perhaps because the state petitioners’ brief had been a bit coy on whether the major questions doctrine was, in fact, a clear-statement rule, several of the Justices repeatedly pressed West Virginia Solicitor General Lindsay See on this point at oral argument:

balance between federal and state power and the power of the Government over private property.”) (citations and quotation marks omitted).

³²⁶ See generally Joshua C. Macey & Matthew Christiansen, *Long Live the Federal Power Act’s Bright Line*, 134 HARV. L. REV. 1360 (2021) (examining recent Supreme Court precedents addressing the Federal Power Act’s “bright line” jurisdictional divide between state and federal control over the energy sector).

³²⁷ E.g., Brief of West Virginia, et al., at 14, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530).

³²⁸ Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32250, 32529 (Sept. 6, 2019) (to be codified at 40 C.F.R. 60).

³²⁹ *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 999 (D.C. Cir. 2021) (Walker, J., dissenting).

³³⁰ Brief of West Virginia, et al., at 20, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) No. 20-1530.

³³¹ Brief of North American Coal Corp., at 17, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) No. 20-1530.

- Justice Thomas: So what is the difference between clear statement and major questions?
- See: So there are multiple versions of the clear statement canons. Major questions is one of them. The federalism canon is a different version of the clear statement canon.³³²
- * * *
- Chief Justice Roberts: I just want to follow up a little bit because I'm not quite clear what your position is. So the major questions doctrine you would categorize as simply a variety of the clear statement doctrine?
- See: We would, Your Honor.³³³
- * * *
- Justice Barrett: Well, when you say—let me just push you a little bit on what you mean by “clear statement.” . . . So, when you say, clear statement canon or clear statement rule, you're using that synonymously with, like, a linguistic canon?
- See: It is similar in that sense. It—if what you mean by linguistics is that it is text-based, that is true.³³⁴

For his part, Justice Gorsuch emphatically described the major questions doctrine as a clear-statement rule in his concurring opinion: After reframing the majority opinion's use of ““clear congressional

³³² Transcript of Oral Argument at 7:1–6, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

³³³ *Id.* at 9:8–14.

³³⁴ *Id.* at 35:4–23.

authorization”” as a “clear-statement rule[]” in its first paragraph,³³⁵ his concurring opinion uses the phrase clear statement seventeen times.³³⁶

But the majority opinion in *West Virginia* never uses the phrase “clear statement” in its legal analysis.³³⁷ It instead uses the phrase “clear congressional authorization,” quoting that precise framing at least three times.³³⁸ The majority opinion mentions “clear statement” only twice, but both references appear in the description of the case’s procedural history where the Court attributed the use of the phrase to EPA or the D.C. Circuit, not itself.³³⁹ Justice Kagan’s dissent also avoids using that phrase.³⁴⁰ And as far as we can tell, none of the foundational cases for the major questions doctrine uses “clear statement.”³⁴¹ The first and so far only time the major questions doctrine was ever equated with a clear-statement rule in a Supreme Court opinion was in Justice Gorsuch’s concurring opinion in *West Virginia*.³⁴²

Early commentary on *West Virginia* has not highlighted the omission of the phrase “clear statement” from the majority opinion’s legal analysis. To the contrary, several commenters expressly call the major questions doctrine a clear-statement rule.³⁴³ These commenters may be relying on Justice Gorsuch’s concurring opinion rather than the majority or simply equating the requirement of “clear congressional authorization” with requiring a “clear statement.”

³³⁵ *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (Gorsuch, J., concurring).

³³⁶ *Id.* at 2616, 2619, 2620–23, 2625.

³³⁷ *See id.* at 2615–16.

³³⁸ *See id.* at 2609 (twice on same page); *id.* at 2614.

³³⁹ *Id.* at 2605 (“EPA argued that under the major questions doctrine, a clear statement was necessary to conclude that Congress intended to delegate authority ‘of this breadth to regulate a fundamental sector of the economy.’”); *West Virginia*, 142 S. Ct. at 2605 (“As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a clear statement of congressional intent to delegate such power to EPA.”).

³⁴⁰ *See id.* at 2634 (Kagan, J., dissenting) (quoting the majority’s use of “clear congressional authorization,” not the concurring opinion’s use of “clear-statement rule”).

³⁴¹ *See, e.g.,* *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (noting that “[i]t is unnecessary even to consider the application of clear statement requirements”).

³⁴² Justice Gorsuch’s concurring opinion in *Gundy*, which helped increase interest in the major questions doctrine, does not refer to the major questions doctrine as a clear-statement rule. *See* Sohoni, *supra* note 1, at 273 (noting that, in *Gundy*, Justice Gorsuch described the doctrine “as negating deference, rather than as setting out a clear statement rule” (citing 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting))).

³⁴³ *See supra* note 8 and accompanying text. This was admittedly true even before *West Virginia*, at least as to some perceived forms of the doctrine. *See, e.g.,* Sunstein, *supra* note 3, at 477 (“The strong version, by contrast, operates as a clear statement principle, in the form of a firm barrier to certain agency interpretations”).

But if the Court had wanted to call the major questions doctrine a clear-statement rule, it knew how: The Court has used that phrase in other settings, including in an opinion issued just a few weeks before *West Virginia*.³⁴⁴ Justice Gorsuch even showed them how to do it in his concurring opinion—no less than seventeen times.³⁴⁵ And the possibility could not have been lost on the other Justices in the majority: As noted, three who opted not to join Justice Gorsuch's concurring opinion pressed West Virginia Solicitor General Lindsay See on her description of the major questions doctrine as a clear-statement rule, expressing some doubt on the description.³⁴⁶ The omission of "clear statement" from the majority opinion's legal analysis appears to have been intentional.

The reason for the difference between the majority and concurring opinions may be that clear-statement rules are often viewed as more aggressive canons of statutory interpretation that allow courts to choose a less plausible reading (over the more natural one) if in service of a constitutional norm, like separation of powers.³⁴⁷ Justice Gorsuch's concurring opinion makes this very point. Shortly after reframing "clear congressional authorization" as a "clear-statement rule," Justice Gorsuch cited Justice Barrett's 2010 law review article on substantive canons and faithful agency.³⁴⁸ He then stated that *Brown & Williamson*, often viewed as the key major questions case before *West Virginia*, treated the major questions doctrine as an ambiguity canon, which Justice Barrett's article explains is one that guides

³⁴⁴ *Boechler, P.C. v. Commissioner of Internal Revenue*, 142 S. Ct. 1493, 1499 (2022) ("To satisfy the clear-statement rule, the jurisdictional condition must be just that: clear.").

³⁴⁵ 142 S. Ct. 2587, 2616–26 (Gorsuch, J., concurring).

³⁴⁶ Transcript of Oral Argument at 9:8–13, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) ("Chief Justice Roberts: I just want to follow up a little bit because I'm not quite clear what your position is. So the major questions doctrine you would categorize as simply a variety of the clear statement doctrine?"); *id.* at 35:4–6 ("Justice Barrett: Well, when you say—let me just push you a little bit on what you mean by 'clear statement.'").

³⁴⁷ The North American Coal Corporation urged this same view:

The major questions doctrine avoids those weighty constitutional questions by hewing to a presumption in favor of narrower delegations. If a statute authorizes agency action, but is ambiguous regarding whether the agency is bounded in a material way or assumes final say on momentous economic, social, or political issues, the Court *must*—under the canon of avoidance—adopt the former interpretation if "fairly possible."

Brief of N. Am. Coal Corp., at 21, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) No. 20-1530 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

³⁴⁸ 142 S. Ct. at 2616 (citing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010)).

a court on how to choose between two *equally* plausible interpretations.³⁴⁹ Again citing Justice Barrett, Justice Gorsuch says that is wrong.³⁵⁰ According to Justice Gorsuch, the Court's precedents should be seen as instead applying a clear-statement rule,³⁵¹ which, Justice Barrett's cited article says, is an "aggressive" substantive canon that permits a court to choose a *less* plausible interpretation if in service of a constitutional norm.³⁵²

That is not how we read the majority opinion's use of "clear congressional authorization." Rather, the majority says that, if "Congress could reasonably be understood to have granted" the authority, the court can—and should—uphold it.³⁵³ In other words, although a court must approach an agency's assertion of authority with "skepticism" after having determined it is "unheralded" and represents a "transformative" change, if the most natural reading of the statute would permit the agency action, the agency has "clear congressional authorization" for the action. In contrast, under a clear statement-rule, the court might depart from the most natural reading of a statute to avoid potential constitutional problems.³⁵⁴ And it appears that

³⁴⁹ 142 S. Ct. at 2620 n.3 (Gorsuch, J., concurring) (explaining "[a]mbiguity canons merely instruct courts on how to 'choos[e] between equally plausible interpretations of ambiguous text,' and are thus weaker than clear-statement rules.") (quoting Barrett, *supra* note 282, at 109).

³⁵⁰ *Id.*

³⁵¹ *Id.* ("But our precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it.")

³⁵² Barrett, *supra* note 282, at 118 ("Other canons are more aggressive, directing a judge to forgo the most plausible interpretation of a statute in favor of one in better accord with some policy objective. Standard examples of canons functioning this way include the rule that where one interpretation of a statute raises a serious constitutional question, the court should adopt any other plausible interpretation of the statute (avoidance) Canons in this category are often expressed as 'clear statement rules' that require a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it." (footnotes omitted)).

³⁵³ 142 S. Ct. at 2609. That understanding also aligns with the Court's explanation in *King*:

If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words 'in their context and with a view to their place in the overall statutory scheme.'

King v. Burwell, 576 U.S. 473, 474 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

³⁵⁴ Relatedly, Justice Gorsuch's concurring opinion repeats his own view of the non-delegation doctrine from his *Gundy* concurring opinion. 142 S. Ct. at 2617 (Gorsuch, J., concurring). As noted above, in *Gundy*, Justice Gorsuch advocated abandoning the longstanding intelligible principal standard for permissible congressional delegations

several justices in the majority, namely Chief Justice Roberts and Justices Thomas, Kavanaugh, and Barrett, were not prepared to go that far in *West Virginia*.³⁵⁵ On that score, it is also noteworthy that, unlike Justice Gorsuch's concurring opinion, the majority opinion does not link the major questions doctrine to a constitutional norm,³⁵⁶ which further suggests the majority did not intend to adopt a clear-statement rule.³⁵⁷

CONCLUSION

Although the *West Virginia* majority opinion sought to cabin the major questions doctrine, stressing that it applies only in "extraordinary" cases, the decision appears to have had the opposite effect: Since the decision came down, parties have tried to leverage the doctrine in challenges too numerous to count in a wide range of settings.³⁵⁸

Few if any of these challenges follow the two-prong framework announced in *West Virginia*. Instead, challengers continue to press a

in favor of a much narrower standard that would permit Congress to delegate authority to an agency only to "fill up the details," engage in "fact-finding," or undertake "non-legislative responsibilities" such as those traditionally under the executive's purview. 139 S. Ct. 2116, 2136-37 (2019). That narrow view of the nondelegation doctrine would then also presumably inform his application of a clear-statement rule, making it doubly more aggressive than the majority opinion. Professor Sohoni makes a similar observation. See Sohoni, *supra* note 1, at 300 ("[D]ifferent versions of the nondelegation doctrine (or different 'theories' of it, if we must use the tedious locution of legal academic writing) would call for different versions of the clear statement rule that the Court is now committed to applying.").

³⁵⁵ Justice Barrett opted not to join the concurring opinion despite its many favorable references to her academic work. See 142 S. Ct. 2587, 2616 (Gorsuch, J., concurring).

³⁵⁶ Professor Sohoni contends that it may be time to rethink the relationship between the major questions doctrine and nondelegation doctrine after the Court declined to ground any of its major questions rulings in nondelegation concerns, noting that none of the major questions cases say that there would be a nondelegation concern if Congress had delegated to the agency the authority the agency claimed. See Sohoni, *supra* note 1, at 291.

³⁵⁷ Although *West Virginia* includes a vague passing reference to "separation of powers principles" in Section III.A of the opinion, the Court does not tie its analysis to those constitutional concerns. 142 S. Ct. at 2609.

³⁵⁸ See Alex Guillén, *Impact of Supreme Court's Climate Ruling Spreads*, POLITICO (July 20, 2022, 12:00 PM), <https://www.politico.com/news/2022/07/20/chill-from-scotus-climate-ruling-hits-wide-range-of-biden-actions-00045920> [https://perma.cc/LHN8-25EQ]; Erin Webb, *Analysis: Major Questions Doctrine Filings Are Up in a Major Way*, BLOOMBERG L. (Feb. 1, 2022, 5:00AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-major-questions-doctrine-filings-are-up-in-a-major-way> [https://perma.cc/Q89S-BY9U].

multifactor test of economic and political significance, stressing in particular, absolute figures of economic effects like the amount of compliance costs or the number of jobs affected. For example, in *Texas v. EPA*, which raises a challenge to EPA’s new greenhouse gas emission standards for light-duty vehicles, private petitioners stress that, “[b]y the agency’s own estimates, the rule will cost billions of dollars annually and \$300 billion in total—far more than what the Supreme Court has found to be economically significant in other major-question cases.”³⁵⁹ And in *Biden v. Nebraska*, which involves a challenge to the Secretary of Education’s authority under the Higher Education Relief Opportunities for Students (“HEROES”) Act of 2003 to forgive a portion of certain borrowers’ student loans,³⁶⁰ the state respondents argue, as the very first factor under the major questions doctrine, that, “[w]ith estimated costs between \$430 billion and \$519 billion, the economic significance [of the challenged action] is plain.”³⁶¹

There are relatively few court decisions resolving these challenges so far, but in the few cases to have invalidated agency action under the major questions doctrine since *West Virginia*, several courts have also continued to apply a multifactor test of economic and political significance rather than the two-prong framework applied in *West Virginia*. For example, in *Texas v. United States*, which involved a challenge to the Department of Homeland Security’s Deferred Action for Childhood Arrivals (“DACA”) program, the Fifth Circuit held that the major questions doctrine applied based on the total benefits (rather than costs) of the agency action, which were estimated at “over \$3.5 billion in net fiscal benefits to federal, state, and local entities” and \$460 billion to “national GDP,” and failed legislative proposals resembling the agency action.³⁶² And in *Brown v. U.S. Department of Education*, which involved a challenge similar to the one raised in *Biden v. Nebraska*, Judge Pittman of the Northern District of Texas held that the major questions doctrine applied for two reasons: The government action “will cost more than \$400 billion” and multiple bills “authorizing something like the agency’s action” have all failed.³⁶³ As noted, however, the total costs (much less benefits) of an agency’s action were not relevant in *West Virginia*’s legal analysis and the ex-

³⁵⁹ Brief for Private Petitioners at 16, *Texas v. EPA*, No. 22-1031 (D.C. Cir. Nov. 3, 2022).

³⁶⁰ *Nebraska v. Biden*, 52 F.4th 1044, 1045–46 (8th Cir. 2022), *cert. granted*, 2022 U.S. LEXIS 5177 (2022).

³⁶¹ Response for Nebraska et al. at 28, *Biden v. Texas*, No. 22-506 (S. Ct. Nov. 23, 2022) (citations omitted).

³⁶² See 50 F.4th 498, 498, 527 (5th Cir. 2022) (footnote omitted).

³⁶³ *Brown v. U.S. Dep’t of Educ.*, No. 4:22-cv-0908-P, 2022 WL 16858525, at *11–12 (N.D. Tex. Nov. 10, 2022) (citation omitted).

istence of similar failed legislative proposals was not relevant standing alone but was instead subsumed as one of several indicators addressing whether the agency action represented a transformative change in its authority.

Now that the Supreme Court has granted the Government's petitions in *Biden v. Nebraska* and *Brown v. United States*, the Court may have an opportunity to further expand upon its framework for the major questions doctrine in *West Virginia*. Although much of the briefing filed to date has focused on whether the parties challenging the Secretary's action have standing to sue, the major questions doctrine features prominently in the parties' discussion of the merits. Because of the dollar figures involved (billions by anyone's account), it is likely that costs will feature prominently in the challengers' briefing on the merits. If the Court does not resolve the case on standing or some other threshold ground and reaches the major questions doctrine, regardless of how the Court ultimately resolves the case, it would provide a prime opportunity for the Court to again reject costs and other amorphous considerations of economic and political significance as a relevant consideration for the doctrine, adhering instead to the two-prong framework it followed in *West Virginia*.