

ARTICLES

MAJOR QUESTIONS IN LOWER COURTS

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INTRODUCTION

In June 2022, the Supreme Court handed down its landmark decision in *West Virginia v. Environmental Protection Agency (EPA)*,¹ which marked the first time the Court named and expressly relied on the major questions doctrine.² Just one year later, in June 2023, the Court handed down *Biden v. Nebraska*,³ another landmark decision that applied the major questions doctrine.

Before *West Virginia*, the Court had arguably invoked the major questions doctrine (though not by name) in roughly half a dozen cases⁴ over approximately thirty years, but the Court’s application of the doctrine across

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1. 142 S. Ct. 2587 (2022).
2. *Id.* at 2609, 2633–34, 2641.
3. 143 S. Ct. 2355, 2374–75 (2023).
4. 142 S. Ct. at 2608–09.

these cases bore little in common.⁵ Legal scholarship rightfully criticized the Court's inconsistency and the doctrine's overall lack of clarity,⁶ which allowed litigants to construe the doctrine in surprising ways.⁷ In *West Virginia*, the Court had the opportunity to articulate a clear and workable framework of the doctrine to guide lower courts and litigants. Although one could read *West Virginia* as an attempt to provide such guidance to lower courts,⁸ it is far from a model of clarity.⁹

This Article surveys how lower federal courts have interpreted *West Virginia* and applied the major questions doctrine. As of October 1, 2023, 114 lower federal court cases have cited *West Virginia*, thirty-eight of which discuss the major questions doctrine.¹⁰ Of these thirty-eight, thirteen were from circuit

5. Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 49–71 (2022).

6. See, e.g., 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.”); 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, 2033–39 (2018); Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 487 (2021); 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. 217, 218 (2022).

7. Brunstein & Revesz, *supra* note 6, at 218–19.

8. Brunstein & Goodson, *supra* note 5.

9. See *infra* Part I. Surveying Lower Court Decisions.

10. See *infra* Part I. Surveying Lower Court Decisions. The remaining seventy-six citing references to *West Virginia* are summarized here. Eighteen cases cite *West Virginia* for other principles of statutory interpretation. See, e.g., *Midship Pipeline Co., v. Fed. Energy Regul. Comm'n*, 45 F.4th 867, 876 (5th Cir. 2022) (“Agencies have only those powers given to them by Congress, and ‘enabling legislation’ is generally not an ‘open book to which the agency [may] add pages and change the plot line.’” (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (internal citations omitted))). One case cites *West Virginia* in a discussion providing background on Section 111(d) of the Clean Air Act. See *Demmons v. ND OTM L.L.C.*, No. 1:22-CV-00305-NT, 2023 WL 5936671, at *4 (D. Me. Sept. 12, 2023). Twelve cases cite *West Virginia* to argue that deference to agency interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) may have fallen out of favor with the Supreme Court. See, e.g., *Diaz-Rodriguez v. Garland*, 55 F.4th 697, 728 (9th Cir. 2022) (“We recognize the future of the *Chevron* deference doctrine has been called into question. In recent years, several [J]ustices have called for the Court to reexamine *Chevron* deference or proposed

courts (in the D.C., Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits), and twenty-five were from district courts (in the D.C., First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits). These cases deal with a wide range of issues, including, for example, student visas, gun control, campaign contributions, the terrorism watchlist, minimum wage standards, the duties of investors, and COVID-19 masking and vaccine requirements.

There is no one major questions doctrine in the lower courts. Judges have taken vastly different approaches to defining and applying the doctrine both within and across circuits. These differences illustrate that many judges may view the doctrine as a little more than a grab bag of factors, which they seem to be choosing from at their discretion. Lower court judges do not appear to be constrained in how they apply the doctrine. In a majority of cases concerning Biden Administration agency actions and executive orders, judges applied the doctrine to reach outcomes that aligned with the political party of their appointing President.

There are many dimensions across which judges' definitions and applications of the doctrine varied. First, judges varied in how they defined the triggers for the doctrine. Some judges relied on a single factor to trigger the doctrine—for example, whether the action at issue raised a question of “economic and political significance,” according to the court.¹¹ Another judge took a different approach, defining the doctrine as applying to cases in which an agency action constitutes a “transformative expansion of regulatory authority.”¹² Others relied on two or more factors—for example, “[1] the

narrowing its scope . . . Further, the Court has sometimes reversed an agency's interpretation of a statute without citing *Chevron*.” (citing *West Virginia*, 142 S. Ct. at 2587 (internal citations omitted)). Eleven cases cite *West Virginia* to note major questions arguments that the court does not reach for a variety of reasons. *See, e.g.*, *SEC v. LBRY, Inc.*, No. 21-CV-260-PB, 2023 WL 4459290, at *1 n.2 (D.N.H. July 11, 2023) (“LBRY also made a cursory argument—presented for the first time in its supplemental brief in support of the motion to limit remedies—that the ‘major questions doctrine’ forecloses the SEC’s efforts to regulate digital assets . . . This eleventh-hour argument has been forfeited.” (citing *West Virginia*, 142 S. Ct. at 2609)). Thirty-four cases cite *West Virginia* for mootness arguments. *See, e.g.*, *Smith v. Becerra*, 44 F.4th 1238, 1247 (10th Cir. 2022) (“The defendant bears the burden of establishing that a ‘once-live case has become moot.” (citing *West Virginia*, 142 S. Ct. at 2607)). Finally, eight cases cite *West Virginia* for standing arguments. *See, e.g.*, *League of Women Voters of Fla. Inc. v. Fla. Sec’y of State*, 66 F.4th 905, 945 (11th Cir. 2023) (“In considering a litigant’s standing to appeal, the question is whether it has experienced an injury ‘fairly traceable to the judgment below.’ If so, and a ‘favorable ruling’ from the appellate court ‘would redress that injury,’ then the appellant has a cognizable Article III stake.” (citing *West Virginia*, 142 S. Ct. at 2606)).

11. *See, e.g.*, *Texas v. United States*, 50 F.4th at 526–27 (quoting *Texas v. United States (DAPA)*, 809 F.3d 134, 181 (5th Cir. 2015)).

12. *Mayes v. Biden*, 67 F.4th 921, 934 (9th Cir. 2023).

'history and the breadth of the authority that [the agency] asserted[.]' . . . [(2)] the 'economic and political significance' of that assertion; and [(3)] the principle that '[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].''¹³ Another judge relied on three somewhat different factors: "(1) whether the challenged action is outside the agency's traditional field of expertise, (2) whether it intrudes on matters typically governed by state law, and (3) whether Congress has already expressly considered and rejected the measure."¹⁴

Even among judges who defined the doctrine in the same or similar ways, judges varied in their analyses under the doctrine. This variance is partly explained by the fact that when it came time to apply the doctrine, judges sometimes deviated from their own articulated frameworks. For example, some judges that advanced a multi-prong framework involving the "history and the breadth of the authority that [the agency] asserted," did not actually discuss regulatory history.¹⁵

Judges who relied on the same triggers for the doctrine also differed in terms of the metrics they used to assess the applicability of those triggers. For example, in assessing whether an agency action was economically significant, one judge explained that "courts have generally considered an agency action to be of vast economic significance if it requires 'billions of dollars in spending.'"¹⁶ Another judge found that an agency action was economically significant because it would have an "economic impact" of \$1.7 billion in projected "annual transfer from employers to employees."¹⁷ Meanwhile, another judge found that just *millions* of dollars in costs was sufficient to trigger the doctrine.¹⁸ Another judge found that an agency action was economically significant not because of its costs, but because of its *benefits*.¹⁹

13. *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. (DHS)*, 50 F.4th 164, 206 (D.C. Cir. 2022) (Henderson, J., dissenting) (quoting *West Virginia*, 142 S. Ct. at 2608–09 (internal citations omitted) (alteration in original)); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

14. *Miller v. Garland*, No. 1:23-cv-195 (RDA/JFA), 2023 WL 3692841, at *9 (E.D. Va. May 26, 2023) (quoting *Brown & Williamson Tobacco*, 529 U.S. at 159–60).

15. *Wash. All. of Tech. Workers*, 50 F.4th at 206 (Henderson, J., dissenting) (alteration in original) (quoting *West Virginia*, 142 S. Ct. at 2608). See also *infra* notes 55–62 and accompanying text.

16. *Brown v. U.S. Dep't of Educ. (DOE)*, 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022), *vacated and remanded*, 143 S. Ct. 2343 (2023) (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

17. *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023).

18. See *Chamber of Com. v. Consumer Fin. Prot. Bureau (CFPB)*, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *75 (E.D. Tex. Sept. 8, 2023)

19. *Texas v. United States*, 50 F.4th 498, 527 (5th Cir. 2022).

Yet another judge considered the scale of the relevant regulated industry as opposed to the agency action itself.²⁰

Finally, some of the variations in judges' definitions and applications of the doctrine stem from whether the judges relied on the *West Virginia* majority opinion or the *West Virginia* concurring opinion from Justice Neil Gorsuch.²¹ Thirty-two of the thirty-eight decisions apply the *West Virginia* majority opinion, while five decisions—all from district courts in the First, Fourth, and Fifth Circuits—seem to rely partly or exclusively on the reasoning in the *West Virginia* concurring opinion from Justice Gorsuch.²² All six of these judges were Republican appointees.²³ As explained in greater detail below,²⁴ Justice Gorsuch's concurring opinion differs from the majority opinion in important ways.²⁵

This survey also reveals that in a majority of cases concerning Biden Administration agency actions and executive orders, judges applied the doctrine in line with the political party of their appointing President. Of the thirty-eight cases discussing the doctrine, twenty-one were challenges to Biden Administration agency actions or executive orders.²⁶ Among these

20. *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346 (JSR), 2023 WL 4858299, at *8 (S.D.N.Y. July 31, 2023) (concluding that the major questions doctrine did not apply because the regulated “industry—though certainly important—falls far short of being a ‘portion of the American economy’ bearing ‘vast economic and political significance’” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

21. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

22. See *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492 (W.D. La. 2022); *Brown v. DOE*, 640 F. Supp. 3d 644, 664–66 (N.D. Tex. 2022); *Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *4, *6 (N.D. Tex. Mar. 9, 2023); *Miller v. Garland*, No. 1:23-cv-195 (RDA/JFA), 2023 WL 3692841, at *9 (E.D. Va. May 26, 2023); *United States v. Freeman*, No. 21-CR-41-JL, 2023 5391417, at *9 (D.N.H. Aug. 22, 2023).

23. *Current Federal Judges by Appointing President and Circuit*, BALLOTPEDIA, https://ballotpedia.org/Current_federal_judges_by_appointing_president_and_circuit#Appointments_by_circuit_court_and_party (last visited Nov. 11, 2023) [hereinafter *Current Federal Judges*] (listing current federal judges, both circuit and district, and the President and the President's party the judge was appointed by).

24. See *infra* Part I. Surveying Lower Court Decisions.

25. Brunstein & Goodson, *supra* note 5, at 87–100; Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy* 7 (May 5, 2023) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332).

26. These twenty-one cases concerned rules promulgated under the Biden Administration, or executive orders signed by President Biden. See *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022) (concerning Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021)); *Louisiana v. Becerra*, 629 F. Supp. 3d 477 (concerning the Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs, 86

Fed. Reg. 68,052 (Nov. 30, 2021)); *Brown v. DOE*, 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022), *vacated and remanded*, 143 S. Ct. 2343 (2023) (concerning the Federal Student Aid Programs, 87 Fed. Reg. 61,512 (Oct. 12, 2022)); *Sweet v. Cardona*, 641 F. Supp. 3d 814 (N.D. Cal. 2022) (concerning Secretary of Education Cardona's settlement agreement with a class of student-loan borrowers who filed borrower-defense applications); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (concerning Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021)); *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023) (concerning Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021)); *Commonwealth v. Biden*, 57 F.4th 545, 554 (6th Cir. 2023) (concerning Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021)); *Tennessee v. U.S. Dep't of Agric. (USDA)*, No. 3:22-CV-257, 2023 WL 3048342 (E.D. Tenn. Mar. 29, 2023) (concerning Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement, 87 Fed. Reg. 35,855 (June 14, 2022)); *West Virginia v. EPA*, No. 3:23-CV-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023) (concerning Revised Definition of "Waters of the United States," 88 Fed. Reg. 3,004 (Jan. 18, 2023)); *Mayer v. Biden*, 67 F.4th 921 (9th Cir. 2023) (concerning Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021)); *Ready for Ron v. FEC*, No. 22-3282 (RDM), 2023 WL 3539633 (D.D.C. May 17, 2023) (concerning an FEC advisory opinion); *Miller v. Garland*, No. 1:23-CV-195 (RDA/JFA), 2023 WL 3692841 (E.D. Va. May 26, 2023) (concerning Factoring Criteria for Firearms with Attached "Stabilizing Braces," 88 Fed. Reg. 6,478 (Jan. 31, 2023)); *Heating, Air Conditioning & Refrigeration Distrib. Int'l v. EPA*, 71 F.4th 59 (D.C. Cir. 2023) (concerning Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act, 86 Fed. Reg. 55,116 (Oct. 5, 2021)); *Rest. L. Ctr. v. DOL*, No. 1:21-CV-1106-RP, 2023 WL 4375518 (W.D. Tex. July 6, 2023) (concerning Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021)); *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346 (JSR), 2023 WL 4858299 (S.D.N.Y. July 31, 2023) (concerning an SEC enforcement action commenced in 2023); *Alaska Indus. Dev. & Exp. Auth. v. Biden*, No. 3:21-cv-00245-SLG, 2023 WL 5021555 (D. Alaska Aug. 7, 2023) (concerning Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021)); *Texas v. Nuclear Regulatory Comm'n (NRC)*, 78 F.4th 827 (5th Cir. 2023) (concerning the approval of an NRC license); *Chamber of Com. v. CFPB*, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398 (E.D. Tex. Sept. 8, 2023) (concerning an update to the CFPB Supervision & Examination Manual); *West Virginia v. U.S. Dep't of the Treas.*, 82 F.4th 1068 (11th Cir. 2023) (concerning Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338 (Jan. 27, 2022)); *Utah v. Walsh*, No. 2:23-CV-016-Z, 2023 WL 6205926 (N.D. Tex. Sept. 21, 2023) (concerning Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022)); *Texas v. Biden*, No. 6:22-CV-00004, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023) (concerning Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021). Three of these cases involve "independent" agencies (the FEC, NRC, and CFPB). These three cases are included among those defined as Biden Administration agency actions because agency independence should not be viewed as a binary, but rather, on a continuum. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L.

twenty-one cases, eighteen applied the doctrine along partisan lines: eight involved Democratic appointees upholding Biden Administration agency actions or executive orders, and nine of these cases involved Republican appointees invalidating Biden Administration agency actions or executive orders.²⁷ In one additional case, a Republican appointee invalidated a Biden Administration agency action, but on grounds that were, in his view, distinct from the major questions doctrine.²⁸

That leaves just three cases that challenged Biden Administration agency actions or executive orders in which judges reached outcomes that clearly cut against the political party of the judges' appointing President. The first case is *Mayer v. Biden*,²⁹ in which Judge Bennett, a Republican appointee in the Ninth Circuit, joined by another Republican appointee and a Democratic appointee, upheld the Biden Administration's Contractor Vaccine Mandate despite three other circuits having previously found that it violated the major questions doctrine.³⁰ The second case is *Miller v. Garland*,³¹ in which Judge Rossie Alston, a Republican appointee in the Eastern District of Virginia, upheld the Biden Administration's rule clarifying that weapons equipped with

Rev. 769, 769 (2013). The remaining cases, which are discussed throughout this Article, involved cases challenging agency actions that pre-date the Biden Administration, or cases that did not involve an agency action.

27. See *Current Federal Judges*, *supra* note 23 (listing current federal judges, both circuit and district, and the President and the President's party the judge was appointed by). Eight cases involved Democratic appointees holding that a Biden Administration agency action or executive order at issue did not violate the doctrine. See *Sweet*, 641 F. Supp. 3d 814; *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023); *Tennessee v. USDA*, No. 3:22-CV-257, 2023 WL 3048342 (E.D. Tenn. Mar. 29, 2023); *Ready for Ron v. FEC*, No. 22-3282 (RDM), 2023 WL 3539633 (D.D.C. May 17, 2023); *Rest. L. Ctr. v. DOL*, No. 1:21-CV-1106-RP, 2023 WL 4375518 (W.D. Tex. July 6, 2023); *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346 (JSR), 2023 WL 4858299, at *8 (S.D.N.Y. July 31, 2023); *Alaska Indus. Dev. & Exp. Auth. v. Biden*, No. 3:21-cv-00245-SLG, 2023 WL 5021555 (D. Alaska Aug. 7, 2023); *West Virginia v. U.S. Dep't of the Treas.*, 82 F.4th 1068. Nine cases involved Republican appointees holding that a Biden Administration agency action or executive order at issue violated the doctrine. See *Georgia v. President of the United States*, 46 F.4th 1283; *Louisiana v. Becerra*, 629 F. Supp. 3d 477; *Brown*, 640 F. Supp. 3d 664; *Louisiana v. Biden*, 55 F.4th 1017; *Commonwealth v. Biden*, 57 F.4th at 554; *West Virginia v. EPA*, No. 3:23-CV-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023); *Texas v. NRC*, 78 F.4th 827; *Chamber of Com. v. CFPB*, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398 (E.D. Tex. Sept. 8, 2023); *Texas v. Biden*, No. 6:22-CV-00004, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023).

28. See *Heating, Air Conditioning & Refrigeration*, 71 F.4th 59.

29. 67 F.4th 921 (9th Cir. 2023).

30. See *id.* See generally *Louisiana v. Biden*, 55 F.4th at 1035; *Kentucky v. Biden*, 57 F.4th at 557; *Georgia v. President of the U.S.*, 46 F.4th at 1308.

31. No. 1:23-CV-195 (RDA/JFA), 2023 WL 3692841 (E.D. Va. May 26, 2023).

a stabilizing brace, which had previously evaded regulation, qualified under the definition of a “rifle” under the National Firearms Act.³² And the third case is *State of Utah v. Walsh*,³³ in which Judge Mark Kacsmaryk, a Republican appointee in the Northern District of Texas, held that the doctrine did not apply to the Biden Administration’s 2022 Investment Duties Rule.

This survey also reveals some notable doctrinal developments. First, there is a circuit split over whether the major questions doctrine does not apply, as a categorical matter, to the procurement actions of the President. Five of the thirty-eight cases concerned President Biden’s vaccine mandate for federal contractors,³⁴ and one case concerned President Biden’s minimum wage standard for federal contractors.³⁵ The Ninth Circuit found as a categorical matter that the doctrine does not apply to proprietary actions of the President, while the Fifth, Sixth, and Eleventh Circuits reached the opposite conclusion.³⁶ In addition, there was only one decision in which a judge found that the major questions doctrine *did* apply but concluded that the agency had “clear congressional authorization” for the action.³⁷ And finally, two judges applied the doctrine in cases in which agencies were not a party.³⁸ One of these cases did not involve any agency action whatsoever.³⁹

The upshot of this survey is that then-Judge Kavanaugh’s observation that “determining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality” remains as pertinent as ever.⁴⁰ The Court’s continued lack of clarity means lower courts remain unconstrained in how they apply the doctrine, and their applications of the doctrine appear to largely track with the political party of the judges’ appointing President.⁴¹

32. *Id.* at *9–10.

33. No. 2:23-CV-Z, 2023 U.S. Dist. LEXIS 52503 (N.D. Tex. Mar. 28, 2023).

34. *See* *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023); *Louisiana v. Biden*, 55 F.4th 1017; *Kentucky v. Biden*, 57 F.4th 545; *Georgia v. President of the U.S.*, 46 F.4th 1283.

35. *Texas v. Biden*, No. 6:22-CV-00004, 2023 U.S. Dist. LEXIS 171265 (S.D. Tex. Sept. 26, 2023).

36. *See* *Mayes*, 67 F.4th 921; *Louisiana v. Biden*, 55 F.4th 1017; *Kentucky v. Biden*, 57 F.4th 545; *Georgia v. President of the U.S.*, 46 F.4th 1283.

37. *Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *4–5 (N.D. Tex. Mar. 9, 2023).

38. *See* *Niblock v. Univ. of Ky.*, No. CV 5:19-394-KKC, 2023 WL 4997678 (E.D. Ky. Aug. 4, 2023); *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston L.L.C.*, 76 F.4th 291 (4th Cir. 2023).

39. *See* *N.C. Coastal Fisheries Reform Grp.*, 76 F.4th 291.

40. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

41. *See supra* notes 25–34 and accompanying text.

I. SURVEYING LOWER COURT DECISIONS

Judges have taken vastly different approaches to interpreting *West Virginia* and defining and applying the major questions doctrine. This part analyzes each case discussing the major questions doctrine since *West Virginia*, organized by circuit.

A. D.C. Circuit

Since *West Virginia*, the D.C. Circuit has decided four cases that discuss the major questions doctrine,⁴² and judges in the District of Columbia have decided two cases that discuss the doctrine.⁴³

The first case from the D.C. Circuit, *Loper Bright Enterprises, Inc. v. Raimondo*,⁴⁴ addressed the legality of the National Marine Fisheries Service's rule that established industry-funded at-sea monitoring programs under the Magnuson-Stevens Fishery Conservation and Management Act.⁴⁵ Judge Rogers, writing for the court, advanced a framework of the doctrine comprised of two prongs: "the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion."⁴⁶ In a terse analysis, Judge Rogers concluded that the major questions doctrine did not apply because Congress "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."⁴⁷

The second case, *Washington Alliance of Technology Workers v. Department of Homeland Security (DHS)*,⁴⁸ addressed the legality of a DHS rule under the Immigration and Nationality Act⁴⁹ that allowed F-1 student visa holders to complete a one-year post-graduation optional practical training program and allowed for a two-year extension for students with degrees in STEM

42. *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 364–65 (D.C. Cir. 2022), *cert granted in part*, 143 S. Ct. 2429 (2023); *Wash. All. of Tech. Workers v. DHS*, 50 F.4th 164, 206 (D.C. Cir. 2022); *Guedes v. ATF*, 66 F.4th 1018 (D.C. Cir. 2023); *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA*, 71 F.4th 59, 67 (D.C. Cir. 2023).

43. *United States v. Rhine*, No. CR 21-0687 (RC), 2023 WL 372044, at *33 n.5 (D.D.C. Jan. 24, 2023); *Ready for Ron v. FEC*, No. 22-3282 (RDM), 2023 WL 3539633, at *10 (D.D.C. May 17, 2023).

44. 45 F.4th 359, 363 (D.C. Cir. 2022).

45. Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 109-179, 120 Stat. 3575 (1976) (codified at 16 U.S.C. § 1801).

46. *Loper Bright*, 45 F.4th at 364–65.

47. *Id.* at 365.

48. 50 F.4th 164, 167–69 (D.C. Cir. 2022).

49. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101).

fields. Judge Pillard, writing for the court, upheld the rule without reaching the major questions doctrine.⁵⁰ Judge Henderson, dissenting in part, concluded that DHS's rule violated the major questions doctrine.⁵¹ Judge Henderson's framework of the doctrine consisted of three enumerated prongs: "[(1)] the 'history and the breadth of the authority that [the EPA] ha[d] asserted[;]' [(2)] the 'economic and political significance' of that assertion; and [(3)] the principle that '[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle device[s].'"⁵² Judge Henderson then found that DHS's use of a definitional statutory provision was "too 'subtle [a] device' and a 'wafer-thin reed' on which to rest" the rule which concerns "the largest highly skilled guest worker program."⁵³ Finally, she found that "as to breadth, the [rule] triples the amount of time that STEM F-1 graduates may stay in the country—an alarming expansion of DHS authority under the F-1 statute."⁵⁴

Judge Justin Walker authored the two remaining D.C. Circuit opinions that discussed the doctrine. First, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF)*⁵⁵ involved a challenge to an ATF rule that defined "machine gun" under the National Firearms Act and Gun Control Act to include bump stocks.⁵⁶ The D.C. Circuit upheld the rule and denied a petition for rehearing en banc.⁵⁷ In a dissent to the denial for rehearing en banc, Judge Walker cited *West Virginia* and other major questions doctrine precedents to argue that the ATF rule was a "glaring example of an increasingly common story" in which "[(1)] Congress considers a highly controversial solution to a modern problem that attracts great public attention[;] . . . [(2)] Despite that attention, Congress does not pass legislation addressing it[;] . . . [(3)] The executive then finds within an old statute the power to address the problem that Congress did not."⁵⁸

In *Heating, Air Conditioning & Refrigeration Distributions International v. EPA*, however, Judge Walker defined the doctrine as applying to agency "decisions

50. *Wash. All. of Tech. Workers*, 50 F.4th at 194.

51. *Id.* at 206 (Henderson, J., dissenting) (internal citations omitted).

52. *Id.*

53. *Id.*

54. *Id.*

55. 66 F.4th 1018 (D.C. Cir. 2023).

56. *Id.* at 1020.

57. *Id.* at 1019.

58. *Id.* at 1029 (Walker, J., dissenting) (first citing Nat'l Fed'n of Indep. Bus. (NFIB) v. Occupational Safety & Health Admin. (OSHA), 142 S. Ct. 661, 671 (2022); then citing Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs. (HHS), 141 S. Ct. 2485 (2021); then citing *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); and then citing *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 476 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

of vast economic and political significance.”⁵⁹ He concluded that the rule at issue—which dealt with the phaseout of hydrofluorocarbons under the American Innovation and Manufacturing Act—did not trigger the doctrine because it was not “important” or “expensive” enough.⁶⁰ Judge Walker explained that although the Court was not relying on the major questions doctrine, the Court was relying on “another long-standing rule of interpretation,” which he called “the *American Trucking* rule”: “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”⁶¹

Judges in the District Court for the District of Columbia decided two cases that discussed the major questions doctrine. First, in *United States v. Rhine*,⁶² a defendant charged with involvement in the January 6, 2021, attack on the Capitol argued that the law he was charged with violating was unlawful under the major questions doctrine. Judge Rudolph Contreras quickly dismissed the major questions argument in a footnote, in which he defined the doctrine as turning on the “history and breadth of the authority that the agency has asserted and the economic and political significance of that assertion.”⁶³

Finally, in *Ready for Ron v. Federal Election Commission (FEC)*, a political committee brought an action against the FEC to provide an in-kind contribution without facing an enforcement action under the Federal Election Campaign Act (FECA).⁶⁴ Judge Randolph Moss explained that the major questions doctrine turns on the “‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion.”⁶⁵ Moreover, he added that the doctrine “applies in particular when such authority ‘lack[s] historical precedent,’ . . . in the face of ambiguous statutory language.”⁶⁶ He concluded that the doctrine did not apply to this case because the “authority the FEC assert[ed] [was] no different than the authority it has always asserted . . . since FECA’s inception” and the statutory terms on which the FEC relied were part of “FECA’s core provisions,” not “the sort of ‘cryptic’ statutory language with which the major questions doctrine is most concerned.”⁶⁷

59. 71 F.4th 59, 67 (D.C. Cir. 2023).

60. *Id.*

61. *Id.* (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

62. No. CR 21-0687 (RC), 2023 WL 372044, at *9 n.5 (D.D.C. Jan. 24, 2023).

63. *Id.* Judge Contreras concluded that there was “no plausible argument” that the issue of whether a purported delegation to restrict an area to protect the President, Vice President, or other Secret Service protectee, rose to the level of a major question. *Id.*

64. *Id.* at *1.

65. *Id.* at *10.

66. *Id.*

67. *Id.*

As the cases summarized above demonstrate, judges in the D.C. Circuit offered several different articulations of the major questions doctrine. Judge Rogers and Judge Contreras defined the doctrine as a two-prong framework that involves “the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion.”⁶⁸ Judge Henderson and Judge Moss both seemed to advance a three-prong framework comprised of the two prongs from Judge Rogers and Judge Contreras’s framework and an additional third prong discussing whether the agency relied on “‘modest words,’ ‘vague terms,’ or ‘subtle device[s]’” or “‘ambiguous” and “‘cryptic’ statutory language.”⁶⁹

Meanwhile, Judge Walker seems to have offered two formulations of the doctrine, which differ from one another and from the formulations advanced by the other judges in the D.C. Circuit. Judge Walker advanced a three-prong framework in *Guedes* that involves (1) congressional and public attention to a “highly controversial” issue, (2) congressional failure to “pass legislation,” and (3) the executive’s reliance on an “old statute.”⁷⁰ All three of these factors differ from those relied upon by the other judges in the D.C. Circuit, although the first and second factors could be read as metrics of political significance. In his second formulation of the doctrine, in *Heating, Air Conditioning & Refrigeration*, Judge Walker defined the doctrine simply as applying to “decisions of vast economic and political significance.”⁷¹ Here, Judge Walker also differentiated the major questions doctrine from “the *American Trucking* rule” that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.”⁷² In drawing this distinction, Judge Walker’s formulation is directly in tension with that of Judge Henderson and Judge Moss, who considered whether the agency relied on “vague terms or ancillary provisions” in their frameworks of the major questions doctrine.⁷³

68. *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 364 (D.C. Cir. 2022) (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022)); *United States v. Rhine*, No. CR 21-0687 (RC), 2023 WL 372044, at *9 n.5 (D.D.C. Jan. 24, 2023) (quoting *West Virginia*, 142 S. Ct. at 2595).

69. *Wash. All. of Tech. Workers v. DHS*, 50 F.4th 164, 206 (D.C. Cir. 2022) (quoting *West Virginia*, 142 S. Ct. at 2609); *Ready for Ron v. FEC*, No. 22-3282 (RDM), 2023 WL 3539633, at *10 (D.D.C. May 17, 2023) (quoting *West Virginia*, 142 S. Ct. at 2608).

70. *Guedes v. ATF*, 66 F.4th 1018, 1029 (D.C. Cir. 2023).

71. *Heating, Air Conditioning, & Refrigeration Distrib. Int’l v. EPA*, 71 F.4th 59, 67 (D.C. Cir. 2023).

72. *Id.* (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

73. See *infra* note 69 and accompanying text. Judge Walker’s distinction between the major questions doctrine and the “*American Trucking* rule” also seems to be in tension with *West*

The variation in how D.C. Circuit judges applied the doctrine is not explained solely by their differing frameworks but also by the fact that judges did not always faithfully apply their own frameworks. While Judge Rogers, Judge Henderson, Judge Contreras, and Judge Moss all articulated frameworks of the doctrine that involve “the ‘history and breadth of the authority that [the agency] has asserted,’”⁷⁴ only Judge Moss’s analysis discussed the history of the agency’s exercise of regulatory authority.⁷⁵ These omissions cannot necessarily be explained by a lack of pertinence. For example, Judge Henderson’s omission of regulatory history was especially odd given the majority opinion’s extensive discussion of regulatory history.⁷⁶

Throughout these opinions, judges in the D.C. Circuit differed in their treatment and measurement of economic and political significance. For example, in assessing economic significance, Judge Rogers noted that the agency at issue had not claimed the “power to regulate the national economy.”⁷⁷ But Judge Rogers did not discuss other metrics of economic significance, such as the cost of the rule, which the fishing companies cited in their briefing: the monitoring program would “cost . . . upwards [of] \$710 per day[, which] is expected to impose a substantial hardship on the fleet.”⁷⁸ Judge Henderson cited the size and length of the regulatory program.⁷⁹ Judge Walker referred only to the rule’s “importan[ce]” and “expens[e],” but did not specify a metric for either consideration.⁸⁰ In contrast, although Judge Contreras and Judge Moss included this prong in their frameworks, they did not address this prong in their analyses.

Overall, the six opinions from judges in the D.C. Circuit following *West Virginia* reveal at least three different frameworks for the major questions doctrine and significant variation in terms of how judges apply their frameworks.

Virginia, in which the Court cited *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) as a major questions doctrine precedent. 142 S. Ct. at 2600.

74. See *infra* notes 68–69 and accompanying text.

75. Ready for Ron v. FEC, No. CV 22-3282 (RDM), 2023 WL 3539633, at *10 (D.D.C. May 17, 2023).

76. Wash. All. of Tech. Workers v. DHS., 50 F.4th 164, 194 (D.C. Cir. 2022).

77. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022).

78. Opening Brief for Appellants, Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 370 (D.C. Cir. 2022).

79. Wash. All. of Tech. Workers, 50 F.4th at 194.

80. Heating, Air Conditioning, & Refrigeration Distrib. Int’l v. EPA, 71 F.4th 59, 67 (D.C. Cir. 2023).

B. Fifth Circuit

Since *West Virginia*, the Fifth Circuit has decided three cases that discussed the doctrine,⁸¹ and district court judges in the Fifth Circuit have decided nine cases that discussed the doctrine.⁸²

In the three Fifth Circuit opinions, *Texas v. United States*,⁸³ *Louisiana v. Biden*,⁸⁴ and *Texas v. Nuclear Regulatory*,⁸⁵ judges advanced a framework of the doctrine that turned on “economic and political significance.”⁸⁶ The first Fifth Circuit case, *Texas v. United States*, involved a challenge to the Deferred Action for Childhood Arrivals (DACA) program under the Immigration and Nationality Act.⁸⁷ As in prior litigation over DACA and the Deferred Action for Parents of Americans (DAPA) program, the court held that DACA violated the major questions doctrine because it concerned “question[s] of deep ‘economic and political significance.’”⁸⁸ Judge Priscilla Richman’s analysis relied only on metrics of economic and political significance.⁸⁹ Comparing DACA to DAPA, Judge Richman acknowledged that nearly three times as many people would be eligible for DAPA (4.3 million) as compared to DACA (only 1.5 million).⁹⁰ But she dismissed this difference, concluding that “[a]ny difference in size does not meaningfully diminish the importance of the issues at stake” and turned to other metrics.⁹¹ Somewhat counterintuitively, she relied instead on metrics of the economic harm that would result from the *rescission* of DACA, writing that:

DACA is of enormous political and economic significance to supporters and opponents alike. Amici businesses report that national GDP may contract by as much as \$460 billion without DACA. An expert for the Intervenors estimated that DACA contributes

81. *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Texas v. Nuclear Regulatory Comm’n*, 78 F.4th 827 (5th Cir. 2023).

82. *United States v. Empire Bulkers Ltd.*, No. CR 21-126, 2022 WL 3646069 (E.D. La. Aug. 24, 2022); *Louisiana v. Becerra*, 629 F. Supp. 3d 477 (W.D. La. 2022); *Kovac v. Wray*, No. 3:18-CV-01110-X, 2023 WL 2430147 (N.D. Tex. Mar. 9, 2023); *Brown v. DOE*, 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022), *vacated and remanded*, 143 S. Ct. 2343 (2023); *Rest. L. Ctr. v. DOL*, No. 1:21-CV-1106-RP, 2023 WL 4375518, at *12 (W.D. Tex. July 6, 2023).

83. 50 F.4th 498 (5th Cir. 2022).

84. 55 F.4th 1017 (5th Cir. 2022),

85. 78 F.4th 827 (5th Cir. 2023).

86. *Louisiana v. Biden*, 55 F.4th at 1029.

87. *Texas v. United States*, 50 F.4th 498.

88. *Id.* at 526.

89. *Id.*

90. *Id.* at 527.

91. *Id.*

over \$3.5 billion in net fiscal benefits to federal, state, and local entities.⁹²

The second case, *Louisiana v. Biden*, involved a challenge to President Biden's Executive Order under the Federal Property and Administrative Services Act requiring COVID-19 vaccination for employees of federal contractors (Contractor Vaccine Mandate).⁹³ Although Judge Kurt D. Engelhardt also defined the doctrine as turning on economic and political significance, his analysis did not focus on metrics of this significance, but rather, on regulatory history. He concluded that the Contractor Vaccine Mandate was not a "straight-forward nor [a] predictable example of procurement regulations authorized by Congress" and that it was inconsistent with the historical record; it thus constituted "an 'enormous and transformative expansion in' the President's power under the [] Act."⁹⁴

The third case, *Texas v. Nuclear Regulatory Commission*, concerned the Nuclear Regulatory Commission's licensing of certain nuclear storage facilities.⁹⁵ Judge James C. Ho focused his analysis on measuring the political significance of the action.⁹⁶ As metrics of political significance, Judge Ho considered that nuclear waste "has been hotly politically contested for over a half century,"⁹⁷ and Congress itself acknowledged in the findings section of the Nuclear Waste Policy Act that "high-level radioactive waste and spent nuclear fuel have become major subjects of public concern."⁹⁸

There were also nine district court cases that discussed the major questions doctrine in the Fifth Circuit, in which judges offered a variety of frameworks of the doctrine. First, in at least three cases, district court judges also defined the doctrine as turning on economic and political significance. For example, in *Brown v. U.S. Department of Education (DOE)*,⁹⁹ which challenged President Biden's student loan cancellation policy under the Higher Education Relief Opportunities for Students Act (HEROES Act),¹⁰⁰ Judge Mark T. Pittman in the Northern District of Texas defined the doctrine as applying to

92. *Id.*

93. *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022).

94. *Id.* at 1029–31. In his dissent, Judge Graves argued that the major questions doctrine did not apply to the President, nor to the use of proprietary authority. *Id.* at 1038–39 (Graves, J., dissenting).

95. 78 F.4th 827 (5th Cir. 2023).

96. *Id.* at 844.

97. *Id.*

98. *Id.*

99. 640 F. Supp. 3d 644, 664–66 (N.D. Tex. 2022).

100. The Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (2003) (codified at 20 U.S.C. §§ 1098aa–1098ee).

“decisions of vast ‘economic and political significance.’”¹⁰¹ Judge Drew B. Tipton in the Southern District of Texas also defined the doctrine as turning on economic and political significance in *Texas v. Biden*,¹⁰² which involved a challenge to President Biden’s executive order under the Procurement Act raising the minimum wage paid by federal contractors.¹⁰³

Similarly, in *United States v. Empire Bulkers Ltd.*,¹⁰⁴ in which a defendant was charged with a violation of a regulation instituting recordkeeping requirements under the Act to Prevent Pollution from Ships, Judge Mary Ann Vial Lemmon in the Eastern District of Louisiana defined the doctrine as applying to “issues of major national significance.”¹⁰⁵ Her analysis, however, did not discuss metrics of significance but instead focused on the fact that the regulation “d[id] not result in a shift of the enforcement regime,” and so “there [was] no major enforcement shift that could be considered a ‘major question.’”¹⁰⁶

In two other cases, district court judges seemed to define the doctrine as turning on economic and political significance but also found other factors relevant as well. This was the case in *Louisiana v. Becerra*, a case challenging the Department of Health and Human Services’ COVID-19 masking and vaccination requirements for the Head Start program.¹⁰⁷ Judge Terry A. Doughty in the Western District of Louisiana defined the doctrine as turning on economic and political significance.¹⁰⁸ But Judge Doughty also seemed to identify as relevant whether the agency action would “bring about an enormous and transformative expansion in [its] regulatory authority,” whether the “agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’” and whether the agency relied on “vague terms or ancillary provisions.”¹⁰⁹

This was also the case in *Kovac v. Wray*,¹¹⁰ a case in which individuals who were erroneously placed on the terrorism watchlist sued agencies in the Northern District of Texas alleging that the agencies violated the doctrine in

101. *Brown*, 640 F. Supp. 3d at 664–66. In *Brown v. DOE*, the Court reversed Judge Pittman’s standing analysis because the Court ruled on standing and did not address Judge Pittman’s framing of the major questions doctrine. See *Brown v. DOE*, 143 S. Ct. 2343 (2023).

102. No. 6:22-CV-00004, 2023 U.S. Dist. LEXIS 171265 (S.D. Tex. Sept. 26, 2023).

103. *Id.* at *27 (citing *Louisiana v. Biden*, 55 F.4th 1017, 1029–31 (5th Cir. 2022))

104. *United States v. Empire Bulkers Ltd.*, No. CR 21-126, 2022 WL 3646069 (E.D. La. Aug. 24, 2022).

105. *Id.* at *1–2.

106. *Id.* at *2.

107. 629 F. Supp. 3d 477, 482–83, 492 (W.D. La. 2022).

108. *Id.* at 492.

109. *Id.* at 491–92.

110. No. 3:18-CV-0110-X, 2023 WL 2430147 (N.D. Tex. Mar. 9, 2023).

creating and maintaining the watchlist.¹¹¹ Judge Brantley Starr initially defined the doctrine as turning on “the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion,”¹¹² but then defined the doctrine as simply applying to agency “decisions of vast economic and political significance.”¹¹³ Judge Starr concluded that the terrorism watchlist had vast political significance because the watchlist consists of over a million people, the government can place an unlimited number of people on the list, and there are significant liberty intrusions that flow from the list.¹¹⁴

In four other district court opinions, judges advanced multi-prong frameworks of the doctrine. Two of these opinions were from Judge Robert Pitman in the Western District of Texas. First, in *Restaurant Law Center v. United States Department of Labor (DOL)*,¹¹⁵ Judge Robert Pitman considered a DOL rule that instituted pay protections for tipped employees.¹¹⁶ He defined the doctrine as concerning: “[1] the history and the breadth of the authority that [the EPA] ha[d] asserted[;] . . . [(2)] the economic and political significance of that assertion; and [(3)] the principle that [e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle device[s].”¹¹⁷ In his analysis, he concluded that the cost of the rule, \$183.6 million, was less than the billions of dollars considered in prior major questions doctrine cases and did not rise to the level of vast economic significance required by *West Virginia*.¹¹⁸ He also considered the history of DOL’s guidance and concluded that the rule did not “‘substantially restructure’ the market or invoke any ‘newfound power’; nor [did] it rely on a ‘rarely used’ or ‘ancillary provision’ of the law.”¹¹⁹

In Judge Robert Pitman’s second opinion, *Mayfield v. DOL*,¹²⁰ which concerned the DOL’s minimum wage salary test for exemption from the Fair Labor Standards Act (FLSA),¹²¹ he adopted a similar approach. He defined

111. *See id.* at *1–3.

112. *Id.* at *4.

113. *Id.* (citing *Brown v. DOE*, 640 F. Supp. 3d 644, 664–66 (N.D. Tex. 2022), *vacated and remanded*, 143 S. Ct. 2343 (2023)). To my knowledge, this is the only case after *West Virginia* in which a judge determined the doctrine applied, but that the agency action survived because the agency had clear congressional authorization. *Id.* at *5–8.

114. *Kovac*, 2023 WL 2430147, at *5.

115. No. 1:21-CV-1106-RP, 2023 WL 4375518 (W.D. Tex. July 6, 2023).

116. *See id.*

117. *Id.* at *12 (internal quotations omitted).

118. *Id.* at *13.

119. *Id.*

120. No. 1:22-cv-792-RP, 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023).

121. 29 U.S.C. § 203.

the doctrine as turning on “the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion.”¹²² In assessing economic significance, he considered the \$173.3 million in costs to employers, as well as the \$298.8 million in transfers, and concluded that these figures were not large enough to trigger the doctrine.¹²³ He also concluded that the rule did not regulate “vast swaths of American life” as it made 1.2 million workers nonexempt, who were previously exempt, but this was a “small fraction” of the 139.4 million workers who are covered by the FLSA.¹²⁴ In addition, his analysis focused on the fact that the rule was not adopting “a new approach,” but instead was consistent with the agency’s approach for over seven decades and was within DOL’s “conferred authority” as DOL is “expect[ed]” to regulate the labor force.¹²⁵

Judge J. Campbell Barker also offered a similar, although somewhat different, framework in *Chamber of Commerce v. Consumer Financial Protection Bureau (CFPB)*,¹²⁶ which involved a challenge to CFPB’s guidance that discrimination is an “unfair, deceptive, or abusive act[] or practice[].”¹²⁷ He defined the doctrine as turning on “the law’s history, the breadth of the regulatory assertion, and the economic and political significance of the assertion.”¹²⁸ In his analysis, Judge Barker found that “the *millions* of dollars per year spent by companies” in compliance with a rule triggered the doctrine.¹²⁹ He also wrote that the action “would have significant political implications as to both state and federal power.”¹³⁰ As to state power, Judge Barker noted that it would “significantly alter the balance between federal and state power.”¹³¹ Judge Barker concluded that “[t]he federal-powers implications of the agency’s position are just as profound” because “[f]ederal nondiscrimination statutes typically define what classes are protected, what outcomes or actions are prohibited, and defenses to liability. Those decisions are often part of delicate negotiations requiring compromises or tradeoffs.”¹³²

Magistrate Judge Rebecca Rutherford in the Northern District of Texas offered a different multi-prong framework of the doctrine in *Federation of*

122. *Mayfield*, 2023 WL 6168251, at *12.

123. *Id.* at *6–7.

124. *Id.* at *7.

125. *Id.*

126. No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 8, 2023).

127. *Id.* at *8.

128. *Id.* at *7.

129. *Id.* (emphasis added).

130. *Id.* at *8.

131. *Id.*

132. *Id.*

Americans for Consumer Choice, Inc v. DOL,¹³³ which concerned DOL's rule to determine whether financial professionals are acting as "investment advice fiduciaries" under ERISA.¹³⁴ Judge Rutherford wrote that "[w]hen determining whether the major questions doctrine applies, the Fifth Circuit generally considers factors such as: (1) whether the authority is from an 'old statute employed in a novel manner,' (2) the economic impact of the regulation, (3) whether the regulation lies outside of the agency's 'core competencies,' and (4) whether the regulation involves a matter of political significance."¹³⁵ In her analysis, Judge Rutherford considered "the costs imposed on individuals covered by the statute—not simply the total amount of assets affected."¹³⁶ Since compliance costs amounted to \$80 million annually, she found that amount "far short of the 'vast economic . . . significance' to support application of the [doctrine]."¹³⁷

Finally, in *Utah v. Walsh*,¹³⁸ which involved a challenge to DOL's Investment Duties rule clarifying the duties of fiduciaries to ERISA employee benefit plans, Judge Matthew J. Kacsmaryk in the Northern District of Texas defined the doctrine as turning on the "history and the breadth of the authority that [the agency] has asserted."¹³⁹

As the cases summarized above demonstrate, all three Fifth Circuit opinions, from Judge Richman, Judge Engelhardt, and Judge Ho, as well as at least two district court opinions, from Judge Mark Pittman and Judge Tipton, all defined the doctrine as applying to agency decisions of "vast economic and political significance."¹⁴⁰ Judge Lemmon similarly defined the

133. No. 3:22-cv-00243-K-BT, 2023 U.S. Dist. LEXIS 157268 (N.D. Tex. June 30, 2023).

134. *Id.* at *3.

135. *Id.* at *39. (citing *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617–18 (5th Cir. 2021)).

136. *Id.* at *40 (citing *BST Holdings, L.L.C.*, 17 F.4th at 617 (finding that the major questions doctrine applies when compliance costs surpass \$3 billion); *Brown v. DOE*, 640 F. Supp. 3d 644 (N.D. Tex. 2022) (finding the major questions doctrine to apply when compliance costs surpass \$400 billion); *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023) (suggesting the major questions doctrine applies in a case to release 43 million borrowers from their obligations to pay back \$430 billion in student loans).

137. *Fed'n of Ams. for Consumer Choice, Inc. v. DOL*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *15 (N.D. Tex. June 30, 2023).

138. No. 2:23-CV-016-Z, 2023 WL 6205926, at *4 n.3 (N.D. Tex. Sept. 21, 2023).

139. *Utah v. Walsh*, No. 2:23-CV-016-Z, 2023 WL 6205926, at *4 n.3 (N.D. Tex. Sept. 21, 2023).

140. *Texas v. United States*, 50 F.4th 498, 527 (5th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017, 1028 (5th Cir. 2022).

doctrine as applying to “issues of major national significance.”¹⁴¹ In contrast, Judge Kacsmaryk defined the doctrine as turning on the “‘history and the breadth of the authority that [the agency] has asserted.’”¹⁴² The remaining district court opinions all define the doctrine as turning on several factors in ways that differ from one another. For example, while Judge Robert Pitman defined the doctrine as turning on “[1] the history and the breadth of the authority that [the EPA] ha[d] asserted[;] . . . [(2)] the economic and political significance of that assertion; and [(3)] the principle that [e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle device[s],”¹⁴³ Judge Rutherford wrote that the doctrine turns on “(1) whether the authority is from an ‘old statute employed in a novel manner,’ (2) the economic impact of the regulation, (3) whether the regulation lies outside of the agency’s ‘core competencies,’ and (4) whether the regulation involves a matter of political significance.”¹⁴⁴

As in the D.C. Circuit, judges in the Fifth Circuit also deviated from their own articulated frameworks of the doctrine. For example, neither Judge Engelhardt nor Judge Lemmon discussed metrics of economic or political significance despite having defined the doctrine as turning on economic and political significance. Instead, both judges focused on regulatory history and whether the action constituted a “transformative expansion” or “shift” in the agency’s authority.¹⁴⁵

Judges also seemed to differ in their treatment of regulatory history. As explained above, for Judge Engelhardt, Judge Lemmon, and Judge Kacsmaryk, regulatory history was the focus of their analysis.¹⁴⁶ Judge Robert Pitman and Judge Doughty analyzed regulatory history, among other factors. For Judge Starr and Judge Mark Pittman, regulatory history was relevant not to whether the agency action triggered the major questions doctrine but to whether there was clear congressional authorization; this is explained in further detail below. Finally, and in sharp contrast, Judge

141. *United States v. Empire Bulkers Ltd.*, No. CR 21-126, 2022 WL 3646069, at *3 (E.D. La. Aug. 24, 2022).

142. *Utah v. Walsh*, No. 2:23-CV-016-Z, 2023 WL 6205926, at *4 n.3 (N.D. Tex. Sept. 21, 2023).

143. *Rest. L. Ctr. v. DOL.*, No. 1:21-CV-1106-RP, 2023 WL 4375518, at *8 (W.D. Tex. July 6, 2023) (internal quotations omitted).

144. *Fed’n of Ams. for Consumer Choice, Inc. v. DOL.*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *14 (N.D. Tex. June 30, 2023) (citing *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617–18 (5th Cir. 2021)).

145. *Louisiana v. Biden*, 55 F.4th 1017, 1029–31 (5th Cir. 2022); *United States v. Empire Bulkers Ltd.*, No. CR 21-126, 2022 WL 3646069, at *2 (E.D. La. Aug. 24, 2022).

146. *Louisiana v. Biden*, 55 F.4th at 1029–31; *Empire Bulkers Ltd.*, 2022 WL 3646069, at *1–2; *Utah v. Walsh*, 2023 WL 6205926, at *4 n.3.

Richman seemed to implicitly reject the relevance of regulatory history. There, the government pointed to the Reagan Administration's Family Fairness program, which deferred deportation for 1.5 million people, but the court found this comparison irrelevant.¹⁴⁷ The court explained that "historical practice . . . 'does not, by itself, create power.'"¹⁴⁸ While this does not necessarily contradict the language in *West Virginia*, Judge Richman did not engage with the importance that *West Virginia* places on history.¹⁴⁹ Meanwhile, Judge Barker focused on the history of the law instead of the regulations.¹⁵⁰

Judges in the Fifth Circuit also differed in how they measured economic and political significance and what they viewed as the threshold amount for significance. Some judges looked to the number of individuals affected. For example, Judge Doughty wrote that the Head Start Mandate triggers the doctrine because it imposes requirements on "273,600 Head Start staff, 864,000 children and approximately 1,000,000 volunteers."¹⁵¹ Similarly, Judge Starr concluded that the terrorism watchlist had vast political significance because the watchlist consists of over a million people, the government can place an unlimited number of people on the list, and there are significant liberty intrusions that flow from the list.¹⁵² However, Judge Robert Pitman found that the rule did not trigger the doctrine when DOL's rule affected 1.2 million workers because this was a "small fraction" of the 139.4 million workers who are covered by the FLSA.¹⁵³

Other judges considered various cost figures associated with the rules.

147. *Texas v. United States*, 50 F.4th 498, 527 (5th Cir. 2022).

148. *Id.* (quoting *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015)).

149. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–12 (2022) ("[A]s Justice Frankfurter has noted, '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.'").

150. *Chamber of Com. v. CFPB*, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *18 (E.D. Tex. Sept. 8, 2023) ("The law's history, the breadth of the regulatory assertion, and the economic and political significance of the assertion."). *Id.* at *20 ("In addition, the CFPB's claimed authority to prohibit disparate-impact discrimination is something that Congress rarely authorizes. When it does, Congress authorizes disparate-impact liability only in narrow circumstances, with limits that exist to avoid 'serious constitutional questions.' So one would naturally expect a clear statement for Congress to authorize a version of discrimination liability that even explicit nondiscrimination statutes usually do not cover and that can raise serious constitutional questions." (citing *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 540 (2015))).

151. *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 493 (W.D. La. 2022).

152. *Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *5 (N.D. Tex. Mar. 9, 2023).

153. *Mayfield v. DOL*, No. 1:22-cv-792-RP, 2023 WL 6168251, at *22 (W.D. Tex. Sept. 20, 2023).

Judge Rutherford wrote that compliance costs that amounted to \$80 million annually” were “far short of the ‘vast economic . . . significance’ to support application of the [doctrine].”¹⁵⁴ Yet, Judge Barker found that “the millions of dollars per year spent by companies” in compliance with a rule triggered the doctrine.¹⁵⁵ Judge Mark Pittman concluded that the doctrine applied to agency actions that result in “billions of dollars in spending.”¹⁵⁶ In line with that analysis, Judge Robert Pitman concluded that the cost of the rule, \$183.6 million, was less than the billions of dollars considered in prior major questions doctrine cases and did not trigger the doctrine.¹⁵⁷ Judge Tipton considered the \$13.4 million in familiarization costs, \$3.8 million in implementation costs, and \$1.7 billion in annual transfer payments.¹⁵⁸ Meanwhile, in a particularly troubling analysis, Judge Richman cited not the costs of a rule going into effect but rather the costs of *rescinding* a rule—in other words, the benefits of the rule.¹⁵⁹

At other points, judges considered other factors in measuring political significance, such as Judge Mark Pittman, who looked to whether Congress “engaged in robust debates” over bills and “considered and rejected” such bills.¹⁶⁰ Judge Barker considered whether the subject of the statute was “often part of delicate negotiations requiring compromises or tradeoffs.”¹⁶¹

Finally, three of the district court opinions, from Judge Doughty, Judge Starr, and Judge Mark Pittman—all of whom are Republican appointees—seemingly relied on Justice Gorsuch’s concurrence in *West Virginia*.¹⁶² Under Justice Gorsuch’s framework, an agency action triggers the doctrine when

154. Fed’n of Ams. for Consumer Choice, Inc. v. DOL, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *15 (N.D. Tex. June 30, 2023).

155. Chamber of Com. v. CFPB, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *19 (E.D. Tex. Sept. 8, 2023).

156. Brown v. DOE, 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022), *vacated and remanded*, 143 S. Ct. 2343 (2023) (citing King v. Burwell, 576 U.S. 473, 485 (2015)).

157. Rest. L. Ctr. v. DOL, No. 1:21-CV-1106-RP, 2023 WL 4375518, at *13 (W.D. Tex. July 6, 2023).

158. Texas v. Biden, No. 6:22-CV-00004, 2023 U.S. Dist. LEXIS 171265, at *31 (S.D. Tex. Sept. 26, 2023).

159. Texas v. United States, 50 F.4th 498, 519–20 (5th Cir. 2022). *See also* Brunstein & Goodson, *supra* note 5 at 51–71.

160. *Brown*, 640 F. Supp. at 664 (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2620–21 (2022) (Gorsuch, J., concurring)).

161. Chamber of Com. v. CFPB, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *20 (E.D. Tex. Sept. 8, 2023).

162. *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492 (W.D. La. 2022); *Brown*, 640 F. Supp. 3d at 664; *Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *4 (N.D. Tex. Mar. 9, 2023).

the agency (1) “claims the power to resolve a matter of great ‘political significance,’” (2) “seeks to regulate ‘a significant portion of the American economy,’” or (3) “seeks to ‘intrud[e] into an area that is the particular domain of state law.’”¹⁶³ If the agency action triggers the doctrine, then determining whether there is clear congressional authorization depends on: (1) “the legislative provisions on which the agency seeks to rely ‘with a view to their place in the overall statutory scheme,’” (2) “the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address,” (3) “the agency’s past interpretations of the relevant statute,” and (4) “when there is a mismatch between an agency’s challenged action and its assigned mission and expertise.”¹⁶⁴

There is variation even among the judges who seemed to rely on Justice Gorsuch’s concurrence. For example, Judge Doughty quoted Justice Gorsuch’s four factors in determining whether there is clear congressional authorization.¹⁶⁵ Justice Gorsuch’s concurrence also seems to inform Judge Starr’s opinion, but he lists six factors to determine clear congressional authorization: the agency “(1) relies on a ‘cryptically delegated’ power, (2) ‘lack[s] the requisite expertise,’ (3) ‘relies on an unheralded power,’ (4) receives a ‘transformative [power] expansion,’ (5) ‘fundamental[ly] revis[es]’ the law, and (6) regulates subject matter ‘with a unique political history.’”¹⁶⁶ Meanwhile, Judge Mark Pittman’s analysis of whether there was clear congressional authorization focused on traditional tools of statutory construction but cites Justice Gorsuch’s concurrence in finding relevant “‘the agency’s past interpretations of the relevant statute.’”¹⁶⁷

C. Ninth Circuit

The Ninth Circuit decided one case that discussed the major questions doctrine,¹⁶⁸ and judges in the district courts in the Ninth Circuit decided four cases discussing the major questions doctrine.¹⁶⁹

163. *West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

164. *Id.* at 2622–23.

165. *Louisiana v. Becerra*, 629 F. Supp. 3d at 492.

166. *Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *10 (N.D. Tex. Mar. 9, 2023).

167. *Brown*, 640 F. Supp. 3d at 664 (quoting *West Virginia*, 142 S. Ct. at 2625 (Gorsuch, J., concurring)).

168. *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023).

169. *Sweet v. Cardona*, 641 F. Supp. 3d 814 (N.D. Cal. 2022); *Kaweah Delta Health Care Dist. v. Becerra*, No. CV 20-6564-CBM-SP(X), 2022 WL 18278175 (C.D. Cal. Dec. 22, 2022); *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6,

Mayes v. Biden,¹⁷⁰ the Ninth Circuit’s only case discussing the major questions doctrine, involved another challenge to President Biden’s Contractor Vaccine Mandate.¹⁷¹ Here, Judge Mark Bennett, writing for the court, held that the major questions doctrine does not apply to actions by the President since the doctrine is concerned with “agency decisions of vast ‘economic and political significance,’” but went on to explain that even if the major questions doctrine did apply to presidential actions, it would still not preclude the Mandate.¹⁷²

Judge Bennett advanced a framework of the doctrine focused on whether the action constitutes a “transformative expansion of regulatory authority.”¹⁷³ Judge Bennett also explicitly rejected Arizona Attorney General Mayes’s formulation of the doctrine that relied on Justice Gorsuch’s concurrence in *West Virginia* and focused on metrics of economic and political significance and whether the action intruded into an area that is the particular domain of state law.¹⁷⁴ Judge Bennett cataloged the history of executive orders under the statute and concluded that the Mandate “fit[] well within the Procurement Act’s historical uses, [and] was not a transformative expansion of the President’s authority under that Act.”¹⁷⁵

District courts within the Ninth Circuit have decided four cases discussing the major questions doctrine. First, in *Sweet v. Cardona*,¹⁷⁶ in the Northern District of California, student-loan borrowers brought a class action against DOE alleging that DOE had unlawfully denied or delayed processing their borrower-defense claims.¹⁷⁷ DOE reached a settlement, which in part provided for automatic loan discharge for students who attended certain for-profit schools.¹⁷⁸ A group of these schools intervened to challenge the legality of the settlement.¹⁷⁹ Judge Alsup’s framework of the doctrine focused on whether the agency relied on “modest words, vague terms, or subtle devices” or “oblique or elliptical language” to “make a radical or fundamental change to a statutory scheme.”¹⁸⁰

2023); Alaska Indus. Dev. & Exp. Auth. v. Biden, No. 3:21-CV-00245-SLG, 2023 WL 5021555 (D. Alaska Aug. 7, 2023).

170. 67 F.4th 921 (9th Cir. 2023).

171. *Id.*

172. *Id.* at 933 (quoting *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (citation omitted) (emphasis in original)).

173. *Id.* at 934.

174. *Id.*

175. *Id.* at 936–39.

176. 641 F. Supp. 3d 814 (N.D. Cal. 2022).

177. *Id.*

178. *Id.* at 833.

179. *Id.* at 833–36.

180. *Id.* at 824 (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022)).

Similar to Judge Bennett, Judge Alsup also eschewed reliance on metrics of economic and political significance and focused instead on whether the agency action was unheralded and transformative.¹⁸¹ He explained that the settlement would “not fundamentally transform a domestic industry, nor [would] it have any national ripple effect.”¹⁸² With regards to metrics of economic and political significance, he emphasized that while “this settlement [would] discharge over six billion dollars in loans . . . *West Virginia* made clear that determining whether a case contains a major question is not merely an exercise in checking the bottom line.”¹⁸³ Moreover, he explained that Supreme Court precedent “considered ‘unusual’ and ‘unheralded’ applications of agency authority.”¹⁸⁴ He then considered the history of the DOE’s use of the settlement authority and included a table outlining seven prior exercises of this settlement authority.¹⁸⁵ He ultimately concluded that the settlement was not unusual or unheralded since DOE had exercised this settlement authority “many times, even in the past few years, even across administrations”¹⁸⁶

In the second district court case, *Kaweah Delta Health Care District v. Becerra*,¹⁸⁷ Judge Consuelo Marshall in the Central District of California addressed the legality of HHS’s rule adopting the Low Wage Index Redistribution and Payment Reduction policies under the Medicare Act, which increased the Medicare wage index values for hospitals in the bottom quartile and decreased the wage index for all other hospitals.¹⁸⁸ Judge Marshall also seems to define the doctrine as turning on whether the agency made “major policy decisions” based on “modest words, vague terms, or subtle device[s]” or “oblique or elliptical language” which constituted a “‘radical or fundamental change’ to a statutory scheme.”¹⁸⁹ She concluded that the Low Wage Index Redistribution and Payment Reduction policies were major policy decisions and a fundamental change to the manner in which wage indexes are calculated.¹⁹⁰

In *Arizona v. Walsh*,¹⁹¹ Judge John J. Tuchi in the District of Arizona decided a challenge to the DOL’s rule raising the minimum wage for

181. *Id.* at 824.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. No. CV 20-6564-CBM-SP(X), 2022 WL 18278175 (C.D. Cal. Dec. 22, 2022).

188. *See id.*

189. *Id.* at *8.

190. *Id.* at *8–9.

191. No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023).

employees of federal contractors.¹⁹² Judge Tuchi’s analysis focused on regulatory history.¹⁹³ He found that the President’s asserted authority was not “novel” or “breathtaking,” noting that “presidents of both political parties have issued [similar] orders . . . pertaining to the compensation of contractors’ employees, including orders specifically setting requirements for their minimum wages.”¹⁹⁴ He also found relevant that this was “not a case in which an agency ha[d] relied on an ancillary statutory provision to exercise novel regulatory powers”¹⁹⁵ With regards to metrics of economic and political significance, Judge Tuchi explained that DOL’s rule would affect 1.8 million employees (roughly one percent of the national workforce), and approximately 327,300 of those workers would receive a wage increase in the first year of implementation.¹⁹⁶ However, he explained that “[f]or comparison, the Supreme Court did not apply the major questions doctrine in *Biden v. Missouri*,”¹⁹⁷ which concerned “a vaccine mandate affecting more than 10 million workers employed in facilities accepting federal Medicare and Medicaid funding.”¹⁹⁸ Second, he noted that DOL’s rule would have an economic impact of \$1.7 billion in projected annual transfers from employers to employees.¹⁹⁹ He found that this was “far less than the \$1 trillion reduction in GDP projected to result from the Clean Power Plan by 2040 [in *West Virginia*], or the \$50 billion the Supreme Court found to be a ‘reasonable proxy’ of the economic impact of the nationwide eviction moratorium [in *Alabama Realtors*].”²⁰⁰

Finally, *Alaska Industrial Development and Export Authority v. Biden*²⁰¹ involved an action against the Biden Administration’s moratorium on oil and gas leasing in the Arctic National Wildlife Refuge.²⁰² Judge Sharon L. Gleason did not define a framework of the doctrine but states that the doctrine applies to cases involving an “agency’s assertion of ‘sweeping authority’ such as a statutory interpretation that would allow an agency to ‘substantially restructure the American energy market’ or ‘cancel[] roughly \$430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers.’”²⁰³ In

192. *Id.*

193. *Id.*

194. *Id.* at *7.

195. *Id.*

196. *Id.* at *8.

197. 595 U.S. 87 (2022).

198. *Walsh*, 2023 WL 120966, at *8.

199. *Id.*

200. *Id.*

201. No. 3:21-CV-00245-SLG, 2023 WL 5021555 (D. Alaska Aug. 7, 2023).

202. *See id.*

203. *Id.* at *11.

contrast, Judge Gleason explained that the moratorium “affect[ed] only a total of nine oil and gas leases held by three lessees over a discrete portion of land in northern Alaska, and it is both temporary and limited in nature.”²⁰⁴

As the cases summarized above demonstrate, judges in the Ninth Circuit advanced at least four different frameworks of the major questions doctrine. Judge Bennett’s framework turned on whether the agency action constituted a “transformative expansion of regulatory authority.”²⁰⁵ Both Judge Alsup and Judge Marshall articulated frameworks of the doctrine that consider whether an agency made a “major policy decision” through “modest words, vague terms, or subtle devices” or “oblique or elliptical language” to affect a “radical or fundamental change to a statutory scheme.”²⁰⁶ Judge Tuchi defined the doctrine as applying where an “agency has relied on an ancillary statutory provision to exercise novel regulatory powers.”²⁰⁷ And, Judge Gleason defined the doctrine as applying to agency assertions of “sweeping authority.”²⁰⁸

In three of the four decisions—*Mayes v. Biden*, *Sweet v. Cardona*, and *Arizona v. Walsh*, judges focused their analyses on regulatory history and whether the action at issue represented a transformative change in authority.²⁰⁹ Both *Mayes v. Biden* and *Sweet v. Cardona* also explicitly rejected formulations of the doctrine that placed dispositive weight on economic and political significance.²¹⁰

Judges in the Ninth Circuit also differed in selecting metrics of economic significance. For example, Judge Alsup noted that the settlement at issue would discharge over six billion dollars in student debt but clarified that this was insufficient on its own to trigger the doctrine.²¹¹ Meanwhile, Judge Tuchi discussed two metrics—that the rule at issue would affect 1.8 million employees and have an economic impact of \$1.7 billion in projected annual transfers from employers to employees.²¹²

In contrast to some of the other lower court opinions, Judge Bennett rejected this reliance on metrics of economic and political significance: “the majority in *West Virginia* described the effect of the EPA action in that case as

204. *Id.*

205. *Mayes v. Biden*, 67 F.4th 921, 934 (9th Cir. 2023).

206. *Sweet v. Cardona*, 641 F. Supp. 3d 814, 824 (N.D. Cal. 2022); *Kaweah Delta Health Care Dist. v. Becerra*, No. CV 20-6564-CBM-SP(X), 2022 WL 18278175, at *8 (C.D. Cal. Dec. 22, 2022).

207. *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023).

208. *Id.* at *11.

209. *Mayes*, 67 F.4th at 932–33; *Sweet*, 641 F. Supp. 3d at 822–23; *Walsh*, 2023 WL 120966, at *7.

210. *Mayes*, 67 F.4th at 933; *Sweet*, 641 F. Supp. 3d at 824–254.

211. *Sweet*, 641 F. Supp. 3d at 821.

212. *Walsh*, 2023 WL 120966, at *8.

‘restructur[ing] the American energy market’ because it ‘represent[ed] a ‘transformative expansion in [its] regulatory authority.’”²¹³ The court did “not read that sentence to mean that restructuring a sector or seeking to regulate a significant portion of the American economy is sufficient by itself to trigger the major questions doctrine.”²¹⁴

D. Other Circuits

There have been fourteen additional cases discussing the major questions doctrine across the lower courts. These cases are all discussed below, with an emphasis on highlighting the variation in judges’ approaches to defining and applying the doctrine.

There has been one case discussing the doctrine in the First Circuit, *United States v. Freeman*,²¹⁵ which concerned a criminal prosecution of a defendant on charges related to the operation of an unlicensed money transmitting business.²¹⁶ Judge Joseph N. Laplante, a Republican appointee in the District of New Hampshire, cited Justice Gorsuch’s concurrence for the triggers of the doctrine, writing that the doctrine applies when an agency “claims the power to resolve a matter of great ‘political significance’ or end an ‘earnest and profound debate across the country,” “seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities,” or “seeks to intrud[e] into an area that is the particular domain of state law.”²¹⁷

In his analysis of economic significance, Judge Laplante noted that the relevant metric was not the “entire \$3 trillion virtual currency market” since the rule was directed at a fraction of market participants, and also noted that there was no evidence that the guidance would “require billions of dollars in spending by private persons or entities” or cause any other downstream consequences, such as job losses or increases in consumer prices.²¹⁸

There has also been one case in the Second Circuit discussing the doctrine. This case, *Securities Exchange Commission (SEC) v. Terraform Labs Pte. Ltd.*,²¹⁹ before Judge Jed S. Rakoff in the Southern District of New York, involved an SEC enforcement action against a crypto-asset company for fraud.²²⁰ Judge Rakoff wrote that the doctrine applies “where an agency

213. *Id.*

214. *Id.*

215. No. 21-CR-41-JL, 2023 WL 5391417 (D.N.H. Aug. 22, 2023).

216. *See id.*

217. *Id.* at *9.

218. *Id.*

219. No. 23-cv-1346 (JSR), 2023 WL 4858299 (S.D.N.Y. July 31, 2023).

220. *See id.*

claims the ‘power to regulate a significant portion of the American economy’ that has ‘vast economic and political significance.’²²¹ In contrast to Judge Laplante, Judge Rakoff looked to the significance of the industry that the SEC was regulating—the crypto-currency industry—and, comparing it to the industries at issues in the Court’s major questions doctrine precedents, concluded that it fell short of triggering the doctrine.²²² Judge Rakoff also explained that the SEC’s action was not a “transformative expansion in its regulatory authority” because it “align[ed] . . . with Congress’s expectations” of what the SEC regulates.²²³

The Fourth Circuit has decided one case discussing the doctrine, and district court judges in the Fourth Circuit have decided two cases discussing the doctrine. The Fourth Circuit case, *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston L.L.C.*,²²⁴ involved a challenge brought by a conservation group against a commercial fishing company pursuant to the Clean Water Act’s citizen-suit provision.²²⁵ Writing for the court, Judge Julius N. Richardson named five triggers of the doctrine.²²⁶ First, the “question must have significant political and economic consequences.”²²⁷ A second “hallmark is when the Act’s structure indicates that Congress did not mean to regulate the issue in the way claimed”²²⁸ or when “there is a different, “distinct regulatory scheme” already in place to deal with the issue which would conflict with the agency’s newly asserted authority.”²²⁹ Third, courts are also “more hesitant to recognize new-found powers in old statutes against a backdrop of an agency failing to invoke them previously.”²³⁰ Fourth, “when the asserted power raises federalism concerns.”²³¹ Fifth, when the “asserted authority falls outside the agency’s traditional expertise,” “or is found in an ‘ancillary provision.’”²³² Judge Richardson explained that while

221. *Id.* at *8.

222. *Id.*

223. *Id.*

224. 76 F.4th 291, 296 (4th Cir. 2023).

225. *Id.* at 296–97.

226. *Id.* at 296.

227. *Id.*

228. *Id.* at 297.

229. *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–46, (2000)).

230. *Id.* (first citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022); then citing *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022)).

231. *Id.* (citing *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–73, 174 (2001)). See also *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

232. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston L.L.C.*, 76 F.4th 291, 297 (4th

these “indicators are non-exhaustive and need not be present in every major-questions case, they are among the things that cause us to hesitate and look for clear congressional authorization before proceeding.”²³³

In contrast, in *Miller v. Garland*,²³⁴ Judge Rossie D. Alston in the Eastern District of Virginia defined the doctrine as turning on three factors. This case involved a challenge to the ATF’s rule, clarifying that weapons equipped with a stabilizing brace, which had previously evaded regulation, qualified under the definition of a “rifle” under the National Firearms Act.²³⁵ Judge Alston explained that the doctrine applies to “‘novel’ interpretations of ‘ancillary statutes’” and identified three factors that the Supreme Court has considered in applying the doctrine: “(1) whether the challenged action is outside the agency’s traditional field of expertise, (2) whether it intrudes on matters typically governed by state law, and (3) whether Congress has already expressly considered and rejected the measure.”²³⁶ The second factor appears to come from Justice Gorsuch’s concurrence, although Judge Alston does not cite Justice Gorsuch’s concurrence.²³⁷

Finally, Judge Robert C. Chambers in the Southern District of West Virginia took yet another approach in *GenBioPro, Inc. v. Sorsaia*.²³⁸ This case involved a challenge to West Virginia’s Unborn Child Protection Act as unlawfully restricting the sale of mifepristone in West Virginia.²³⁹ Judge Chambers defined the doctrine as applying to “decisions of vast economic and political significance.”²⁴⁰ He “does not dispute the serious social, ethical, economic, and political issues implicated by abortion.”²⁴¹ Yet, he determines that FDA’s rule regulating access to mifepristone does not trigger the doctrine because “[t]he seminal major questions cases all involved novel agency interpretations of long-standing ambiguous regulatory provisions as major grants of authority to reconfigure large aspects of the economy,”²⁴² and, in contrast, FDA’s rule “does not ‘effect a fundamental revision of the statute, changing it

Cir. 2023) (first citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); then citing *West Virginia*, 142 S. Ct. at 2610).

233. *N.C. Coastal Fisheries Reform Grp.*, 76 F.4th at 297.

234. No. 123CV195RDAJFA, 2023 WL 3692841 (E.D. Va. May 26, 2023).

235. *Id.* at *1. The Court is considering granting the petition for certiorari in this case.

236. *Id.* at *9.

237. *West Virginia v. EPA*, 142 S. Ct., 2587, 2621 (2022) (Gorsuch, J., concurring); see also *Brunstein & Goodson*, *supra* note 5, at 94–95.

238. No. CV 3:23-0058, 2023 WL 5490179 (S.D.W. Va. Aug. 24, 2023).

239. *Id.*

240. *Id.* at *4.

241. *Id.*

242. *Id.*

from one sort of scheme of regulation into an entirely different kind.”²⁴³

In the Sixth Circuit, there were two circuit opinions²⁴⁴ and three opinions from district court judges discussing the doctrine.²⁴⁵ Judge Joan Larsen in *Kentucky v. Biden*,²⁴⁶ and Judge David Bunning in *United States v. Sadrinia*²⁴⁷ dismissed the major questions doctrine argument out of hand and did not define the doctrine.²⁴⁸ Judge Richard Griffin in *Allstates Refractory Contractors, L.L.C. v. Su*²⁴⁹ and Judge Travis McDonough in *Tennessee v. U.S. Dep’t of Agriculture*²⁵⁰ both defined the doctrine as turning on “the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion.”²⁵¹ Finally, in *Niblock v. University of Kentucky*,²⁵² Judge Karen K. Caldwell, defined the doctrine as applying to agency actions “of vast economic and political significance.”²⁵³ Judge Caldwell, who is a Republican appointee, also seemingly relied on Justice Gorsuch’s concurrence in stating that “[c]ourt need not assess the [rule’s] scope or impact on the nation (whether it involves a matter of great political significance, vast economic regulation, or intrusion upon state sovereignty).”²⁵⁴

In the Eighth Circuit, the District of North Dakota decided *West Virginia v. EPA*,²⁵⁵ in which plaintiffs sought a preliminary injunction against the implementation of the EPA’s rule revising the definition of “Waters of the

243. *Id.*

244. *Kentucky v. Biden*, 57 F.4th 545 (6th Cir. 2023) (involving a challenge to President Biden’s Contractor Vaccine Mandate); *Allstates Refractory Contractors, L.L.C. v. Su*, 79 F.4th 755 (6th Cir. 2023).

245. *United States v. Sadrinia*, No. CR 22-28-DLB-CJS, 2023 WL 3854054 (E.D. Ky. June 6, 2023); *Tennessee v. USDA*, No. 3:22-CV-257, 2023 WL 3048342 (E.D. Tenn. Mar. 29, 2023); *Niblock v. Univ. of Ky.*, No. CV 5:19-394-KKC, 2023 WL 4997678 (E.D. Ky. Aug. 4, 2023).

246. 57 F.4th 545 (6th Cir. 2023).

247. No. CR 22-28-DLB-CJS, 2023 WL 3854054 (E.D. Ky. June 6, 2023).

248. *Kentucky v. Biden*, 57 F.4th at 555 n.2 (“Because we are confident that the plain language of the [] Act does not authorize the contractor mandate under any standard, we need not decide whether this is the kind of ‘extraordinary case’ that would warrant a higher standard.” (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022)); *see also* *Allstates Refractory Contractors, L.L.C. v. Su*, 79 F.4th 755, 767 n.3 (6th Cir. 2023).

249. 79 F.4th 755 (6th Cir. 2023).

250. No. 3:22-CV-257, 2023 WL 3048342 (E.D. Tenn. Mar. 29, 2023).

251. *Id.* at *25; *Su*, F.4th at 767 n.3 (quoting *West Virginia*, 142 S. Ct. at 2608).

252. No. CV 5:19-394-KKC, 2023 WL 4997678 (E.D. Ky. Aug. 4, 2023).

253. *Niblock*, 2023 WL 4997678, at *3.

254. *Id.*

255. No. 3:23-CV-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023).

United States” (WOTUS) under the Clean Water Act.²⁵⁶ Judge Daniel Hovland defined the doctrine as prohibiting agencies from “exercis[ing] regulatory power ‘over a significant portion of the American economy’ or ‘mak[ing] a radical or fundamental change to a statutory scheme.’”²⁵⁷

There has been one case in the Tenth Circuit discussing the doctrine, *Huck v. United States*,²⁵⁸ which was a district court opinion from Judge Robert Shelby in the District of Utah. Judge Shelby in the District of Utah concluded that the doctrine did not apply to the Bureau of Land Management’s regulations restricting motor vehicle access to certain public lands.²⁵⁹ Judge Shelby explains that the doctrine applies to “broad exercise[s] of [agency] authority” but does not undergo a major questions analysis, instead concluding that the agency had clear congressional authorization.²⁶⁰

The Eleventh Circuit has decided two cases discussing the doctrine. In *West Virginia v. U.S. Department of the Treasury*,²⁶¹ Judge Robin S. Rosenbaum dissented from a denial of a rehearing en banc of a decision regarding a tax offset provision in the American Rescue Plan Act.²⁶² In a lengthy analysis, Judge Rosenbaum suggests that the doctrine applies “where an agency repurposed a statute to serve a new aim not articulated by Congress,” where an “agency invo[kes] ‘extravagant statutory power over the national economy,’ affecting a broad swath of the economy not previously regulated by the agency,” or when both these conditions are present.²⁶³ And in *Georgia v. President of the United States*,²⁶⁴ which was another challenge to the Contractor Vaccine Mandate, Judge Britt C. Grant concluded that the Mandate violated the major questions doctrine without undergoing any sort of analysis.²⁶⁵

CONCLUSION

Surveying lower court decisions in the year following *West Virginia* reveals that there is no one major questions doctrine in the lower courts. Lower courts exhibited significant variation in their articulations and applications of the doctrine both within and across circuits. It appears that lower courts have read

256. *West Virginia v. EPA*, No. 3:23-CV-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023).

257. *Id.* at *15 (quoting *West Virginia*, 142 S. Ct. at 2608–09).

258. No. 222CV00588RJSDBP, 2023 WL 6163615 (D. Utah Sept. 21, 2023).

259. *Id.* at *13.

260. *Id.*

261. 82 F.4th 1068 (11th Cir. 2023).

262. *Id.* at 1088–93 (Rosenbaum, J., dissenting).

263. *Id.* at 1090–91.

264. 46 F.4th 1283 (11th Cir. 2022).

265. *Id.* at 1295–96 (citing *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022)).

West Virginia as providing vast discretion in applying the doctrine, treating the doctrine as little more than a grab-bag of factors at their disposal. And, in most cases concerning Biden Administration agency actions and executive orders, judges appear to apply the doctrine to reach outcomes that appear to align with the partisan preferences of the judge's appointing President.