

Regulatory Antecedents and the Major Questions Doctrine

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*In recent years, federal courts have increasingly assessed the legality of regulatory action by considering its antecedents, or lack thereof, in prior agency actions. In several notable Supreme Court decisions—most recently, in *West Virginia v. Environmental Protection Agency*—a majority of justices have expressed skepticism of agency authority when “an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.” District and appellate courts have relied on this language to strike down numerous agency actions dating back to 2014.*

Yet federal agencies have insufficiently adapted to this increased judicial focus on regulatory antecedents. While significant agency rulemakings typically include extensive dockets with many different types of analysis, they have generally provided limited analysis of regulatory antecedents. When agencies do provide relevant analysis, as they have for several recent proposals that have met objections under the major questions doctrine, such analysis often fails to catalog key regulatory antecedents or is insufficiently targeted to legal objections from opponents of the policy. In some actions, the only explicit discussion of the Supreme Court’s emphasis on agency exercise of “unheralded power” comes from dissenting commissioners on a multi-member agency.

This Article suggests that agencies more extensively catalog regulatory antecedents at all stages of the rulemaking process, from drafting to promulgation. By assessing antecedents in regulatory proposals, agencies can more fully lay the foundation for their authority and facilitate targeted comments that consider whether the antecedents offered by the agency support the proposed action. This will enable an even more complete analysis of regulatory antecedents in the final rulemaking, including responses to legal objections, which will provide government litigators with a roadmap for responding to claims that the agency action is unheralded and thereby reduce the vulnerability of agency action under the major questions doctrine.

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Introduction

In *Utility Air Regulatory Group v. Environmental Protection Agency (UARG)*, the Supreme Court announced that “[w]hen 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.”¹ The Court’s newly-stated emphasis on regulatory novelty to assess the legality of agency action marked an important development in what has since become known as the “major questions doctrine.”²

In *UARG*, decided in 2014, the Court held that the Environmental Protection Agency (EPA) lacked authority to require permitting of stationary sources based solely on the emission of greenhouse gases.³ While parts of the decision rested on more traditional tools of statutory interpretation,⁴ the Court also noted that it was “reluctant to read into ambiguous statutory text” the “unheralded power” that EPA’s interpretation effectively asserted over the “construction and modification of tens of thousands, and the operation of millions, of small sources nationwide.”⁵ According to the Court, the fact that EPA had never previously claimed authority over nearly so many sources offered strong evidence that the Clean Air Act did not delegate that authority.

The Supreme Court has since interpreted *UARG*—and, in particular, its focus on regulatory novelty—as canonical to the nascent major questions doctrine.⁶ Since *UARG*, the Court has applied that doctrine three times to hold agency action unlawful.⁷ In each decision—all issued since August 2021—the Court emphasized what it characterized as a lack of regulatory antecedents for the challenged action.⁸ That emphasis was most pronounced in *West Virginia v. Environmental Protection Agency*,⁹ in which the Court formally announced the “major questions doctrine” and centralized regulatory novelty within the doctrine.¹⁰

¹ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) [*UARG*] (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

² The Supreme Court used the label “major questions doctrine” for the first time in a majority opinion in June 2022, in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). That case identified several previous Supreme Court decisions, including *UARG*, as falling within the doctrine. It twice quoted *UARG*’s “unheralded power” language, *id.* at 2608, 2610, and as detailed further below, focused extensively on the supposed lack of regulatory antecedents for the regulation at issue, *id.* at 2610–12.

³ *UARG*, 573 U.S. at 333.

⁴ *See id.* at 332–33.

⁵ *Id.* at 324.

⁶ *See supra* note 2.

⁷ The Supreme Court also applied the major questions doctrine in *King v. Burwell*, 576 U.S. 473 (2015), which upheld the availability of tax credits under the Affordable Care Act in states that had a federal exchange.

⁸ *West Virginia*, 142 S. Ct. at 2610–12; *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022); *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

⁹ Of the three Supreme Court decisions between 2021 and 2022 cited in the prior footnote, *West Virginia* was also the only opinion that was not issued per curiam.

¹⁰ *E.g. West Virginia*, 142 S. Ct. at 2610 (defining “a major questions case” in part as one in which an agency “‘claim[s] to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority’”) (quoting *UARG*, 573 U.S. at 324).

While the contours of the major questions doctrine are still being defined,¹¹ the concept of regulatory novelty plays an important role in the doctrine under both Supreme Court precedent and lower-court application.¹² If an action represents a marked and substantial departure from anything the agency has done before (i.e., is “unheralded”), then this could favor the application of the major questions doctrine to strike down the challenge action—so long as the doctrine’s other prongs are met. If, however, the agency can point to analogous exercises of authority in the past, such a showing could strongly support the agency’s statutory authority for the challenged action.¹³

Given the Court’s focus on regulatory antecedents, agencies implementing contentious policies that could be vulnerable under the major questions doctrine have a strong incentive to identify relevant antecedents. Yet for several key recent policy proposals—issued after the Court’s focus on regulatory antecedents became clear—agencies have focused limited attention on identifying relevant antecedents and failed to explicitly address objections that the agency is asserting “unheralded power.” This omission leaves much of the work of identifying relevant antecedents to public commenters. While supportive commenters can sometimes offer helpful regulatory antecedents for the agency to discuss in its final rule, such work should not fall principally on commenters and should instead be conducted by the agency itself. Identifying relevant antecedents at the proposal stage is particularly useful as it will allow the agency to consider more targeted rebuttals to the relevance of particular antecedents, and to better structure its final action and legal justification to limit legal vulnerability.

Agencies can better anticipate and respond to objections that they are exercising “unheralded power” by identifying and documenting relevant regulatory antecedents early and throughout the rulemaking process. Doing so has numerous advantages. By assessing regulatory antecedents before the proposal stage, agencies could weigh the legal vulnerabilities of competing regulatory approaches and perhaps fine-tune their regulatory approach. By detailing those antecedents in the proposed rule, agencies would effectively invite more targeted comments on the relevance of regulatory antecedents that the agency could consider and respond to when finalizing the rule. And by responding to relevant objections and further detailing antecedents at the final rulemaking stage, agencies can provide a roadmap for the legal defense of those rules in court against claims of “unheralded power.” While litigators could of course hone the agency’s argument, agency attorneys involved in the regulatory process will often have more time and subject-matter expertise to identify regulatory antecedents.

¹¹ E.g., Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 966–67 (2021) (“Scholars have struggled to discern any coherent principle behind the doctrine. Those who have attempted to define the doctrine have come to different conclusions about what the major questions doctrine is, and even which cases fall within its domain in the first place.”).

¹² See *infra* Part I.

¹³ Cf. *Smiley v. Citibank*, 517 U.S. 735, 740 (1996) (“[A]gency interpretations that are . . . long standing come . . . with a certain credential of reasonableness, since it is rare that error would long persist.”). See also *infra* Part I for cases in which the reviewing court upheld an agency action on the basis that it was not “unheralded.”

This Article proceeds in three parts. Part I traces the rise of an “unheralded power” analysis in the courts, describing the focus on regulatory novelty over the past decade in both the Supreme Court and in lower federal courts. Part II looks at how agencies have responded to this judicial focus on regulatory novelty. It provides two case studies of agency actions proposed in the past year, after the Supreme Court had emphasized the significance of regulatory antecedents: the Securities and Exchange Commission’s climate-disclosure regulation and the Federal Energy Regulatory Commission’s policy statements for natural gas pipelines. In both instances, dissenting commissioners disputed the statutory authority for the proposed action, invoking the major questions doctrine and claiming that the agency was asserting unheralded power. Yet both times, the proposal offered limited regulatory antecedents in response to these objections. Instead, commenters identified key regulatory antecedents for the proposed action—antecedents that, if included in the final agency action, would offer strong support for that action in subsequent legal challenges. Part III suggests that agencies more consistently and robustly document regulatory antecedents throughout the rulemaking process, including a detailed discussion of relevant antecedents at the proposal stage. This Part identifies numerous advantages to assessing and describing relevant antecedents throughout the rulemaking process and offers recommendations on the types of antecedents for agencies to consider.

I. The Significance of Regulatory Novelty in Judicial Review

This Part traces the rising importance in recent years of regulatory novelty in judicial review. It begins by discussing five Supreme Court cases in which the Court has focused on the novelty of the regulatory action. As these cases demonstrate, the Court considers the “unheralded” nature of an agency action to be a core component of the major questions doctrine. The Court particularly emphasized the significance of regulatory novelty this past term in *West Virginia v. Environmental Protection Agency* and in two per curiam opinions striking down high-profile public-health regulations. This Part then traces the consideration of regulatory novelty and attention to agency exercise of “unheralded power” in federal appellate and district courts.

All told, this Part demonstrates that, over the past decade, the courts have become increasingly focused on regulatory novelty, and that the fate of numerous regulations has turned in significant part on whether the reviewing court considered those regulations to be unprecedented.¹⁴ Following *West Virginia*, that focus on regulatory novelty is likely to continue over the coming years.

¹⁴ Scholars Leah M. Litman and Daniel T. Deacon have also traced the heightened focus on anti-novelty in judicial jurisprudence, tying it to the constitutional anti-novelty principle that Litman has previously identified. See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. ___, manuscript at 49–50 (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724/ (“Similar to the origins of the constitutional anti-novelty rhetoric, the regulatory anti-novelty rhetoric began with the passing observation, in *FDA v. Brown & Williamson*, that the agency had asserted a new and different authority to regulate the tobacco industry. . . . Since *Brown & Williamson*, the novelty of an agency’s regulation has increasingly featured in the Court’s major question cases and has also taken on additional significance. It has now hardened into a central principle guiding the application of the doctrine.”).

A. Consideration of Regulatory Novelty in the Supreme Court

The Supreme Court’s modern focus on regulatory “unheralded power” begins, in a sense, with a case in which it did not deploy the term: *Food & Drug Administration v. Brown & Williamson Tobacco Corporation*.¹⁵ In that 2000 decision, the Court confronted the Food and Drug Administration’s (FDA) newfound determination that tobacco products fall under its jurisdiction pursuant to the Food, Drug, and Cosmetic Act (FDCA) and concurrent regulations restricting the sale and distribution of tobacco to minors.¹⁶ The Court ruled against the FDA, concluding “that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”¹⁷

The Court relied on three primary and interrelated rationales for rejecting the FDA’s claimed authority to regulate tobacco.¹⁸ First, the Court identified inconsistencies between the FDA’s purported authority and the FDCA’s text, structure, and purpose,¹⁹ concluding “that were the FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them.”²⁰ Second, the Court discussed the significance of historical legislation involving tobacco, concluding that Congress “has foreclosed the removal of tobacco products from the market”²¹ and instead, through a series of statutes passed since the 1960s, regulated tobacco through more targeted measures.²² Third, and most relevant here, the Court recognized that this legislation occurred “against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco” in most circumstances.²³ Although the FDA’s previous positions were “not determinative” by themselves, the Court found them “relevant to understanding . . . the background against which Congress enacted subsequent tobacco-specific legislation.”²⁴ The inconsistency between the FDA’s newfound and prior position—and the fact that Congress had passed numerous statutes related to tobacco against the backdrop of that longstanding prior position—led the Court to conclude that Congress had not granted the FDA authority to regulate tobacco.

¹⁵ 529 U.S. 120, 159 (2000). The Supreme Court quoted from *Brown & Williamson* for its pronouncement in *UARG* that “[w]hen 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.” *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159).

¹⁶ *Brown & Williamson*, 529 U.S. at 126 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996)).

¹⁷ *Id.*

¹⁸ See generally Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 318, 326–37 (2022) (outlining three rationales).

¹⁹ *Brown & Williamson*, 529 U.S. at 133–37.

²⁰ *Id.* at 137.

²¹ *Id.*

²² *Id.* at 137–43 (collecting and analyzing numerous statutes evincing “the collective premise . . . that cigarettes and smokeless tobacco will continue to be sold in the United States,” such that “[a] ban of tobacco products by the FDA would therefore plainly contradict congressional policy”).

²³ *Id.* at 144.

²⁴ *Id.* at 147.

Whereas the Court’s focus on regulatory novelty in *Brown & Williamson* was nuanced and narrow, the Court expressed a somewhat broader skepticism of novel regulatory approaches fourteen years later in *UARG*. In that case, the Court confronted the legality of EPA regulations that subjected stationary sources to the permitting requirements of specific Clean Air Act provisions based solely on their emission of greenhouse gases.²⁵ EPA had previously regulated greenhouse gas emissions from motor vehicles and, as EPA interpreted the statute, this automatically subjected stationary sources to Clean Air Act regulation on the basis of their greenhouse gas emissions.²⁶ Under those stationary-source provisions, however, regulation is triggered for sources emitting or having the potential to emit as few as 100 tons per year²⁷—a threshold that, if applied to greenhouse gases, would newly subject to regulation millions of small stationary sources.²⁸ EPA accordingly issued a regulation known as the Tailoring Rule that substantially raised the emission threshold for stationary-source permitting for greenhouse gas emissions, ensuring a manageable number of regulated sources.²⁹

In *UARG*, the Supreme Court rejected the Tailoring Rule—and, more broadly, EPA’s authority to regulate stationary sources under the relevant provisions based only on their emission of greenhouse gases. To reject the Tailoring Rule, the Court relied on the Clean Air Act’s plain language, concluding that the emission thresholds that EPA adopted were incompatible with those provided by statute and amounted to a “rewriting of the statutory” text.³⁰ For the broader conclusion about EPA’s authority, the Court relied on the Clean Air Act’s “structure and design,” finding “no doubt that the [relevant statutory provisions] are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources.”³¹ The Court further noted that “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.”³² Partially quoting from *Brown and Williamson*, the Court announced: “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.”³³ This characterization broke from *Brown & Williamson*’s more nuanced approach to regulatory novelty and suggested a broader skepticism of regulatory “unheralded power” that would come to form the basis of the major questions doctrine in subsequent decisions.

²⁵ *UARG*, 573 U.S. at 333.

²⁶ *See id.* at 310.

²⁷ *Id.* at 309–10.

²⁸ *Id.* at 322 (stating that “annual permit applications would jump from about 800 to nearly 82,000” under Prevention of Significant Deterioration program and “from fewer than 15,000 to about 6.1 million” under Title V under strict adherence to statutory emission thresholds) ((citing Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,557, 31,562–63 (June 3, 2010) [hereinafter Tailoring Rule]).

²⁹ *Id.* at 312 (citing Tailoring Rule, 75 Fed. Reg. 31,514).

³⁰ *Id.* at 325.

³¹ *Id.* at 322.

³² *Id.* at 324.

³³ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159).

Those subsequent decisions came in 2021 and 2022, through a series of three opinions striking down environmental and public-health regulations. Two of those decisions were relatively short per curiam opinions issued after expedited briefing. First, in *Alabama Association of Realtors v. Department of Health & Human Services*, the Court blocked the Center for Disease Control and Prevention’s (CDC) nationwide eviction moratorium for tenants in financial need located in counties experiencing high levels of COVID-19 transmission.³⁴ The CDC had issued the moratorium under a provision of the Public Health Service Act that, as the Court characterized it, “authorizes [CDC] to implement measures like fumigation and pest extermination.”³⁵ Though the Court’s analysis was brief, it pointed to the statutory text, the breadth of asserted power, and the unheralded nature of that assertion under the applicable statutory provision.³⁶ On the latter point, the Court explained that CDC’s “claim of expansive authority under [the applicable statutory provision] is unprecedented. Since that provision’s enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.”³⁷

Next, in *National Federation of Independent Business v. Department of Labor*, the Court blocked an Occupational Safety and Health Administration (OSHA) regulation mandating that large employers require eligible employees to either be vaccinated against COVID-19 or undergo regular testing and masking.³⁸ The Court’s brief analysis begins by addressing the text of the Occupational Safety and Health Act of 1970, stating that the statute addresses “hazards that employees face at work” and therefore does not permit broader regulation of COVID-19 that “is not an *occupational* hazard in most.”³⁹ Highly relevant to the Court’s analysis was its finding “that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace.”⁴⁰ The Court dismissed the relevance of regulatory antecedents offered in the dissenting opinion such as “a fire or sanitation regulation imposed by the agency,” differentiating “a vaccine mandate” as “strikingly unlike the workplace regulations that OSHA has typically imposed” because it “cannot be undone at the end of the workday.”⁴¹ The Court found that this “lack of historical precedent, coupled with the breadth of authority” claimed, served as a “telling indication” that OSHA’s regulation exceeded its authority.⁴²

Most recently,⁴³ in *West Virginia v. Environmental Protection Agency*, the Supreme Court reaffirmed its focus on regulatory novelty from prior cases and centralized that focus

³⁴ 141 S. Ct. 2485 (2021).

³⁵ *Id.* at 2486.

³⁶ *Id.* at 2488–89.

³⁷ *Id.* at 2489. The Court did not specifically quote *UARG*’s “unheralded power” language.

³⁸ 142 S. Ct. 661 (2022).

³⁹ *Id.* at 665.

⁴⁰ *Id.* at 666.

⁴¹ *Id.* at 665 (internal quotation marks omitted). In the first paragraph of the opinion, the Court also noted that “OSHA has never before imposed such a mandate.” *Id.* at 662.

⁴² *Id.* at 666 (cleaned up).

⁴³ On the same day that the Supreme Court issued *National Federation of Independent Business*, it also issued a decision in *Biden v. Missouri* upholding a Department of Health and Human Services regulation requiring facilities

within its newly-articulated major questions doctrine.⁴⁴ In dispute in the case was the Clean Power Plan, a 2015 regulation from the EPA issued under Section 111(d) of the Clean Air Act aimed at reducing greenhouse gas emissions from the power sector.⁴⁵ Section 111(d) authorizes EPA to issue “standards of performance” for existing stationary sources for certain types of pollutants.⁴⁶ The statute defines a “standard of performance,” in relevant part, as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction.”⁴⁷

In the Clean Power Plan, EPA defined the “best system of emission reduction” for greenhouse gases from the power sector through a combination of three approaches, or “building blocks.”⁴⁸ The first and least contentious of these building blocks involved certain technological improvements at coal-fired power plants.⁴⁹ The second and third building blocks relied on an approach called “generation shifting,” in which power generation shifts from higher- to lower-emitting power sources.⁵⁰ Specifically, the second building block envisioned that generation would incrementally shift from coal-fired power plants to lower-emitting gas-fired power plants; the third building block envisioned that generation would incrementally shift from those fossil-fuel plants to zero-emitting renewable-energy power sources.⁵¹ Having identified these three building blocks as the “best system of emission reduction,” EPA then imposed emissions limits for the power sector that could be achieved through these approaches.⁵²

receiving Medicare and Medicaid funding to ensure that their staff is vaccinated against COVID-19. 142 S. Ct. 647 (2022). While the decision does not invoke the major questions doctrine, it finds that the regulation is consistent with the agency’s “longstanding practice” requiring participants “to satisfy a host of conditions that address the safe and effective provision of healthcare,” and in particular the agency’s imposition of “conditions of participation that relate to the qualifications and duties of healthcare workers themselves.” *Id.* at 652–53.

⁴⁴ 142 S. Ct. 2587 (2022).

⁴⁵ *Id.* at 2602 (citing Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) [hereinafter Clean Power Plan]). The procedural posture of *West Virginia* is far more complicated than the other cases discussed in this section, for reasons that do not affect its implications for this article. EPA promulgated the Clean Power Plan in 2015, but the rule was stayed by the Supreme Court and did not take effect. *Id.* at 2604 (citing *West Virginia v. EPA*, 577 U.S. 1126 (2016)). After the Trump administration took office, EPA repealed the Clean Power Plan in 2019, concluding that the Plan was issued “in excess of its statutory authority.” *Id.* (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. 32,520, 32,523 (July 8, 2019)). The U.S. Court of Appeals for the D.C. Circuit subsequently vacated that repeal, finding that EPA had the authority to issue the Clean Power Plan in the first place. *Id.* at 2605 (citing *Am. Lung Ass’n v. Env’t Prot. Agency*, 985 F.3d 914, 988 (D.C. Cir. 2021)). *West Virginia* was the appeal of that D.C. Circuit decision.

⁴⁶ 42 U.S.C. § 7411(d).

⁴⁷ *Id.* § 7411(a)(1). The provision also requires that the system be “adequately demonstrated” and that EPA “tak[e] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.”

⁴⁸ *West Virginia*, 142 S. Ct. at 2593 (citing Clean Power Plan, 80 Fed. Reg. at 64,667).

⁴⁹ *Id.* (citing Clean Power Plan, 80 Fed. Reg. at 64,727).

⁵⁰ *Id.*

⁵¹ *Id.* (citing Clean Power Plan, 80 Fed. Reg. at 64,667, 64,729, 64,748).

⁵² *Id.* (citing Clean Power Plan, 80 Fed. Reg. at 64,797–811).

In *West Virginia*, the Court held that Section 111(d) does not permit EPA to premise its emissions limits under that provision on the reductions achievable through generation shifting. Rather than begin with the statutory text as it mostly had in the decisions analyzed above, the Court discussed each of those decisions (and several others⁵³) to identify a canon of “extraordinary cases” involving “regulatory assertions [that] had a colorable textual basis” but in which ““common sense as to the manner in which Congress would have been likely to delegate” such power to the agency at issue . . . made it very unlikely that Congress had actually done so.”⁵⁴ Among other common features of those prior decisions, the Court pointed to the “unprecedented”⁵⁵ and “unheralded”⁵⁶ nature of the challenged regulations⁵⁷ as a reason for “reluctance” to read the claimed authority “into ambiguous statutory text.”⁵⁸ The Court labeled this “identifiable body of law” as the “major questions doctrine.”⁵⁹

Turning to the Clean Power Plan, the Court then explained that “this is a major questions case” in which “EPA claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority.”⁶⁰ The Court began by emphasizing the Clean Power Plan’s unprecedented nature, claiming that “[p]rior to 2015, EPA had always set emissions limits under Section 111” premised on the emission reductions achievable through at-the-source pollution controls and not on generation shifting.⁶¹ The Court dismissed one counter-example offered by EPA in litigation—a 2005 mercury regulation that set a sector-wide emissions cap rather than mandate controls for individual sources⁶²—on the basis that the 2005 rule supposedly “set the cap based on the application of particular controls” that could be installed at individual plants (a characterization the dissent disputed).⁶³ The Court also pointed to EPA’s longstanding preference for a “technology-based approach” since the Clean Air Act’s passage.⁶⁴

⁵³ *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

⁵⁴ *West Virginia*, 142 S. Ct. at 2609 (quoting *Brown & Williamson*, 529 U.S. at 133) (cleaned up).

⁵⁵ *Id.* at 2608 (quoting *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489).

⁵⁶ *Id.* (quoting *UARG*, 573 U.S. at 324).

⁵⁷ The Court also quoted its prior recognition in *National Federation of Independent Business* that “‘OSHA, in its half century of existence,’ had never relied on its authority to regulate occupational hazards to impose such a remarkable measure” as it did in the COVID-19 vaccine-or-test rule. *Id.* at 2608–09 (quoting 142 S. Ct. at 666).

⁵⁸ *Id.* at 2609.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2610 (cleaned up) (quoting *UARG*, 573 U.S. at 324).

⁶¹ *Id.*

⁶² *Id.* (citing Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) [hereinafter Mercury Rule]). The dissent disputed this characterization, explaining that “the approval of cap and trade [in the Mercury Rule] allowed EPA to make the emissions limits more stringent than it otherwise could have, because EPA knew that plants unable to cost-effectively install scrubbers could instead meet the limits through generation shifting.” *Id.* at 2639–40 (citing Mercury Rule, 70 Fed. Reg. at 28,619). It also highlighted numerous instances in which EPA had relied on generation shifting under other Clean Air Act provisions. *Id.* at 2640 (Kagan, J., dissenting) (collecting regulations). The majority opinion did not directly respond to the dissent’s characterization of the Mercury Rule. In a footnote, it also dismissed the relevance of the other antecedents offered by the dissent, characterizing them as “inapposite” because they “were not Section 111 rules.” *Id.* at 2611 n.1 (majority opinion).

⁶³ *Id.*

⁶⁴ *Id.* at 2611.

As *West Virginia* makes clear, regulatory novelty is now embedded as one of the core aspects of the major questions doctrine. For the doctrine to apply, the Court explained, a regulation must be both “unprecedented” and “effect[ly] a fundamental revision of the statute.”⁶⁵ Thus, while regulatory novelty by itself does not trigger the major questions doctrine or invalidate an agency regulation, it is a key factor that courts will consider when assessing the doctrine’s application and the regulation’s legality.

B. Consideration of Regulatory Novelty in Appellate and District Courts

It is not only the Supreme Court that has focused on regulatory novelty in recent years. Following the Court’s lead, federal appellate and district courts have also begun assessing the legality of agency action based in part on the novelty of that action and whether it asserts “unheralded power.” As of November 2022, more than two dozen federal appellate and district court decisions have cited *UARG*’s “unheralded power” language.⁶⁶ In most of those opinions, the citation was part of a discussion as to whether the agency was exercising unprecedented authority that factored into the court’s decision on the legality of the challenged action.

Consideration of the “unheralded” nature of agency action has been used to strike down (either vacate or enjoin) high-profile agency actions under the Obama, Trump, and Biden administrations. These include the Obama administration’s Fiduciary Rule to broaden regulation of investment advice related to pensions and retirement plans⁶⁷ and regulations of hydraulic fracturing on federal lands;⁶⁸ actions taken under the Trump administration to require drug

⁶⁵ *Id.* at 2612 (cleaned up). After assessing the Clean Power Plan’s novelty, the Court then addressed this second prong of the major questions doctrine. *See id.* at 2612–14.

⁶⁶ A search on WestLaw for cases citing *UARG* and using the phrase “unheralded power” yields 29 results. Of those 29 results, one is a state court opinion and another is the Supreme Court’s decision in *West Virginia*. Of the other 27 results, 15 are from federal district courts and 12 are from federal appellate courts. One of the appellate court decisions is the D.C. Circuit opinion on the rescission of the Clean Power Plan, which the Supreme Court overturned in *West Virginia*. *Am. Lung Ass’n v. Env’t Prot. Agency*, 985 F.3d 914, 964 (D.C. Cir. 2021). One of the 12 appellate court decisions citing *UARG*’s “unheralded power” language overturns one of the 15 district court decisions citing this same language. *Chamber of Com. of United States of Am. v. United States Dep’t of Lab.*, 885 F.3d 360, 381 (5th Cir. 2018); *Chamber of Com. of the United States of Am. v. Hugler*, 231 F. Supp. 3d 152, 179 (N.D. Tex. 2017). One of the 12 appellate decisions affirms one of the 15 district decisions. *Merck & Co. v. United States Dep’t of Health & Hum. Servs.*, 962 F.3d 531 (D.C. Cir. 2020); *Merck & Co. v. United States Dep’t of Health & Hum. Servs.*, 385 F. Supp. 3d 81, 97 (D.D.C. 2019). The 12 appellate decisions also include two Sixth Circuit dissenting opinions on the legality of the OSHA vaccine-or-test regulation that the Supreme Court resolved in *National Federation of Independent Business*, as well as two Fifth Circuit decisions on the Deferred Action for Parents of Americans and Lawful Permanent Residents program. *In re MCP NO. 165*, 21 F.4th 357, 397 (6th Cir. 2021) (Larsen, J., dissenting) (OSHA rule); *In re MCP No. 165*, 20 F.4th 264, 273 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of rehearing en banc) (OSHA rule); *Texas v. United States*, 787 F.3d 733, 761 n.90 (5th Cir. 2015) (DAPA); *Texas v. United States*, 809 F.3d 134, 183 n.190 (5th Cir. 2015) (DAPA).

⁶⁷ *E.g.*, *Chamber of Com. of United States of Am. v. United States Dep’t of Lab.*, 885 F.3d 360 (5th Cir. 2018).

⁶⁸ *State of Wyoming v. United States Dep’t of the Interior*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *7 (D. Wyo. June 21, 2016), *judgment vacated, appeal dismissed sub nom.* *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir.

manufacturers to disclose wholesale acquisition costs in television advertisements,⁶⁹ restrict immigration in light of the COVID-19 pandemic,⁷⁰ impose COVID-related restrictions on the cruise ship industry,⁷¹ and use military construction funds to construct a border wall;⁷² and the Biden administration’s travel mask mandate⁷³ and vaccination requirement for HeadStart employees, volunteers, and contractors.⁷⁴ As discussed further below, courts on several occasions have also identified regulatory antecedents to reject claims that the agency was exercising “unheralded power.”⁷⁵

Decisions striking down purportedly unprecedented agency action typically discuss the “unheralded” nature of the asserted authority somewhat briefly and contextualize it among other factors counseling against the lawfulness of the challenged action.⁷⁶ This is consistent with the Supreme Court’s treatment of regulatory novelty in *Brown & Williamson* and *UARG*.⁷⁷ But in light of the Court’s increased focus over the past two terms on regulatory novelty under the major questions doctrine,⁷⁸ this may be starting to change. In its September 2022 decision permanently enjoining the COVID-19 vaccination for HeadStart personnel, the U.S. District Court for the Western District of Louisiana distinguished 18 regulatory antecedents that the government offered in litigation.⁷⁹

As noted above, a handful of courts have upheld agency action in part because it did not represent an “unheralded power,” pointing to regulatory consistency and relevant antecedents.⁸⁰ In several of these, however, the issue has not been particularly close. For instance, one decision by the U.S. Court of Appeals for the Fifth Circuit highlighted OSHA’s “consistent[] . . . interpretation for decades” to issue citations at a multi-employer construction worksite.⁸¹ Another by the U.S. District Court for the District of Columbia upheld a Treasury Department

2017). The Tenth Circuit dismissed the case and vacated the judgment under prudential ripeness due to a change in administration, and did not address the case’s merits.

⁶⁹ *Merck & Co. v. United States Dep’t of Health & Hum. Servs.*, 962 F.3d 531 (D.C. Cir. 2020) (affirming district court’s vacatur).

⁷⁰ *P.J.E.S. by & through Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492, 538 (D.D.C. 2020).

⁷¹ *State v. Becerra*, 544 F. Supp. 3d 1241, 1264 (M.D. Fla. 2021).

⁷² *California v. Trump*, 407 F. Supp. 3d 869, 895 (N.D. Cal. 2019), *aff’d sub nom. Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020), *judgment vacated sub nom. Biden v. Sierra Club*, 142 S. Ct. 56 (2021). The Supreme Court’s one-paragraph judgment was based on changed circumstances and not on the merits.

⁷³ *Health Freedom Def. Fund, Inc. v. Biden*, No. 8:21-CV-1693-KKM-AEP, 2022 WL 1134138, at *11 (M.D. Fla. Apr. 18, 2022).

⁷⁴ *Louisiana v. Becerra*, No. 3:21-CV-04370, 2022 WL 4370448, at *11–12 (W.D. La. Sept. 21, 2022).

⁷⁵ See *infra* notes 81–84 and accompanying text.

⁷⁶ A particularly stark example is the Fifth Circuit’s decision striking down DAPA, which quotes *UARG*’s discussion of “unheralded power” only in a footnote. *Texas*, 809 F.3d at 183 n.190. In numerous other cases, the court discusses the lack of antecedents in a paragraph or two. *E.g.*, *Chamber of Com.*, 885 F.3d at 380–81; *P.J.E.S.*, 502 F. Supp. 3d at 538.

⁷⁷ See *supra* notes 15–33 and accompanying text.

⁷⁸ See *supra* notes 34–47 and accompanying text.

⁷⁹ *Louisiana*, 2022 WL 4370448, at *11–12 (W.D. La. Sept. 21, 2022).

⁸⁰ The Supreme Court has also previously cited consistency with agency practice in upholding a challenged regulation. *Missouri v. Biden*, 142 S. Ct. 647, 652–53 (2022); see also *supra* note 43.

⁸¹ *Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 735–36 (5th Cir. 2018).

regulation that adopted a “substantially similar” interpretation to one it had adopted for “nearly the entirety of its statutory existence.”⁸² In two other cases,⁸³ a federal district and appellate court respectively rejected claims that the agency was exercising “unheralded power” and pointed to relevant antecedents, but was reversed on appeal when the reviewing court concluded that the antecedents identified below were insufficiently targeted (including the D.C. Circuit in the challenge to the repeal of the Clean Power Plan that would become *West Virginia*).⁸⁴

As these examples illustrate, federal appellate and district courts are frequently considering regulatory antecedents to assess whether a challenged agency action constitutes a claim of “unheralded power” that exceeds the agency’s authority. And in light of the Supreme Court’s increased focus on regulatory novelty and the major questions doctrine over the past two terms, those courts may be increasingly confronted with claims that an agency is exercising “unheralded power” in violation of its statutory delegation. Recent Supreme Court decisions have led to a surge in litigation (or threatened litigation, for unfinalized action) alleging that an action violates the major questions doctrine and is unprecedented.⁸⁵

II. Rebutting Claims of Novelty in the Regulatory Process: Two Case Studies

With courts increasingly focused on regulatory novelty, agencies issuing controversial policies that are likely to meet legal challenges have a strong incentive to identify regulatory antecedents to rebut claims that the new action is “unheralded.” Yet agencies have not developed a consistent practice of identifying relevant regulatory antecedents and rebutting arguments that the policy in question violates the major questions doctrine. As illustrated by the two case studies below, in fact, agencies have been reluctant to catalog relevant antecedents even when dissenting commissioners in multi-member agencies explicitly argued that the agency was violating the major questions doctrine by exercising unheralded power. Both case studies are from 2022, following two recent Supreme Court decisions striking down regulations due in part to their unheralded nature.⁸⁶

A search of the Federal Register and other administrative decisions and guidance reveals that agencies have explicitly discussed “major questions,” “unheralded power,” and related

⁸² *Ass’n for Cmty. Affiliated Plans v. United States Dep’t of Treasury*, 392 F. Supp. 3d 22, 35 (D.D.C. 2019), *aff’d sub nom. Ass’n for Cmty. Affiliated Plans v. United States Dep’t of the Treasury*, 966 F.3d 782 (D.C. Cir. 2020).

⁸³ In another case that cited *UARG*’s “unheralded power” language, the court held that an agency had “express statutory command” and did not delve into regulatory history. *Finnbin, LLC v. Consumer Prod. Safety Comm’n*, 45 F.4th 127, 134 (D.C. Cir. 2022).

⁸⁴ *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 964 (D.C. Cir. 2021), *rev’d and remanded sub nom. West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Chamber of Com. of the United States of Am. v. Hugler*, 231 F. Supp. 3d 152, 179 (N.D. Tex. 2017), *rev’d sub nom. Chamber of Com. of United States of Am. v. United States Dep’t of Lab.*, 885 F.3d 360 (5th Cir. 2018).

⁸⁵ See Alex Guillén, *Impact of Supreme Court’s Climate Ruling Spreads*, POLITICO (July 20, 2022), <https://perma.cc/LHN8-25EQ>; Erin Webb, *Analysis: Major Questions Doctrine Filings Are Up in a Major Way*, BLOOMBERG (Feb. 1, 2022), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-analysis/X76ONCDC000000?bna_news_filter=bloomberg-law-analysis#jcite.

⁸⁶ See *supra* notes 34–42 and accompanying text.

phrases on just a handful of occasions.⁸⁷ Those invocations have typically been in response to comments and not part of an affirmative justification for the agency’s authority to take the action being proposed or finalized. In several recent final rules, for instance, agencies have rebutted public comments submitted on the proposed regulation claiming that the regulation represents an exercise of unheralded power and violates the major questions doctrine.⁸⁸ Under the Trump administration, agencies on several occasions invoked the major questions doctrine as a basis for repealing prior agency policies, including the Clean Power Plan⁸⁹ and the Department of Urban Housing and Development’s regulations requiring grantees to affirmatively further fair housing.⁹⁰ And as detailed in the two case studies below, sometimes the only explicit discussion of the major questions doctrine comes from dissenting commissioners in a multi-member agency.⁹¹

This Part explores two case studies that fall into the latter bucket, where agencies have been reluctant to explore regulatory antecedents despite explicit objections from dissenting commissioners that the agency was exercising unheralded power. We first discuss the treatment of regulatory antecedents in the Securities and Exchange Commission’s proposed rule to require publicly traded companies to disclose information about the extent to which climate change is affecting their financial performance and their business is exposed to risk from a shift to a clean-energy economy.⁹² We then discuss the Federal Energy Regulatory Commission’s treatment of regulatory antecedents in its proposed policy statements for natural gas infrastructure.⁹³

A. SEC’s Proposed Rule to Standardize and Enhance Climate-Related Disclosures

In April 2022, the Securities and Exchange Commission (SEC or the Commission) proposed a regulation to require public companies to provide detailed reporting of climate-

⁸⁷ Related phrases that we searched for are “major questions doctrine,” “major question,” “major questions canon,” and “vast economic and political significance.”

⁸⁸ *E.g.* Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152, 53,186–88 (Aug. 30, 2022); 2022-2023 Station-Specific Hunting and Sport Fishing Regulations, 87 Fed. Reg. 57,108, 57,118–19 (Sept. 16, 2022); Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10), 87 Fed. Reg. 65,426, 65,445 (Oct. 28, 2022).

⁸⁹ 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. 32,520, 32,529 (July 8, 2019).

⁹⁰ Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,903–04 (Aug. 7, 2020) (discussing the “major issues doctrine”). Also under the Trump administration, the Department of Education issued a procedural rule mandating that the Department consider the major questions doctrine in future rulemakings and guidance documents. Rulemaking and Guidance Procedures, 85 Fed. Reg. 62,597, 62,601 (Oct. 5, 2020).

⁹¹ *See infra* Part II.A–B.

⁹² The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) [hereinafter Proposed SEC Rule].

⁹³ Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (2022) [hereinafter Updated Certificate Policy Statement]; Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022) [hereinafter GHG Policy Statement]. The Commission issued both of these policy statements in February 2022. In March 2022, it published an order designating the two policy statements as drafts and accepting further comments. Order on Draft Policy Statements, 178 FERC ¶ 61,197 (2022). As of November 2022, the Commission has not finalized either policy statement.

related risks.⁹⁴ The proposal seeks to standardize and enhance corporate reporting of greenhouse gas emissions, climate-related risk management, exposure to severe weather events and natural hazards, and climate-related goals and governance structures.

The Commission issued this proposal pursuant to its authority under the Securities Act of 1933 and the Securities Exchange Act of 1934. Collectively, these statutes empower the SEC to regulate the securities industry and ensure that investors receive adequate and truthful information about securities offered for public sale. The statutes authorize the Commission to require companies to publicly disclose any information that is “necessary or appropriate in the public interest or for the protection of investors.”⁹⁵ They define the public interest to include “whether the action will promote efficiency, competition, and capital formation.”⁹⁶

In 2010, the Commission issued guidance recognizing that “efforts to reduce greenhouse gas emissions” around the globe broadly affect corporate “performance and operations.”⁹⁷ In that guidance, the Commission concluded that existing regulations may already sometimes require companies to disclose certain climate-related risks when material, including physical climate-change risks; direct impacts on business from climate-related legislation, regulation, and international agreements; and indirect consequences of those regulations, such as increased or decreased demand or competition for particular goods or services.⁹⁸ Although the 2010 guidance did not formally mandate any particular climate-related disclosures, the Commission stated that it would monitor compliance with its directives and consider future rulemaking as necessary.⁹⁹

But such a rulemaking did not materialize over the ensuing decade. In the absence of clear requirements, observers and experts found that companies have not consistently disclosed detailed information on the risks that climate change—and efforts to mitigate it across the world—pose on their operations and assets.¹⁰⁰ The widespread observation that “existing

⁹⁴ Proposed SEC Rule, *supra* note 92.

⁹⁵ 15 U.S.C. § 77g(a)(1); *accord id.* § 77l(b)(1).

⁹⁶ *Id.* § 77b(b).

⁹⁷ Commission Guidance Regarding Disclosure Related to Climate Change at 2, Release No. 82 (Feb. 8, 2010) [Disclosure Guidance]. *See also id.* at 5–6 (explaining that “regulatory, legislative and other developments [related to climate change] could have a significant effect on operating and financial decisions, including those involving capital expenditures to reduce emissions and, for companies subject to ‘cap and trade’ laws, expenses related to purchasing allowances where reduction targets cannot be met”). For a more extensive discussion of the risks that climate change and efforts to mitigate it present to corporate assets and operations, see Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 745, 749–59 (2022).

⁹⁸ *See* Disclosure Guidance, *supra* note 97, at 22–27. *See id.* at 12–21 for an overview of existing SEC rules that, according to the guidance, require certain climate-related disclosures.

⁹⁹ *Id.* at 28.

¹⁰⁰ *See, e.g.,* GOV’T ACCOUNTABILITY OFF., CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS, GAO-18-188 (2018) (“[C]ompanies may report similar climate-related disclosures in different sections of the filings, and climate-related disclosures in some filings contain disclosures using generic language, not tailored to the company, and do not include quantitative metrics”); Condon et al., *supra* note 97, at 776–78 (“[T]he SEC’s 2010 Guidance did not result in the disclosure many expected.”); Proposed SEC Rule, 87 Fed. Reg. at 21,335 (explaining that “registrants often provide information outside of Commission filings and provide different information, in varying degrees of completeness, and in different documents and formats,” thereby “impair[ing] the ability to make investment or voting decisions in line with investors’ risk preferences”).

disclosures of climate-related risks do not adequately protect investors” ultimately spurred the Commission to propose specific regulations for climate-risk disclosure.¹⁰¹ In its 2022 proposal, the SEC required public companies to disclose a range of climate-related information, including the actual financial impact the company has faced due to physical or transition risks, the company’s greenhouse gas emissions¹⁰²), the impact of climate-related weather events and transition activities on the company’s business, the company’s climate-related targets or goals (if any), and the company’s approach to climate-related risk management and any relevant governance structures.¹⁰³

Not all of the SEC commissioners supported the proposal. Commissioner Hester M. Peirce dissented, arguing that the proposal runs afoul of the major questions doctrine, strays from the purpose of the statutory scheme, and is inconsistent with the agency’s traditional approach to disclosure regulation.¹⁰⁴ In Commissioner Peirce’s view, the “proposal turns the disclosure regime on its head” because it is not focused on providing investors with “an accurate picture of the company’s present and prospective performance” but instead prioritizes “a company’s climate reputation.”¹⁰⁵ Commissioner Peirce argued that the proposed rule broke from the Commission’s approach “in the past” by pursuing broad public-policy goals rather than providing material information that could aid “someone whose interest is in a financial return on an investment.”¹⁰⁶

¹⁰¹ Proposed SEC Rule, 87 Fed. Reg. at 21,335.

¹⁰² The proposal would require companies to disclose their Scope 1 and Scope 2 emissions, along with Scope 3 emissions when material or relevant to the company’s emissions target. *Id.* at 21,345. Scope 1 refers to “direct emissions from sources that are owned or controlled” by the company. Scope 2 refers to “indirect emissions from sources that are owned or controlled” by the company, such as emissions from the generation of electricity purchased by the company. Scope 3 refers to “emissions . . . from sources not owned or directly controlled by [the company] but related to [its] activities,” such as emissions from employee travel and commuting. *See* Greenhouse Gases at EPA, ENV’T PROT. AGENCY, <https://www.epa.gov/greeningepa/greenhouse-gases-epa> (last updated July 18, 2022).

¹⁰³ A complete list of the proposed disclosures is provided at Proposed SEC Rule, 87 Fed. Reg. at 21,345. A detailed discussion of each item follows over the rest of the rule’s preamble.

¹⁰⁴ COMM’R HESTER M. PEIRCE, WE ARE NOT THE SECURITIES AND ENVIRONMENT COMMISSION—AT LEAST NOT YET (Mar. 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>. Commissioner Peirce did not cite the “major questions doctrine” by name (note that her statement was released before *West Virginia*) but quoted *UARG* for the proposition that 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.” *Id.* (quoting *UARG*, 573 U.S. at 324). Commissioner Peirce’s dissent cited academic work arguing that mandating climate-related financial disclosure would violate the major questions doctrine. *See, e.g., id.* n.45 (citing Andrew N. Vollmer, MERCATUS CENTER, *Does the SEC Have Legal Authority To Adopt Climate-Change Disclosure Rules?* (2021), <https://perma.cc/6SFS-7TCA>).

¹⁰⁵ PEIRCE, *supra* note 104.

¹⁰⁶ *Id.* Despite Commissioner Peirce’s argument, the Proposed Rule repeatedly highlights benefits to investors and does not hypothesize about the rule’s potential effects on mitigating climate change. *See, e.g.,* Proposed SEC Rule, 87 Fed. Reg. at 21,335 (“We are proposing to require disclosures about climate-related risks and metrics reflecting those risks because this information can have an impact on public companies’ financial performance or position and may be material to investors in making investment or voting decisions. For this reason, many investors—including shareholders, investment advisers, and investment management companies—currently seek information about climate-related risks from companies to inform their investment decision-making. Furthermore, many companies have begun to provide some of this information in response to investor demand and recognition of the potential financial effects of climate-related risks on their businesses.”).

The Commission did not refer to the major questions doctrine in its proposal, and while it did catalog some regulatory antecedents for the approach taken in the proposed rule, that discussion was brief and relatively narrow. In particular, the proposal included a four-paragraph Background section that discussed the Commission’s history of requiring disclosures related to environmental risk and liability.¹⁰⁷ That section highlighted two antecedents involving “the disclosure of material environmental issues.”¹⁰⁸ First, it pointed to SEC guidance and regulation in the 1970s and 1980s requiring companies to disclose “litigation and other business costs arising out of compliance with federal, state, and local laws that regulate the discharge of materials into the environment or otherwise relate to the protection of the environment.”¹⁰⁹ Second, it recognized the significance of the 2010 guidance document discussed above on corporate climate-risk disclosure, explaining that “proposals set forth in this release would augment and supplement the disclosures already required in SEC filings.”¹¹⁰ Outside the Background section, the Commission briefly identified regulatory antecedents for various provisions of the Proposed Rule at numerous places.¹¹¹

While the Commission’s proposal offered a short and limited discussion of regulatory antecedents, supportive commenters offered more extensive and effective arguments that the proposal was consistent with prior Commission regulations. Four comment letters in particular—submitted, respectively, by a group of thirty law professors;¹¹² the Working Group on Securities Disclosure Authority;¹¹³ Harvard Law School professor John C. Coates;¹¹⁴ and the Institute for Policy Integrity at New York University School of Law, Environmental Defense Fund, and Boston University School of Law professor Madison Condon¹¹⁵—detailed a broad range of SEC

¹⁰⁷ See *id.* at 21,337–38.

¹⁰⁸ *Id.* at 21,337.

¹⁰⁹ *Id.* & *id.* nn.29–32 (citing, inter alia, Release No. 33–6383, 47 Fed. Reg. 11,380 (Mar. 3, 1982)).

¹¹⁰ *Id.* at 21,338 (citing Disclosure Guidance, *supra* note 97).

¹¹¹ See, e.g., *id.* at 21,352 (noting that rule’s materiality determination “is similar to what is required when preparing the MD&A section in a registration statement or annual report”); *id.* at 21,359 (recognizing that regulatory provisions on corporate governance “are similar to the Commission’s existing rules under Regulation S–K that call for disclosure about corporate governance in that they are intended to provide investors with relevant information about a registrant’s board, management, and principal committees”); *id.* at 21,366 & n.347 (providing regulatory antecedents for use of a 1% threshold).

¹¹² Jill E. Fisch et al., Comment Letter on Enhancement and Standardization of Climate-Related Disclosures for Investors (June 6, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf>.

¹¹³ Working Group on Securities Disclosure Authority, Comments on Climate-Related Disclosures for Investors (June 16, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131670-302060.pdf>. The Working Group on Securities Disclosure Authority is a bipartisan group that includes “leading academics, former Commission officials, and market participants,” including four SEC chairs, five SEC commissioners, and five SEC general counsel. Richard L. Revesz, one of the authors of this article, was a member of the working group and a signatory of the letter.

¹¹⁴ John C. Coates, Comment Letter on Enhancement and Standardization of Climate-Related Disclosures for Investors (June 2, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20130026-296547.pdf>.

¹¹⁵ Institute for Policy Integrity et al., Regulatory Precedents for the Proposed Rule (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132109-302592.pdf>. The authors of this article are both on staff at the Institute for Policy Integrity, although neither personally signed this comment letter.

antecedent regulations to rebut Commissioner Peirce’s claim that the SEC was claiming “unheralded power” through this proposal.

For instance, while the Commission mainly focused on a handful of prior environmental-focused disclosure requirements, commenters highlighted a broader range of antecedent regulations and noted that the Commission “has repeatedly required disclosure of information that, while not financial on its face, is nevertheless relevant to investors’ assessment of a registrant’s future financial prospects.”¹¹⁶ These include disclosures related to corporate governance,¹¹⁷ corporate performance targets and employee compensation,¹¹⁸ and the sources and availability of raw materials.¹¹⁹ Commenters similarly discussed how the Commission has previously required disclosure related to pressing and politically sensitive market developments, such as risks stemming from Y2K, the Eurozone crisis, Brexit, the COVID-19 pandemic, and the war in Ukraine.¹²⁰ As the coalition of law professors explained, such examples illustrate that “[t]he Commission is cognizant of the appropriate role of disclosure as a regulatory tool and it is not aiming to address climate change any more than it was trying to solve a geopolitical crisis (Russia’s war on Ukraine) or a global health crisis (the Covid-19 pandemic) when it required public companies, for the benefit of investors and markets, to disclose the risks and operational and financial impacts of these critical events.”¹²¹

In addition to identifying these additional regulatory antecedents, commenters also offered more extensive evidence and argument that the antecedents the Commission highlighted (i.e., its environmental disclosure regime dating back to the 1970s) support its authority to mandate climate-risk disclosure. For instance, commenters noted that caselaw supports the SEC’s authority to require disclosure of environmental risk.¹²² Commenters also highlighted that

¹¹⁶ *Id.* at 3. *See also id.* at 7 (“[Existing disclosure requirements elicit information about non-financial information that can serve as a proxy for financial risk. These disclosures allow investors to draw inferences about future performance from a director or manager’s past performance; interpret whether compensation performance targets will change internal risk-taking behavior leading to heightened financial risks; estimate a company’s viability based on its access to necessary materials; and assess risks associated with regulatory non-compliance. In line with this rich tradition of non-financial disclosures that proxy for risk, the Proposed Rule similarly allows investors to ascertain future transition risk from a company’s greenhouse gas emissions.”).

¹¹⁷ *Id.* at 5 (“In 1978, when issuing regulations requiring the disclosure of governance information, the SEC further explained that 54% of individual investors found that information on the quality of management was extremely useful in deciding whether to invest. In line with these findings, the SEC began requiring companies to disclose whether directors, officers, or nominated directors, had been involved in certain types of legal proceedings.”(internal quotation marks omitted)).

¹¹⁸ *Id.*; Coates, *supra* note 114, at 27.

¹¹⁹ Institute for Policy Integrity et al., *supra* note 115, at 6; Working Group on Securities Disclosure Authority, *supra* note 113, at 7–8.

¹²⁰ Fisch et al., *supra* note 112, at 9; Institute for Policy Integrity et al., *supra* note 115, at 17; Working Group on Securities Disclosure Authority, *supra* note 113, at 7 (“[T]he SEC has long rejected the view that it cannot require disclosure on politically sensitive subjects.”).

¹²¹ Fisch et al., *supra* note 112, at 10.

¹²² Coates, *supra* note 114, at 9–10 ((citing *NRDC v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979) for the proposition that while “the Commission was not required to adopt environmental disclosure obligations beyond what it had already adopted, the Court also concluded that it was authorized to and could do so, if the Commission itself came to an expert judgment that doing so was in service of its statutory missions of protecting investors and promoting the public interest”).

opponents of prior SEC environmental-disclosure requirements had not challenged the Commission’s legal authority to require such disclosures.¹²³

The Commission has not finalized its climate-risk disclosure proposal as of November 2022, so it remains to be seen whether and how it enhances its discussion of regulatory antecedents if and when it finalizes the proposed rule.

B. FERC’s Proposed Policy Statements for Natural Gas Infrastructure

In February 2022, the Federal Energy Regulatory Commission (FERC or the Commission) issued two “policy statements” offering guidance on the agency’s permitting of interstate natural-gas pipelines under the Natural Gas Act (NGA). The policy statements, since designated as drafts,¹²⁴ emphasize the significance that the Commission will place on environmental impacts in the permitting process. Most notably, as outlined below, the policy statements announce that the Commission will consider greenhouse gas emissions in the permitting process, and lay out certain parameters that will guide such consideration.

Passed in 1938, the NGA charges the Commission with regulating the transmission of natural gas in interstate commerce.¹²⁵ In particular, Section 7 prohibits the construction or operation of interstate natural-gas infrastructure unless the Commission grants a “certificate of public convenience and necessity” permitting such construction or operation and enabling the operator to exercise eminent domain over all properties necessary to construct the pipeline.¹²⁶ The NGA does not define the term “public convenience and necessity” or enumerate factors for that the Commission to consider under that standard.¹²⁷

Although FERC assesses applications for a certificate of public convenience and necessity on a case-by-case basis, the Commission has traditionally issued guidance documents known as “policy statements” outlining the types of considerations that will underlie its review. Before 2022, the Commission last issued its Section 7 policy statement in 1999.¹²⁸ That 1999 policy statement provides a framework for the Commission to balance a broad range of factors in pipeline certification.¹²⁹ But many have criticized the Commission for failing to consistently

¹²³ Working Group on Securities Disclosure Authority, *supra* note 113, at 4 (“Even opponents of the [2010] guidance agreed that the SEC has authority to mandate environmental-related disclosures—and that such disclosures have long encompassed climate-related matters.”).

¹²⁴ *See supra* note 93.

¹²⁵ 15 U.S.C. § 717(b).

¹²⁶ *Id.* § 717f(c)(1)(A).

¹²⁷ *See id.*

¹²⁸ Statement of Policy, Certification of New Interstate Pipeline Facilities, 88 FERC ¶ 61,227 (1999) [hereinafter 1999 Policy Statement].

¹²⁹ *Id.* at 18 (explaining that the Commission will balance a proposed pipeline’s economic effects against “adverse effects the project might have on [1] the existing customers of the pipeline proposing the project, [2] existing pipelines in the market and their captive customers, or [3] landowners and communities affected by the route of the new pipeline”).

implement this framework in practice,¹³⁰ and instead prioritizing contractual agreements for pipeline capacity (known as precedent agreements) above all other purportedly relevant factors.¹³¹ The Commission’s limited consideration of environmental and climate impacts has drawn particular scrutiny.¹³² In particular, several recent D.C. Circuit decisions rejected FERC pipeline approvals for inadequately considering the climate impacts of pipeline approvals.¹³³ Those decisions criticized the Commission for paying inadequate attention to the emissions resulting from the increased natural gas consumption and production that pipeline build-out will cause (known respectively as “downstream” and “upstream” emissions).¹³⁴

In February 2022,¹³⁵ the Commission released two new policy statements that sought to “provide a more comprehensive analytical framework . . . on how the Commission will evaluate all factors bearing on the public interest” in Section 7 certification proceedings.¹³⁶ The primary policy statement, titled Certification of New Interstate Natural Gas Facilities, updated the 1999 policy statement by emphasizing the need to look beyond precedent agreements when considering project need¹³⁷ and the importance of balancing environmental impacts in the

¹³⁰ See Updated Certificate Policy Statement, *supra* note 93, at P 14 (explaining that “stakeholders have raised various concerns with, among other things, the use of eminent domain, the need for new projects, and the environmental impacts of project construction and operation, including impacts on climate change and environmental justice communities”).

¹³¹ E.g. SARAH LADIN & BURCIN UNEL, INST. FOR POL’Y INTEGRITY, REFORMING PIPELINE REVIEW 3 (2022), https://policyintegrity.org/files/publications/Pipeline_Review_Report_vF.pdf (“[T]he Commission has in practice given only the barest of consideration to factors beyond precedent agreements—long-term capacity contracts between the pipeline and shippers or end users—in evaluating need and determining whether a project is required by the public convenience and necessity. Instead, the Commission relies heavily, if not exclusively, on evidence provided by private actors that a project is needed—that is the precedent agreements.”).

¹³² While the 1999 policy statement calls for the consideration of environmental impacts, it provides that “[t]he balancing of interests and benefits . . . will precede the environmental analysis [and] will largely focus on economic interest.” 1999 Policy Statement, *supra* note 128, at 27. However, the Commission also acknowledged in an order clarifying that policy statement that “adverse impacts on . . . the environment” could cause “the balance [to] tip against certification.” Order Clarifying Statement of Policy, Certification of New Interstate Natural Gas Pipelines, 65 Fed. Reg. 7862, 7867 (Feb. 16, 2000) [hereinafter Order Clarifying 1999 Policy Statement]. And as the Commission explained in the Updated Certificate Policy Statement, “in practice,” the review of economic and environmental impacts occurs concurrently, such that the “1999 Policy Statement has created some confusion and incorrectly conveyed how the Commission considers environmental impacts.” Updated Certificate Policy Statement, *supra* note 93, at P 72.

¹³³ *Sierra Club v. Fed. Energy Regul. Comm’n (Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017); *Food & Water Watch v. Fed. Energy Regul. Comm’n*, 28 F.4th 277 (D.C. Cir. 2022). In another case, the D.C. Circuit expressed “misgivings” about the Commission’s assessment of climate impacts, but found that the issue was not preserved. *Birckhead v. Fed. Energy Regul. Comm’n*, 925 F.3d 510 (D.C. Cir. 2019). In at least one recent case, the D.C. Circuit found that the Commission’s review of climate impacts in a Section 7 proceeding was sufficient. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 109–12 (D.C. Cir. 2022).

¹³⁴ E.g. *Sabal Trail*, 867 F.3d at 1371–75; *Birckhead*, 925 F.3d at 520.

¹³⁵ The Commission issued notices of inquiry on its Section 7 policy statement in 2018 and 2021, receiving comments from a wide range of stakeholders. Alexandra B. Klass, *Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 YALE J. ON REG. 658, 682–84 (2022).

¹³⁶ Updated Certificate Policy Statement, *supra* note 93, at P 51.

¹³⁷ E.g. *id.* at P 54 (“Although precedent agreements remain important evidence of need, and we expect that applicants will continue to provide precedent agreements, the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project.”).

certification decision.¹³⁸ The Commission announced that it would “balance . . . all of the benefits of a proposal together with all of the adverse impacts, including the economic and environmental impacts,” in deciding whether to certify a proposed pipeline,¹³⁹ without “adopt[ing] any bright-line standards for how [it] will carry out this balancing.”¹⁴⁰

In the second policy statement, titled Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, the Commission provided further insight into how it would consider climate impacts as part of the public-interest balancing.¹⁴¹ Most notably, the Commission announced that it would quantify downstream and upstream greenhouse gas emissions and factor them into the public-interest balancing test when those emissions are “reasonably foreseeable,”¹⁴² consistent with D.C. Circuit precedent.¹⁴³ The policy statement “encouraged” applicants “to propose mitigation that will minimize climate impacts,” and noted that “[t]he Commission will consider any mitigation measures proposed by the project sponsor on a case-by-case basis when balancing the need for a project against its adverse environmental impacts.”¹⁴⁴

Two of the FERC commissioners issued lengthy dissenting statements. Commissioner Mark C. Christie’s dissent centered on the major questions doctrine, arguing that the policy statements “rewrite . . . the Natural Gas Act” and “represent[] a truly radical departure from decades of Commission practice and precedent implementing the NGA.”¹⁴⁵ In particular, Commissioner Christie stated FERC’s claimed authority “to reject a project based solely on [greenhouse gas] emissions is specious and ahistorical.”¹⁴⁶ Commissioner Christie targeted the consideration of downstream and upstream emissions, arguing that FERC’s consideration of environmental impacts “is limited to the effects stemming from the construction and operation of the proposed facilities” and does not extend to impacts flowing from the natural-gas consumption and production that those facilities promote¹⁴⁷—an analysis that is “far removed from the Commission’s . . . traditional responsibilities.”¹⁴⁸ In a separate lengthy dissent, Commissioner James Danly also disputed FERC’s authority to factor climate impacts

¹³⁸ *E.g. id.* at PP 62, 72–76 (recognizing that the Commission will consider “environmental interests” and “the interests of landowners and surrounding communities, including environmental justice communities” when “determining whether to issue a certificate of public convenience and necessity”).

¹³⁹ *Id.* at P 94.

¹⁴⁰ *Id.* at P 99. For a more extensive summary of the Updated Certificate Policy Statement, see Klass, *supra* note 135, at 684–87.

¹⁴¹ GHG Policy Statement, *supra* note 93.

¹⁴² *Id.* at P 31. The Commission also stated that it would “[c]onsider direct emissions of a project”—that is, the emissions released directly from the proposed infrastructure itself. *Id.*

¹⁴³ See *supra* notes 133–134 and accompanying text.

¹⁴⁴ GHG Policy Statement, *supra* note 93, at P 98.

¹⁴⁵ *Id.* at P 2 (Christie, dissenting). Commissioner Christie issued the same dissent to both policy statements. For simplicity’s sake, we consistently cite his dissent to the GHG Policy Statement.

¹⁴⁶ *Id.* at P 12 (Christie, dissenting).

¹⁴⁷ *Id.* at P 27 (Christie, dissenting).

¹⁴⁸ *Id.* at P 28 (Christie, dissenting).

(particularly downstream and upstream impacts) into certificate evaluations, without explicitly invoking the major questions doctrine.¹⁴⁹

The policy statements did not directly engage with the dissenting statements or their arguments under the major questions doctrine. For instance, the policy statements did not reference the major questions doctrine or caselaw cautioning against the exercise of “unheralded power.” And while the policy statements cataloged some relevant regulatory antecedents, that analysis was limited. The greenhouse gas policy statement contained one paragraph discussing how “Commission staff has addressed climate change in some fashion in its NEPA documents for at least a decade.”¹⁵⁰ In a sentence, the Commission explained that it has “recognized from its earliest decisions that it may consider the end use of gas as a factor in assessing the public interest and has long considered the impact of natural gas combustion on air pollution,” citing four Commission orders from the 1940s through 1960s.¹⁵¹ In another sentence, the Commission highlighted that a 1961 Supreme Court decision, *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, recognized that the Commission¹⁵² “had the authority to consider . . . the impact of end-users combusting transported gas on air quality, as part of its public convenience and necessity determination.”¹⁵³

Like with the SEC proposal, supportive commenters offered a more extensive analysis of regulatory antecedents to rebut claims from dissenting commissioners that FERC was exercising “unheralded power.”¹⁵⁴ For instance, one comment letter more extensively detailed how the Commission has long considered the advantages and disadvantages of natural gas relative to the alternative fuel sources that the natural gas could displace, and that this assessment has included

¹⁴⁹ *E.g. id.* at P 26 (Danly, dissenting) (“Congress put its thumb on the scale in favor of gas and charged the Commission with ensuring that there would be adequate infrastructure in place to provide an abundant supply of natural gas available at reasonable prices for all Americans to use. The purpose of the NGA is narrow and clear. And it is a mousehole through which the elephant of addressing the climate change impacts of the entire natural-gas industry cannot pass.”). Commissioner Danly issued a separate dissenting opinion for the Updated Certificate Policy Statement, which touched upon a broader range of issues.

¹⁵⁰ *Id.* at P 10 (explaining that the Commission has quantified direct greenhouse gas emissions for “at least a decade” and that “[s]tarting in late 2016,” the Commission “began to conservatively estimate indirect downstream [greenhouse gas emissions]” in its environmental analyses).

¹⁵¹ *Id.* at P 83.

¹⁵² FERC was known as the Federal Power Commission until 1977. For simplicity, this article uses “Commission” to also refer to the Federal Power Commission.

¹⁵³ *Id.* at P 103.

¹⁵⁴ Todd Aagaard et al., Comments of Legal Scholars Supporting FERC’s Authority to Consider Climate Impacts in Certification Proceedings Under Section 7 of the Natural Gas Act (Apr. 25, 2022) [hereinafter Legal Scholars Comments]; Supplemental Comments of the Institute for Policy Integrity at New York University School of Law 6–12 (Oct. 20, 2022) [hereinafter Policy Integrity Comments]; Comments of the Sabin Center for Climate Change Law 2–3 (Apr. 25, 2022); The Niskanen Center and Affected Landowners’ Joint Comments in Response to the Commission’s Order on Draft Policy Statements 6–9 (Apr. 25, 2022). Note that the authors of this article were both signatories to the Legal Scholars Comments. Author Max Sarinsky was also a signatory on the Supplemental Comments of the Institute for Policy Integrity. In addition, numerous industry organizations submitted comments supporting the argument that the draft policy statements violate the major questions doctrine. *E.g.* Comments of Enbridge Gas Pipelines 14–46 (Apr. 25, 2022); Comments of the Interstate Natural Gas Association of America 12–21 (Apr. 25, 2022). All comments on the policy statements are available on FERC’s website, by searching through dockets PL18-1-000 and PL-21-3-000 at <https://elibrary.ferc.gov/eLibrary/search>.

effects on air pollution from the consumption of those competing fuels.¹⁵⁵ The comment letter identified numerous additional certificate proceedings in which the Commission considered downstream air pollution impacts and factored them prominently into its public convenience and necessity determination.¹⁵⁶ It noted one docket in which the Commission previously recognized that downstream air pollution was “one of the important factors” that it considered in Section 7 proceedings.¹⁵⁷

Commenters also highlighted that the Commission’s current Section 7 policy statement identifies downstream air pollution as an important effect to consider in certification proceedings—a fact that the policy statements themselves failed to note.¹⁵⁸ In particular, the 1999 policy statement explains that the “environmental advantages of gas over other fuels” can be considered among the “public benefits” of a proposed natural-gas project.¹⁵⁹ In a subsequent clarification to the 1999 policy statement issued a few months later, the Commission further explained that “the Commission will continue to take into account as a factor for its consideration the overall benefits to the environment of natural gas consumption” when the “natural gas will displace fuels that are more harmful to the environment.”¹⁶⁰ As commenters explained, the fact that the Commission has previously considered downstream air-pollution emissions resulting from natural-gas pipeline build-out—including under its current policy statement—helps counter the argument from dissenting commissioners that FERC is exercising “unheralded power” by doing so in the new policy statements.¹⁶¹

The Commission has not finalized its proposed policy statements as of November 2022, so it remains to be seen how the Commission will respond to dissenting commissioners—and address claims that it is exercising “unheralded power” in violation of the major questions doctrine—if and when it finalizes those policy statements.

III. Best Practices for the Consideration of Regulatory Antecedents

In light of recent caselaw, courts are likely to closely scrutinize regulatory antecedents when agency actions are challenged under the major questions doctrine.¹⁶² Yet as the two case studies discussed above illustrate, agencies frequently do not include an extensive discussion of regulatory antecedents when proposing or finalizing contentious regulations and policies.¹⁶³ This

¹⁵⁵ Legal Scholars Comments, *supra* note 154, at 10–11, 16.

¹⁵⁶ *Id.* at 16 n.73.

¹⁵⁷ *Id.* at 16 & n.75 (citing *Transwestern Pipeline Co.*, 36 F.P.C. 176, 213 (1966)).

¹⁵⁸ *Id.* at 17.

¹⁵⁹ 1999 Policy Statement, *supra* note 128, at 16.

¹⁶⁰ Order Clarifying Statement of Policy, Certification of New Interstate Pipeline Facilities, 90 FERC ¶ 61,128, p. 18 (2000). Commenters also highlighted several instances in recent years in which the Commission had put this guidance into practice and directly factored downstream air-pollution effects into its Section 7 determination. Policy Integrity Comments, *supra* note 154, at 9 n.42 (citing examples).

¹⁶¹ *Id.* at 6–10.

¹⁶² *See supra* Part I.

¹⁶³ *See supra* Part II. Recall that the FERC policy statements were initially issued as final documents, although they were later withdrawn and reclassified as proposals. *See supra* note 93.

contrast between judicial doctrine and regulatory practice creates litigation risk for the agency. To better prepare for legal challenges, agencies should more extensively catalog regulatory antecedents early and throughout the rulemaking process.

This Part recommends that agencies provide an extensive analysis of regulatory antecedents at the regulatory proposal stage, much like proposals often include dedicated sections on other legal justifications or supporting analyses. It first recommends best practices for the content of those analyses. In particular, this Part recommends that agencies look extensively for analogous exercises of agency authority, and search for relevant characterizations of agency authority in prior agency statements. Such an analysis would be substantially more extensive, both by depth and breadth, than the analyses that agencies conducted in the two case studies discussed in Part II.

This Part then recommends best practices for the timing of these analyses, explaining how analysis of regulatory antecedents at the proposal stage (and even beforehand) will best enable the agency to frame the issues, respond to targeted rebuttals, and ultimately defend against legal challenges claiming that the agency has violated the major questions doctrine. It concludes that detailed analysis of regulatory antecedents at every rulemaking stage—pre-proposal, proposal, and final action—will enable agencies to better respond to major questions arguments and reduce litigation risk.

A. Agencies Should Identify a Broad and Deep Range of Regulatory Antecedents

In the two case studies discussed in Part II, the respective agencies identified and briefly discussed some relevant regulatory antecedents.¹⁶⁴ Yet supportive commenters offered a far more extensive inventory and analysis of antecedents supporting the agency's authority.¹⁶⁵ Those comments offer lessons for how agencies should approach their analysis of regulatory antecedents in future dockets.

Analysis of regulatory antecedents from supportive commenters in these two case studies was both broader and deeper than the agency's analysis. By *broader*, we mean that supportive commenters identified a more extensive range of relevant regulatory antecedents, including antecedents that may have appeared more attenuated on their face yet offered targeted responses to objections regarding the supposedly unheralded nature of the agency's action. And by *deeper*, we mean that supportive commenters expanded upon the regulatory antecedents identified by the agency and emphasized particularly relevant features of or quotations within those prior actions. Agencies are likely to benefit from both a broader and deeper presentation of relevant antecedents. In this section, we briefly discuss each in turn.

¹⁶⁴ See *supra* notes 107–110 (SEC proposal), 150–153 (FERC policy statements) and accompanying text.

¹⁶⁵ See *supra* notes 112–123 (SEC proposal), 154–161 (FERC policy statements) and accompanying text

Broader antecedents. It is not entirely clear what “unheralded” means in the context of the major questions doctrine, or how original or unprecedented an agency action must be to qualify.¹⁶⁶ It is thus hard to predict which antecedents courts will credit in future cases, and the level of judicial scrutiny may vary from one case to another.¹⁶⁷ Even still, both logic and Supreme Court precedent suggest that agencies need not identify identical exercises of regulatory authority to defeat claims that their action is unheralded. For one, the major questions doctrine applies only in “extraordinary cases”¹⁶⁸ whereas regulatory history rarely contains a perfect parallel.¹⁶⁹ For another, in *Missouri v. Biden*, the Supreme Court upheld a contentious regulation mandating COVID-19 vaccination of certain healthcare employees by relying on analogous but non-identical regulatory antecedents.¹⁷⁰ Accordingly, antecedents evincing that the agency has exercised analogous authority should suffice to establish that a new claim of authority is not “unheralded.”¹⁷¹

Analogous exercises of agency authority can take numerous forms, and will often not be limited to the most obvious or direct regulatory analogs. Agencies should consider a broad range of antecedents showing that the agency has previously deployed similar tools or pursued similar ends. In the SEC climate-risk disclosure proposal, for instance, commenters identified numerous antecedents in which the SEC required disclosure of non-financial information,¹⁷² whereas the agency’s analysis identified only environmental-related disclosures.¹⁷³ Relevant antecedents

¹⁶⁶ The Supreme Court has not precisely defined what it means for an agency action to be “unheralded.” But it has indicated that it requires the agency’s action to be “unprecedented” and not merely novel or new. *West Virginia*, 142 S. Ct. at 2596. And it has also recognized that analogous exercises of authority can serve as regulatory antecedents that support a rule’s legality. *Missouri v. Biden*, 142 S. Ct. 647, 653 (2022) (citing regulations imposing “conditions of participation that relate to the qualifications and duties of healthcare workers” at facilities that participate in Medicare and Medicaid as a key basis to uphold an agency regulation requiring such participants to ensure their employees are vaccinated against COVID-19).

¹⁶⁷ Without further guidance, judges are likely to approach the question from different levels of specificity. Litigation over the repeal of the Clean Power Plan evinces this point. At the D.C. Circuit, the court rejected the assertion that the Clean Power Plan marked an exercise of “unheralded power,” noting that power plants “have been subject to regulation under Section [111] for nearly half a century.” *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 964 (D.C. Cir. 2021). But the Supreme Court required greater specificity in EPA’s antecedents, finding that the Clean Power Plan was “unheralded” because it marked the first time that EPA issued a regulation under Section 111 that was premised on generation shifting and not restricted to the emission reductions achievable through at-the-source pollution controls. *West Virginia*, 142 S. Ct. at 2596; *see also supra* notes 60–64 and accompanying text.

¹⁶⁸ *West Virginia*, 142 S. Ct. at 2609.

¹⁶⁹ Agency actions would be unnecessary unless they were in some fashion novel (unless the action was merely restoring a prior policy that had since been rescinded). Regulatory novelty alone does not necessarily signal that the action is unheralded or unlawful, as there are many potential reasons that an agency may pursue a new policy. *Cf.* Leah Litman, *Debunking Antinovelty*, 66 DUKE L. J. 1407, 1427 (2017) (rejecting the argument “that legislative novelty suggests that previous Congresses assumed similar legislation was unconstitutional”).

¹⁷⁰ *Missouri*, 142 S. Ct. at 652–53.

¹⁷¹ Dena Adler & Max Sarinsky, *After West Virginia, the Major Questions Doctrine Remains Limited to Extraordinary Cases*, ADMIN. & REG’Y LAW NEWS 5, 7 (Summer 2022), <https://perma.cc/BEU8-9MW3>.

¹⁷² *See supra* notes 116–120 and accompanying text (discussing SEC-required disclosures related to corporate governance, employee compensation, raw materials, Y2K, the Eurozone crisis, Brexit, the COVID-19 pandemic, and the war in Ukraine).

¹⁷³ *See supra* notes 107–110 and accompanying text.

need not come only from prior rulemakings, but can also come from agency guidance,¹⁷⁴ enforcement actions, and certification or permitting proceedings.¹⁷⁵

Agencies should be particularly thoughtful about the timing of antecedents. While the most direct antecedents will often be recent,¹⁷⁶ courts could be more willing to disregard recent antecedents under the theory that older antecedents that were issued closer in time to the passage of the operative legislation are more indicative of statutory purpose and intent.¹⁷⁷ Agencies should thus consider older antecedents even when they are less direct than newer ones.¹⁷⁸ Agencies should fully explain the relevance of less-direct regulatory antecedents, as discussed further below.

When agencies promulgate regulations with numerous provisions that are being challenged as distinct violations of the major questions doctrine, they may wish to separately catalog antecedents for each of those provisions. For instance, the SEC provided some limited analysis of regulatory antecedents for individual provisions of the climate-risk disclosure regulation.¹⁷⁹ Extending this practice could help shield multi-pronged regulations against major questions challenges. While the SEC proposal highlighted antecedents for certain regulatory provisions, commenters identified how the agency could have expanded upon that analysis by identifying antecedents for other provisions.¹⁸⁰

Deeper antecedents. In addition to providing a broad range of relevant antecedents, agencies should also provide a detailed analysis of the antecedents that they identify and explain in detail how those antecedents are analogous to the current action. Agencies should describe precedents with particularity. Where the relevance of a less-direct antecedent may not be obvious, agencies should seek to identify features of or quotations from those antecedents

¹⁷⁴ See, e.g., *supra* notes 95–97 and accompanying text (discussing SEC guidance on disclosure of climate-related risk).

¹⁷⁵ See, e.g., *supra* notes 156–157 and accompanying text (discussing FERC’s consideration of downstream air pollution in individual certification proceedings).

¹⁷⁶ For the SEC’s climate-risk disclosure proposal, for instance, the most direct antecedent was the agency’s 2010 guidance document on disclosing climate-related risk. See *supra* notes 97–99 and accompanying text. For the FERC policy statements, the most direct antecedents were recent orders where the agency had estimated both direct and indirect greenhouse gas emissions. See *supra* note 150 and accompanying text.

¹⁷⁷ The Supreme Court’s formulation of the major questions doctrine focuses on the statute’s “long-extant” nature. *West Virginia*, 142 S. Ct. at 2610. In a two-justice concurrence in *West Virginia* offering his theory of the major questions doctrine, Justice Gorsuch argued that courts should “examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address” and claimed that “an agency’s attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.” *Id.* at 2623 (Gorsuch, J., concurring).

¹⁷⁸ In the FERC policy statements, for instance, the agency had only recently assessed greenhouse gas emissions, but had considered the downstream impacts of other air pollutants resulting from pipeline build-out dating back decades. See *supra* notes 155–157 and accompanying text.

¹⁷⁹ See *supra* note 111 (highlighting SEC’s identification of antecedents for materiality, corporate governance, and threshold provisions).

¹⁸⁰ See Institute for Policy Integrity et al., *supra* note 115, at 10–15 (identifying antecedents for blanket disclosures and bright-line thresholds); *id.* at 15–17 (identifying antecedents for disclosure of uncertain future risks); *id.* at 17–22 (expanding on SEC’s analysis of governance-related disclosure requirements).

evinced the agency recognized that it possessed authority analogous to the authority it now asserts.

FERC's policy statements illustrate how a deeper analysis of relevant antecedents can help rebut claims that the agency is asserting unheralded authority. In the policy statements, the Commission identified several antecedents but described them briefly and at a high level of generality.¹⁸¹ Given their limited attention in the policy statements, dissenting commissioners did not even distinguish these antecedents in their dissenting statements.¹⁸² Supportive commenters provided more detail on the antecedents identified by the Commission, drawing out their relevance and identifying particular quotations in prior proceedings whereby FERC recognized an analogous authority.¹⁸³

B. Agencies Should Consider Regulatory Antecedents at All Stages of the Regulatory Process, Including in the Proposal

While the prior section provides recommendations on the types of antecedents agencies should analyze, this section discusses when they should analyze them. The section recommends that agencies assess regulatory antecedents at all key stages of the regulatory process: formation, proposal, and finalization. The proposal stage is perhaps the most critical, as a detailed analysis of regulatory antecedents at the proposal stage enables the agency to frame the issue and allows for more targeted objections that the agency can address at finalization. This section outlines the merits of analyzing regulatory antecedents at each of the three regulatory stages.

Formation. The formation stage is the pre-proposal period where the agency selects its regulatory approach.¹⁸⁴ This is when the agency first decides whether to act and serves as an opportunity for the agency to analyze the strengths and weaknesses of alternative regulatory approaches. Such an assessment includes considering the legal vulnerabilities and litigation risks of regulatory alternatives. Given the prominence of the major questions doctrine in recent administrative caselaw¹⁸⁵ and court filings,¹⁸⁶ assessing the legal vulnerabilities and litigation risks of regulatory alternatives should include an analysis of the major questions doctrine. This includes (though not necessarily limited to¹⁸⁷) consideration of regulatory antecedents and whether the contemplated action would be “unheralded.”

¹⁸¹ See *supra* notes 150–153 and accompanying text.

¹⁸² See *supra* notes 145–149 and accompanying text.

¹⁸³ See *supra* notes 154–161 and accompanying text. For instance, supportive commenters noted that in one docket, the Commission recognized that downstream air pollution was “one of the important factors” that it considered in natural-gas pipeline certification proceedings. See *supra* note 157 and accompanying text. Commenters also highlighted relevant quotations in the Commission’s 1999 policy statement claiming a similar authority.

¹⁸⁴ Agencies sometimes solicit public input before issuing a regulatory proposal through either a request for information or advanced notice of proposed rulemaking. Other times, agencies issue a proposal without having previously solicited public comment. The recommendations presented herein apply equally to both cases.

¹⁸⁵ See *supra* Part I.

¹⁸⁶ See *supra* note 85 and accompanying text.

¹⁸⁷ See *supra* note 65 and accompanying text (explaining that under *West Virginia*, the major questions doctrine applies if a regulation is both unheralded and effects a fundamental revision of the statute).

Analysis of regulatory antecedents should serve as one factor in the agency’s selection of the preferred regulatory approach among alternative options. Of course, the agency need not choose the least-innovative option, particularly when more innovative alternatives better achieve the agency’s policy objectives (as they often will). But regulatory novelty can be a critical consideration when the agency is selecting among alternatives that meet the agency’s policy objectives. The Clean Power Plan offers a potentially useful illustration. In that rule, EPA considered setting the best system of emission reduction based on co-firing and carbon capture and storage (CCS).¹⁸⁸ While EPA found these tools to be both “technically feasible” and “cost effective,” it preferred generation shifting as the less-expensive alternative.¹⁸⁹ An important countervailing consideration, however, is that CCS and co-firing are source-based rather than system-based controls, making them more squarely in line with EPA’s traditional approach to regulation under Section 111.¹⁹⁰

While the purpose of this illustration is not to second-guess EPA’s approach or suggest that the alternative would have necessarily yielded a different litigation outcome,¹⁹¹ the illustration serves to highlight the importance of considering regulatory novelty during proposal formation. Moving forward, agencies should analyze regulatory precedents at the early stages of rulemaking and assess legal vulnerability under the major questions doctrine when selecting between regulatory approaches.

Of course, even if an agency cannot identify relevant antecedents for a particular regulatory alternative, this does not necessarily mean that the agency should avoid that alternative. After all, the “unheralded” nature of agency regulation serves as just one prong under the major questions doctrine—for the doctrine to apply, the action must also cause a “‘fundamental revision of the statute, changing it from one sort of scheme of regulation’ into an entirely different kind.”¹⁹² Thus, while the lack of relevant antecedents may factor against a regulatory alternative, it is only one factor and not by itself dispositive.

¹⁸⁸ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,727 (Oct. 23, 2015) [hereinafter Clean Power Plan]. Recall that EPA instead premised its regulation on generation shifting, which the Supreme Court struck down in *West Virginia*. See *supra* notes 44–64 and accompanying text.

¹⁸⁹ Clean Power Plan, 80 Fed. Reg. at 64,727.

¹⁹⁰ See *West Virginia*, 142 S. Ct. at 2610 (“Prior 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.”).

¹⁹¹ EPA promulgated the Clean Power Plan years before the Supreme Court’s current focus on the major questions doctrine came into focus.

¹⁹² *West Virginia*, 142 S. Ct. at 2612 (alterations omitted) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)). Only when an agency’s action is both unheralded and transformative does it trigger the major questions doctrine and thus the need for “clear congressional authorization” for the action. *Id.* at 2614 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

Regulatory proposal. The regulatory proposal is when the agency issues a notice of proposed rulemaking in the Federal Register that is subject to public comment.¹⁹³ The regulatory proposal must include “reference to the legal authority under which the rule is proposed” along with “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹⁹⁴

The requirement that agencies reference the legal authority for a proposed regulation¹⁹⁵ serves at least two key purposes. First, it “functions to ensure that the agency considers whether it actually has the authority to make the rule it is proposing.”¹⁹⁶ Second, it ensures that interested parties have adequate notice and opportunity to comment on the agency’s authority.¹⁹⁷ But this is not a high hurdle. While an agency must provide some basis of legal authority,¹⁹⁸ its explanation need not include a detailed analysis¹⁹⁹ or anticipate and respond to potential counterarguments.²⁰⁰

Nonetheless, agencies routinely provide more extensive analysis of their legal authority in the regulatory proposal that goes far beyond the Administrative Procedure Act’s requirements. That analysis often considers judicial canons of constructions and agency deference. For instance, agencies frequently cite the doctrine of *Chevron* deference in a proposed regulation to justify their legal authority.²⁰¹ Agencies have relied on *Chevron* deference in rulemaking

¹⁹³ The Administrative Procedure Act typically requires agencies to engage in notice-and-comment rulemaking, subject to designated exceptions. 5 U.S.C. § 553. Notice-and-comment rulemaking is generally not required when agencies issue “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” or “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” *Id.* § 553(b)(A)–(B). Notice-and-comment rulemaking is also not required for “military or foreign affairs function[s]” or for “matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” *Id.* § 553(a).

¹⁹⁴ *Id.* § 553(b)(2)–(3).

¹⁹⁵ *Id.* § 553(b)(2).

¹⁹⁶ *United States v. Whitlow*, 714 F.3d 41, 46 (1st Cir. 2013); *see also* *United States Telecomm. Ass’n v. FCC*, 825 F.3d 674, 697 (D.C. Cir. 2016) (explaining that a court’s role in challenges to legal authority underlying agency rules “is to ensure that an agency has acted ‘within the limits of [Congress’s] delegation’ of authority”) (alteration in original) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)).

¹⁹⁷ *Whitlow*, 714 F.3d at 46.

¹⁹⁸ *See, e.g.*, *Nat’l Tour Brokers Ass’n v. United States*, 591 F.2d 896, 900, 903 (D.C. Cir. 1978).

¹⁹⁹ *Cf. id.* at 900 (explaining that agency could have fulfilled the requirement by simply listing the statutory provisions under which the proposed regulation was being issued); *Glob. Van. Lines, Inc. v. Interstate Com. Comm’n*, 714 F.2d 1290, 1298 (5th Cir. 1983) (finding that agency violated requirement by omitting reference in its proposal to key statutory provision on which the regulation relied).

²⁰⁰ *Koretov v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (“It is certainly true that agencies are required to ensure that they have authority to issue a particular regulation. . . . But as we have repeatedly made clear, agencies have no obligation to anticipate every conceivable argument about why they might lack such statutory authority.”)

²⁰¹ We searched for references to “‘Chevron’ and ‘deference’” in rules, proposed rules, and notices published in the Federal Register between January 1, 1985 and July 1, 2022 and available on regulations.gov. Based on these search results, we concluded that agencies and commissions have cited *Chevron* deference to support their authority to promulgate a rule or order at least 266 times since 1985. Of those citations, 61 were in proposed rules, with the vast majority (58) of those citations appearing in the regulatory preamble. Agencies also discussed *Chevron* deference in 165 final rules published in the Federal Register during the same time period. Of those, 78 references appeared in the preamble, 37 references were summarizing public comments, and 82 references appeared in the agency’s responses to comments. These numbers may represent an underestimate of the number of times that agencies

relatively consistently over the past several presidential administrations.²⁰² But the Supreme Court is now relying less on *Chevron* deference,²⁰³ and the major questions doctrine has come to play a significant interpretive role in recent years.²⁰⁴ Therefore, while agencies should continue to consider *Chevron* deference and judicial canons of construction when analyzing their legal authority, they should also give close attention to the major questions doctrine—particularly for significant and controversial rulemakings that are more likely to face a challenge under the doctrine. In particular, as detailed above, agencies should catalog regulatory antecedents that support the claimed legal authority by demonstrating that the agency is not exercising an unheralded power.²⁰⁵

Analyzing regulatory precedents in the proposed rule provides several advantages for the agency and the public. From a strategic perspective, opponents of the regulation who plan to challenge the rule on major questions grounds will want to refute the relevance of particular antecedents offered by the agency in their comments, or risk possibly losing the ability to raise such arguments in litigation.²⁰⁶ The agency can then refine its presentation of regulatory antecedents in the final regulation when it considers objections raised by commenters, including rebutting counter-arguments raised about the relevance of particular antecedents, adding antecedents identified by supportive commenters or responsive to unanticipated major questions objections in opposing comments,²⁰⁷ or expanding upon its analysis of particular antecedents in

justified their action by reference to *Chevron* deference, since all such discussions may not contain the word “deference” (or even “Chevron”).

²⁰² Our search yielded just one instance during the Reagan administration in which an agency discussed *Chevron* deference in a Federal Register rule, proposed rule, or notice; three references during the George H.W. Bush administration, and seventeen references under the Clinton administration. References to *Chevron* deference increased substantially during the George W. Bush administration, with 51 total references at an average of approximately six per year. References to *Chevron* deference increased further during the Obama administration, with 106 search results at an average of approximately 13 per year. That annual average increased even further under the Trump administration, where our search yielded 65 results at an average of approximately 16 per year. Under the first seventeen months of the Biden administration (through July 1, 2022), there were 23 references to *Chevron* deference in Federal Register rules, proposed rules, or notices.

²⁰³ See, e.g., Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS L. REV. 441 (2021) (discussing how *Chevron* deference has lost prominence in Supreme Court jurisprudence and come under threat).

²⁰⁴ See *supra* Part I for a discussion about the rise of the major questions doctrine (and, in particular, the judicial focus on an agency’s claim of “unheralded” authority).

²⁰⁵ See *supra* Part III.A.

²⁰⁶ See SECTION OF ADMIN. L. & REG. PRACTICE, ABA, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 53–54 (2d ed. 2013) (explaining that “[s]ome courts have . . . applied the issue-exhaustion doctrine to the notice-and-comment rulemaking process,” and that “[u]nder this approach, a party that fails to raise an objection to a rule during notice-and-comment may not press that objection on direct judicial review of the rule unless (1) another party made the objection or (2) the agency’s decision indicates that it did in fact consider the issue.” Certain statutes also prohibit litigants from raising issues that were not presented to the agency during the comment process. *E.g.* 15 U.S.C. § 78y(c)(1) (Securities Act); 15 U.S.C. § 717r(b) (Natural Gas Act). For further reading on administrative exhaustion in the rulemaking context, see Jeffrey Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109 (2018).

²⁰⁷ See *supra* Part III.A for a discussion of the breadth of antecedents that agencies should identify in proposed rules. Of course, agencies cannot anticipate every objection to a regulatory proposal in advance, and the relevance of some antecedents may only come into focus through objections provided during the notice-and-comment process.

response to targeted objections.²⁰⁸ Extensively analyzing antecedents in the proposed regulation sets up the agency for an even more refined presentation in the final rule.²⁰⁹

Final regulation. The final regulation is when the agency formally promulgates a rule and offers its complete justification for that rule. When issuing a final regulation, agencies must consider and respond to “relevant matter presented” in public comments.²¹⁰

If an agency offers an extensive analysis of regulatory antecedents in its proposal, the final regulation allows the agency to consider public comments submitted, respond to concerns raised about the relevance of particular antecedents, and refine its discussion of antecedents to bolster its legal justification. Agencies should generally err on the side of overinclusion when it comes to its presentation of regulatory antecedents in the final rule, as government attorneys will select which antecedents to feature in future litigation.

A robust analysis of regulatory antecedents in the final regulation will provide a roadmap for government litigators, thereby assisting the government’s defense of the regulation and lowering litigation risk. While litigators can continue to refine the agency’s presentation of regulatory antecedents, there are at least three additional advantages to the agency engaging in a robust characterization of regulatory antecedents itself (beyond the ability to anticipate and respond to opposing arguments through the notice-and-comment process²¹¹). First, regulators are subject-matter experts in the agency’s authority, whereas litigators are typically from the Department of Justice and may lack relevant subject-matter expertise. Second, agency regulators may have more time to identify relevant antecedents,²¹² particularly when litigation is fast-tracked through a request for preliminary relief.²¹³ And third, courts may look more favorably

²⁰⁸ See *supra* Part III.A for a discussion of the depth of antecedents that agencies should identify in proposed rules.

²⁰⁹ Agencies frequently provide supporting documentation with a proposed regulation such as economic or technical analyses. This practice similarly allows the agency to receive public comment and revise the supporting documentation when finalizing the rule.

²¹⁰ 5 U.S.C. § 553(c). Courts have interpreted this to mean that an agency “need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.” *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003).

²¹¹ See *supra* notes 206–209 and accompanying text.

²¹² See Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 945–46 (2008) (finding that the average duration for rulemakings without a statutory deadline is 528 days).

²¹³ Litigation can move particularly rapidly when plaintiffs seek preliminary relief against large and contentious regulations. The COVID-19 vaccination-or-testing standard that the Supreme Court struck down in *National Federation of Independent Business v. Department of Labor* provides an example. Petitioners moved for a stay in the U.S. Court of Appeals on the same day that the regulation was finalized, and the government’s brief was due five days later. See *Docket, BST Holdings v. OSHA*, 17 F.4th 604 (5th Cir. 2021); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021). The regulatory process itself could move very quickly for such rules, but likely not as quickly. For instance, the Occupational Safety and Health Administration took approximately two months to promulgate the COVID-19 vaccination-or-testing standard. See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 663 (2022). The agency issued that regulation without notice and comment pursuant to the relevant statute. See *id.*

upon antecedents identified by the agency when issuing the regulation compared to those identified after the fact by litigators.²¹⁴

Conclusion

This Article traces the rise of an “unheralded power” analysis in federal courts, showing how courts are increasingly considering regulatory novelty when assessing the legality of agency action. This enhanced focus on regulatory novelty provides a strong incentive for agencies to analyze regulatory antecedents during the rulemaking process, particularly for large and contentious regulations that may face challenges under the major questions doctrine. This Article recommends best practices for both the content and timing of agency consideration of regulatory antecedents in the rulemaking process. It suggests that agencies consider a broad range of relevant antecedents and extensively document how those antecedents are analogous to the current action. The Article also recommends that agencies analyze regulatory antecedents at all stages of rulemaking, with a particular emphasis on the regulatory proposal.

²¹⁴ See *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020) (discussing “prohibition on *post hoc* rationalizations” in litigation over agency action).