EXPLORING THE FUTURE OF MAJOR QUESTIONS' MURKY WATERS: *NORTH CAROLINA COASTAL FISHERIES REFORM GROUP V. CAPT. GASTON*

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Introduction

The major questions doctrine (MQD) has been used in so many dozens of lower court opinions since *West Virginia v. EPA*[1] that you could easily be forgiven for letting *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*[2] slip under your radar. After all, commentators are still trying to find answers to the many important debates raging about the major questions doctrine.[3] *West Virginia* explained that the MQD requires "clear congressional authorization" for an agency's asserted authority when "the 'history and the breadth of the

* J.D. Candidate, Harvard Law School, Class of 2024. I want to thank Professor Andrew Mergen for invaluable advice in framing this paper and Dallas Estes for graciously allowing me to pick their brain on their own great Comment on this case. A big thank you to the *Harvard Environmental Law Review* staff, and in particular Logan Campbell, Jonathan Chan, and Allyson Gambardella for excellent editorial advice. And I want to thank Aaron Moody for letting me sink my teeth into the summer intern project that put this case on my radar. Any errors are my own.

1. 597 U.S. 697, 766 (2022) ("The majority today . . . announces the arrival of the 'major questions doctrine'") (Kagan, J., dissenting).
2. 76 F.4th 291 (4th Cir. 2023).
3. Beau J. Baumann has compiled a very helpful reading list. *See* Beau J. Baumann, *The Major Questions Doctrine Reading List*, Yale J. on Regul.: Notice & Comment Blog (Mar. 7, 2023), https://perma.cc/J6NP-DE52.

authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[4] But how does one evaluate "history and breadth" or "economic and political significance?" Under what circumstances can the MQD be invoked? Attempting to answer these more technical questions prompts deeper questions: What exactly is the MQD?[5] Where does it come from?[6] What effects will it have on administrative law and statutory interpretation?[7] Absent further guidance from the Supreme Court, it is these

4. *West Virginia*, 597 U.S. at 721, 723 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)). *West Virginia* was the Court's first use of the MQD by that name in a majority opinion, *see id*. at 766 (Kagan, J., dissenting) ("The majority today . . . announces the arrival of the 'major questions doctrine'"), but the Court relied on several precedents that the majority viewed as applying similar reasoning, sans the MQD moniker. *See id*. at 721–23 (citing to several cases, including: *Brown & Williamson*, 529 U.S. at 159–60; Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S.Ct. 2485, 2487 (2021); Gonzales v. Oregon, 546 U.S. 243, 267 (2006); Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 595 U.S. 109, 117 (2022); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see also id*. at 740–742 (arguing that the history of the MQD can be traced to a similar set of cases, including one as old as 1897) (Gorsuch, J., concurring).

5. *See*, *e.g.*, Ilan Wurman, *Importance and Interpretive Questions*, Va. L. Rev. __, 1 (forthcoming 2024) (arguing that the MQD is, or should be, a linguistic canon); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1034–47 (describing the MQD as a clear statement rule); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L. J. 191, 223 (2023) ("There is one version of the major questions doctrine: a clear-statement rule grounded in the 'separation of powers.'"); Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 Wm. & Mary Env't L. & Pol'y Rev. 47, 50 (2022) (pointing out that "the phrase 'clear-statement rule' is conspicuously absent from the [*West Virginia*] majority opinion's legal analysis"); Nicholas Bednar, Chevron's *Latest Step*, Yale J. on Regul.: Notice & Comment Blog (July 3, 2022) (arguing that "the major-questions doctrine belongs in the *Chevron* framework"); Beau J. Baumann, *Americana Administrative Law*, 111 Geo. L.J. 465, 467–68 (arguing that the MQD has been applied "more like a supercharged rule of *interpretation*").

6. *See, e.g.*, Jack M. Beerman, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron and More*, 65 WM. & Mary L. Rev. __, 6 (forthcoming 2024) (arguing that the MQD "is an unprecedented new judicial creation"); Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1937–38 (2017) (arguing that the proto-MQD in previous MQD cases includes canons that have "no basis in law" and "do not align with the relevant statutes or prior judicial precedents"); Daniel Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 Iowa L. Rev., 42–46 (2024) (arguing that the MQD "[h]as [n]o [n]exus with [a]uthoritative [l]aw").

7. *See*, *e.g.*, Deacon & Litman, *supra* note , at 1049–92 (arguing that the MQD creates several "pathologies," such as allowing controversy to influence legal rulings, enhancing minority rule, permitting judges to make political judgments, and hobbling agency action); Beerman, *supra* note , at 6 (arguing that the MQD "is an unprecedented new judicial creation designed to suppress regulatory innovation"); *see generally* Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 Mich. L. Rev. 55 (2023) (spelling out implications in the national security space); Walter G. Johnson & Lucille

murky and unstable waters that lower courts have been forced to wade into as they grapple with the MQD.

Capt. Gaston is one such decision. The case concerned shrimp trawling in North Carolina, a practice that involves dragging nets along the bottom of coastal waters to catch shrimp.[8] Recreational fishermen, worried that shrimp trawling harms North Carolina fisheries, sued commercial shrimp trawlers under the citizen suit provision of the Clean Water Act (CWA).[9] The plaintiffs argued that two activities associated with shrimp trawling were unauthorized "discharge[s] of a pollutant" under the CWA: discarding unwanted species caught during fishing (known as "bycatch") and disturbing sediment.[10] The Eastern District of North Carolina rejected the plaintiffs' reading of the CWA using typical tools of statutory interpretation.[11] On appeal, the Fourth Circuit also rejected the plaintiffs' arguments, but instead of following the district court's logic, they used the MQD.[12] In doing so, the Fourth Circuit applied the MQD in a way no court had done before: to a dispute between two private parties.[13]

This Comment aims to contribute to the field of MQD research by flagging the important MQD developments that *Capt. Gaston* may foreshadow. Part I summarizes *Capt. Gaston*, both the original case filed in the Eastern District of North Carolina and the subsequent decision by the Fourth Circuit. Part II contrasts the decisions and argues that the Fourth Circuit decision is a significant development for the MQD. *Capt. Gaston* reveals that the MQD's doctrinal instability allows it to be a tool of statutory interpretation applicable to almost any statute and in any context. Part II then explores how this version of the MQD expands the doctrine's anti-innovation effects to a broader range of litigation contexts and heightens the stakes for actors attempting to coordinate legal advocacy.

I. Summary of the Case

The district court and the Fourth Circuit both rejected the plaintiffs' readings of the CWA, but for different reasons. This Part surveys the relevant facts and CWA provisions, then summarizes the reasoning in the opinions.

Tournas, *The Major Questions Doctrine and the Threat to Regulating Emerging Technologies*, 39 Santa Clara High Tech. L.J. 137 (2023) (spelling out implications in the technology space).

8. *N.C. Fisheries Reform Grp. v. Capt. Gaston LLC*, 560 F. Supp. 3d 979, 987–88 (E.D.N.C. 2021), *aff'd*, 76 F.4th 291 (4th Cir. 2023).
9. *Id*. at 986–88.
10. *Id*. at 995; *see also* 33 U.S.C. § 1311(a).
11. *See Capt. Gaston*, F. Supp. 3d at 994–1009; *see also infra* Part I.B.
12. *See* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 295–302 (4th Cir. 2023); *see also infra* Part II.C.
13. *See Capt. Gaston*, 76 F.4th at 299 n.8; *see also infra* Part II.

A. Factual and Statutory Background

Plaintiff North Carolina Coastal Fisheries Reform Group (NCCFRG) is a non-profit group whose members include recreational fishers and small business owners[14] united by a mission "to restore [North Carolina] fisheries back to the world class fisheries that they once were."[15] NCCFRG claimed that commercial shrimp trawling harms other aquatic species because the nets catch anything that is unable to escape.[16] Unwanted species caught in the nets are discarded as bycatch, which NCCFRG claimed adds up to about four pounds of bycatch for every pound of shrimp harvested, or about 34 million pounds of bycatch discarded into North Carolina's Pamlico Sound alone.[17] NCCFRG claimed that shrimp trawling kills millions of fish, including juveniles, and thus contributes to the multi-decade decline of North Carolina fisheries.[18] Other North Carolina recreational fishing groups and environmental non-profits have also advocated against shrimp trawling.[19]

NCCRFG, along with several individual recreational fishers and fishing guides, filed suit against Capt. Gaston LLC and several other commercial shrimp trawling companies in the Eastern District of North Carolina under the CWA citizen suit provision.[20] The plaintiffs claimed that the trawling activities violated § 1311(a) of the CWA, which prohibits "the discharge of any pollutant by any person" except as provided for in the Act.[21] "Discharge of a pollutant" is defined in § 1362(6) as "any addition of any pollutant to navigable waters from any point source",[22] and a "pollutant" includes, in relevant part,

14. *Capt. Gaston*, 560 F. Supp. 3d at 986–87.
15. *North Carolina Coastal Fisheries Reform Group*, NCCFRG, https://perma.cc/LPZ2-A9BM.
16. *Capt. Gaston*, 560 F. Supp. 3d at 988.
17. *Id*.
18. North Carolina Coastal Fisheries Reform Group, *supra*, note . Presumably, impact on juveniles harms fisheries because, NCCFRG claims, the Pamlico Sound "is a highly productive nursery area" and bycaught juveniles "never get the chance to spawn." *Id*.
19. *See, e.g.*, Coastal Conservation Ass'n of North Carolina Fisheries Committee, The Hidden Cost of Destructive Fishing Gear in North Carolina, 1–8 (2016), https://ccanc.org/wp-content/uploads/2016/12/Inshore-Shrimp-Trawling.pdf; North Carolina Wildlife Federation, Shrimp Trawling: Myths and Mismanagement (2021), https://perma.cc/6TM6-YM4J.
20. *Capt. Gaston*, 560 F. Supp. 3d at 986–87; 33 U.S.C. § 1365. The plaintiffs originally sued the North Carolina Department of Environmental Quality as well, but later dropped this part of the suit. 560 F. Supp. 3d at 979 n.1.
21. 33 U.S.C. § 1311(a). The plaintiffs also claimed that the shrimp trawlers had violated North Carolina's public trust doctrine, but the District Court dismissed this claim because only the State could bring a public trust action. 560 F.Supp.3d at 1008–09. This issue was not raised again in the Fourth Circuit.
22. 33 U.S.C. § 1362(12)(A). 33 U.S.C. § 1362(12)(B) also defines "discharge of a pollutant" to mean "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft," but this definition was not at issue in *Capt. Gaston*.

"dredged spoil, . . . biological materials, . . . rock, [and] sand, . . . discharged into water."[23]

The plaintiffs claimed that two of the shrimp trawler's activities constituted an unpermitted discharge of a pollutant and thus violated § 1311(a): disturbance of sediment and discard of bycatch.[24] Defendants moved to dismiss for failure to state a claim under the CWA.[25] The district court agreed with the defendants and rejected both claims.

B. Opinion of the Eastern District of North Carolina

The court dispensed with the disturbed sediment claim in just over a page.[26] At first, the court agreed that the disturbed sediment fit within the plain meaning of "dredged spoil," which the CWA includes in its definition of "pollutant."[27] But this activity nonetheless did not violate the CWA because it was not a "discharge" of a pollutant, which requires the transfer of a pollutant "'*into* navigable waters,'"[28] in other words, "the 'addition' of a pollutant."[29] Instead of being "redeposited or reintroduced," the sediment disturbed by the trawlers stayed in the water.[30]

The plaintiffs' second CWA claim received a much more detailed analysis. The plaintiffs argued that the trawlers had violated the CWA by discarding bycatch without a permit, because bycatch was covered by the definition of "pollutant", as "biological material[]."[31] The court held that it could not resolve the question by looking to the plain meaning of "biological materials," because although, "[i]n its literal sense, the term biological materials could reach the living and dead fish and marine species" that constituted the trawlers' bycatch, "'overly literal reading[s] of a statute, without any regard for its context or history' . . . are discouraged."[32]

So, the court moved on to the statutory context. Focusing on the CWA's federalism disclaimer at § 1370, the court reasoned that "'biological material' must be read in the context of § 1370's requirement of state-rights-conscientious

23. § 1362(6).
24. *Capt. Gaston*, 560 F. Supp. 3d at 995.
25. *Id*. at 986.
26. *Id*. at 996–97.
27. *Id*. at 996 (citing 33 U.S.C. § 1362(6)) ("Such resuspended sediment is material brought up from the bottom of a body of water allegedly by means of a dredge, that is, the dictionary definition of dredged material").
28. *Id*. (quoting *United States v. Deaton*, 209 F.3d 331, 334 (4th Cir. 2000))
29. *Id*. (quoting 33 U.S.C. § 1362(a)(12)).
30. *Id*.
31. *Id*. at 997–1006; *see also*, 33 U.S.C. § 1362(6).
32. *Capt. Gaston*, 560 F.Supp.3d at 997 (quoting Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604 (1978)).

constructions of the Act."[33] Citing to various federal statutes, such as the Magnuson-Stevens Act, the court held that "management of fisheries within state coastal waters ha[d] been recognized as squarely within that state's rights and jurisdiction."[34] Citing to a variety of statutory and policy sources, the court reasoned that state fisheries management "for practical purposes, implicate[d] bycatch and bycatch mortality."[35] Thus, if fisheries management is left to the states, and fisheries management includes bycatch, reading the definitions at § 1362(6) to include bycatch would be impermissible because it "would extend the [CWA] into an area of traditional state management and jurisdiction," contrary not only to the federalism clear statement rule but to the Act's own federalism disclaimer.[36]

The court also held that *lex specialis*—the principle that "a specific statute" is not "controlled or nullified by a general one, regardless of the priority of enactment"[37]—prevented reading § 1362(6) to include bycatch. Section 1362(6), the court reasoned, is a general provision, but there are several provisions and regulations under the Magnuson-Stevens Act and North Carolina law that specifically regulate bycatch.[38] Although the plaintiffs argued that these statutes and regulations implicate only fisheries management, the court pointed out that "the regulatory bodies in charge of fisheries management appear to universally treat bycatch *as a fisheries management issue*"[39] and that the Environmental Protection Agency (EPA) "ha[d] [n]ever understood its statutory authority to reach bycatch."[40] That reading the CWA to regulate bycatch would put it "in tension with more specific regulatory provisions" was thus another reason to reject that reading.[41]

The court also reasoned that "per this interpretation of the Act . . . any person on a dinghy off of Ocracoke Island who picks up a floating crab out of the water and, moments later, places it back in the water after that person has satisfied his or her curiosity commits a literal violation of § 1311(a)" by discharging a pollutant without a permit.[42] This result—which "would transform § 1311(a) into a sweeping source of litigation that Congress could not have intended" and

33. *Id*. at 998. 33 U.S.C. § 1370 preserves the ability of States to adopt more stringent standards than the EPA and also provides that "nothing in this chapter shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."
34. *Capt. Gaston*, 560 F.Supp.3d at 998.
35. *Id*. at 999.
36. *Id*.
37. *Id.* at 1000 (quoting Varity Corp. v. Howe, 516 U.S. 489, 511 (1996))
38. *Id*. at 1000–04 (citing, among others, 16 U.S.C. § 1851(a)(9), 50 C.F.R. § 600.350(d)), and 15A N.C. Admin. Code 3J.0104(d), (f).
39. *Id*. at 1002 (emphasis added).
40. *Id*.
41. *Id.* at 1004.
42. *Id*. at 1003–04.

was not supported by EPA's historical practice—would be absurd.[43] Finally, the court relied on its foregoing analysis to discard plaintiff's attempts to analogize to cases from the Fourth and Sixth Circuits.[44]

The district court opinion employed typical statutory interpretation tools to reach a reasonable decision. The plaintiffs appealed the case to the Fourth Circuit, where they might have expected an uphill battle. But they probably did not expect that they would have to contend with a new elephant in the room: the MQD.

C. The Fourth Circuit

The Fourth Circuit unanimously affirmed the district court on all counts, but for different reasons.[45] Between the time the appellants filed their brief and oral argument, the doctrinal ground shifted: the Supreme Court applied the MQD in *West Virginia v. EPA*.[46]

The Fourth Circuit tackled plaintiffs' bycatch claim first. Instead of affirming the district court's analysis with the same set of statutory interpretation tools, the Fourth Circuit used just one tool: the newly-minted major questions

43. *Id*. at 1004.

44. The plaintiffs argued that the Sixth Circuit had held that "biological material" in the CWA could include dead fish. *Id*. at 1004 (citing Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 586 (6th Cir. 1988)). But the district court rejected the plaintiffs' argument because even though the *Consumers Power* court held that live and dead fish could be "biological materials" under the CWA, their re-addition to waters is not a "discharge" of a pollutant when it "is not a pollutant from 'the outside world.'" *Id*. at 1004–06 (discussing *Consumers Power*, 862 F.2d at 585–86). To counter this interpretation of "discharge," the plaintiffs argued that the Fourth Circuit case *United States v. Deaton* had held that "material already present in navigable waters can be considered a discharge if reintroduced 'when an activity transforms some material from a nonpollutant into a pollutant.'" *Id*. at 1005–06 (quoting United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000)). But the district court pointed out that *Deaton*'s analysis also focused on whether a pollutant was being added "'where none had been before,'" which was not the case with shrimp trawling because "naturally occurring live and dead fish" were already present in the water. *Id*. (quoting *Deaton*, 209 F.3d at 335–36). In the end, although the plaintiffs' reliance on related caselaw was somewhat plausible, the district court found that it could not overcome the statutory analysis the court had already laid out. *Id*. at 1006 ("reference to the context of §§ 1311 and 1362, indicia of congressional intent, and canons of statutory interpretation all indicate that any construction of the Clean Water Act's prohibition on unpermitted discharge of biological materials should not reach casting bycatch (live or dead) back into North Carolina coastal waters.").

45. The panel included Fourth Circuit Judges Julius Richardson and Allison Jones Rushing and district court Judge Sherri Lydon of the District of South Carolina, sitting by designation. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 293 (4th Cir. 2023).

46. Plaintiff's final reply brief was filed on March 23, 2022. Reply Brief of Appellants at 12, *Capt. Gaston*, 76 F.4th 291 (4th Cir. 2023). *West Virginia* was handed down on June 30, 2022. West Virginia v. EPA, 597 U.S. 697, 697 (2022). *Capt. Gaston* was argued on October 25, 2022. *Capt. Gaston*, 76 F.4th at 291.

doctrine.[47] Although the plaintiffs made "a plausible case" when "considering only the statutory text," the Fourth Circuit explained that "we have been instructed to consider, as a background rule, other legal interests that contextually inform our understanding of a statute's meaning."[48] The MQD, "another background principle" that the Supreme Court had recently "formalized," was on point.[49] The Fourth Circuit separated its MQD analysis into two parts: first, it analyzed whether the MQD applied to the plaintiffs' bycatch claim;[50] if so, the court would ask whether plaintiffs had identified "'clear congressional authorization' to regulate bycatch under § 1311 of the Clean Water Act."[51]

The Fourth Circuit held that the bycatch claim was a major question because it met several of the "hallmarks" of a major question that the Supreme Court had previously laid out.[52] First, there was already a "'distinct regulatory scheme' to address the bycatch problem:"[53] the Magnuson-Stevens Act allowed the National Marine Fisheries Service to regulate bycatch in federal waters, and maintained state authority over state waters.[54] Second, and relatedly, "[a]dopting [Plaintiffs'] interpretation would upset the Magnuson-Stevens Act's federal-state balance and raise significant federalism concerns."[55] Federalism concerns arise, the Fourth Circuit explained, because "Congress has repeatedly confirmed that states have the primary authority to regulate fishing in their waters."[56] The states' rights-saving clause of the CWA acknowledges state authority over "'land and water resources,'"[57] which, in other statutes, has referred to "'fish, shrimp . . . and other marine animal and plant life.'"[58] Third, EPA's "own lack of confidence that it ha[d] this authority," as shown by the fact that it had never attempted to regulate bycatch, "suggests that this is a major-questions case."[59] Fourth, if the EPA had the power to regulate bycatch, this "would give it power over 'a significant portion of the American economy,'" including "[a]lmost every commercial or recreational fishermen [*sic*] in America."[60] In a colorful example, the Fourth Circuit explained that "under [Plaintiffs'] proposed reading, when my daughter fishes on a boat by casting a hooked mud minnow into the sea, she has discharged a pollutant. She has taken a biological material (the minnow) and added

47. *See Capt. Gaston*, 76 F.4th at 296–97.
48. *Id*. at 295–96.
49. *Id*.
50. *Id*. at 297.
51. *Id*. at 301 (quoting *West Virginia*, 597 U.S. at 723).
52. *Id*. at 297.
53. *Id*. (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–46 (2000)).
54. *Id*. at 297–98 (citing to various provisions of the Magnuson-Stevens Act and a North Carolina fishery-management plan).
55. *Id*. at 298.
56. *Id*.
57. *Id*. at 298–99 (quoting 33 U.S.C. § 1251(b)).
58. *Id*. at 299 (quoting 43 U.S.C. § 1301(e)).
59. *Id*.
60. *Id*. (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

it to the navigable waters (the sea) from a point source (the boat). And because she has done so without a permit, she faces crushing consequences."[61] Extrapolating that frightening example across every fisher in America yielded the final hallmark of a major question: "[enormous] economic and social consequences."[62] Although the court did not cite a specific dollar figure for "enormous" economic consequences, it noted that "[f]ishing in America generates hundreds of billions of dollars, employs millions of people, and provides recreational sport for millions more," so requiring permits of "virtually every fisherman . . . would work an enormous effect."[63]

Having established that the bycatch claim presented a major question, the court asked whether there was clear congressional authorization for regulating bycatch under the CWA—and held that there was not. The plaintiffs' main argument, as in the district court, was that bycatch was "biological material" within the definition of "pollutant" under the CWA.[64] But the Fourth Circuit held that, for major questions purposes, "more is required" than a literal interpretation.[65] Consulting previous cases that the Supreme Court had retroactively recognized as major questions cases, the Fourth Circuit held that the "broad definitions" at issue in those cases "were too 'cryptic' to qualify as clear congressional authorization."[66] Thus, although "there [was] a 'plausible textual basis' for [Plaintiffs]' reading," it ultimately "[fell] short of the clear congressional authorization needed when the major-questions doctrine applies."[67] Because regulating bycatch under the CWA would trigger a major question and there was not clear congressional authorization for that authority, the Fourth Circuit rejected the plaintiffs' bycatch claim.

Unlike the bycatch claim, the Fourth Circuit rejected the plaintiffs' sediment claims using a typical textual analysis instead of the MQD. On appeal, the plaintiffs argued that the trawlers' sediment-disturbing activities constituted discharge of a pollutant either because they fit under the term "dredged spoil" in the definition of pollutant or because the disturbance included "rock and sand."[68] The Fourth Circuit took a different approach to rejecting the "dredged spoil" argument than the district court by holding that the sediment disturbed by the trawlers did not even count as "dredged spoil."[69] According to the Fourth Circuit, dictionary definitions of "dredge" seemed to refer to material that had

61. *Id*. at 300.
62. *Id*.
63. *Id*.
64. Brief for Appellants at 7.
65. *Capt. Gaston*, 76 F.4th at 302.
66. *Id*. at 301–02.
67. *Id*. at 302.
68. *Id*. at 302–03.
69. *Compare Capt. Gaston*, 560 F. Supp. 3d at 996–97 *with Capt. Gaston*, 76 F.4th at 303–04. In a footnote, the Fourth Circuit suggested that even if disturbing the sediment did fit under the definition of dredged spoil, it likely would not constitute "addition" of a pollutant, a holding

been moved through "excavation or land-altering activity," *not* "the temporary, incidental disturbance caused by a shrimp net."[70] As for "rock and sand," the court conceded that the CWA identified rock and sand as pollutants, but held that the trawlers' activity was not a discharge of a pollutant because it simply moved the rock and sand around instead of *adding* it to the water.[71]

The plaintiffs had lost again, resoundingly. But some of the reasons for why they lost were different. And they show just how powerful the MQD has—and may—become.

II. The MQD's Doctrinal Instability and Its Future After *Capt. Gaston*

Some commentators have warned that the MQD as outlined in *West Virginia* will transform administrative law and become "a powerful weapon wielded against the administrative state."[72] These dire warnings come in part because the Supreme Court's articulation of the "doctrine" of the MQD has not settled on some key points and is vague on many others. This doctrinal instability has thrown the lower courts into confusion,[73] while at the same time giving them what may be a unique opportunity to shape the MQD's evolution as the Supreme Court responds to their signals. *Capt. Gaston*—litigated as *West Virginia* was handed down and decided a little more than a year thereafter—provides an opportunity to evaluate the effects of this instability.[74]

Capt. Gaston confirms that the MQD is an unstable doctrine that has the potential to reshape not just agency lawmaking but all statutory interpretation. Three features of the doctrine stand out in *Capt. Gaston*. First, the "radical

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similar to the district court's. *Capt. Gaston*, 76 F.4th at 303 n.16. The court also pointed out that the trawler nets likely could not count as a "point source." *Id.*

70. *Capt. Gaston*, 76 F.4th at 303.

71. *Id.* at 304.

72. Deacon & Litman, *supra* note , at 1011. *See also*, Beerman, *supra* note , at 6 (arguing that the MQD "is an unprecedented new judicial creation designed to suppress regulatory innovation"); *see generally*, Meyer & Sitaraman, *supra* note (spelling out implications in the national security space); Johnson & Tournas, *supra* note (spelling out implications in the technology space).

73. *See* Ling Ritter, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 Stan. L. Rev. __, 23–37 (forthcoming 2024) (surveying the wide range of approaches to the MQD in the lower courts); Natasha Brunstein, *Taking Stock of West Virginia on its One-Year Anniversary*, Notice & Comment (June 18, 2023) (surveying case law and finding that "*West Virginia* was sufficiently unclear that lower courts have not applied the doctrine in any consistent or disciplined way").

74. Plaintiff's final reply brief was filed on March 23, 2022. Reply Brief of Appellants at 12, *Capt. Gaston*, 76 F.4th 291 (4th Cir. 2023). *West Virginia* was handed down on June 30, 2022. *West Virginia*, 597 U.S. at 697. *Capt. Gaston* was argued on October 25, 2022. *Capt. Gaston*, 76 F.4th at 291.

indeterminacy"[75] of what counts as a major question left ample room for the Fourth Circuit to find a major question at stake in *Capt. Gaston*.[76] Second, it is unclear what kind of statutory interpretation tool the MQD is, and nothing in its current articulation requires that it be applied only to agency interpretations of law.[77] Thus, the Fourth Circuit in *Capt. Gaston* could plausibly use the MQD in a dispute between two *private* parties, something that had never been done.[78] Third, because the MQD requires the high bar of "clear congressional authorization" for a claimed authority to be valid, it may be the decisive factor in this broader range of contexts, just as it was decisive in *Capt. Gaston*.[79]

The potential consequences of the MQD are enormous. The MQD's anti-innovation properties, which have previously been a worry for commentators primarily in the context of government agencies,[80] could dampen innovative legal arguments in potentially any situation where a statute is being interpreted. And with the MQD lurking in the background of potentially any dispute, actors of all stripes have even more to lose when coordination of legal advocacy goes awry or little-known actors accidentally provoke rulings that foreclose statutory interpretation arguments across the board. That is what happened in *Capt. Gaston*: a little case about shrimp trawling filed by an obscure plaintiff organization set important precedent for the CWA almost without anyone noticing.

These MQD problems stand out against a key feature of the *Capt. Gaston* litigation: the Fourth Circuit did not need to use the MQD to resolve this case. The district court's analysis, though not perfect, found a solid resolution to the plaintiffs' dubious interpretations of the CWA. But on appeal, the Fourth Circuit dealt with the plaintiffs' bycatch claims by sweeping all the district court's traditional tools off the table and replacing them with one big hammer: the MQD. The fact that the Fourth Circuit could—and did—so easily pull the MQD off the shelf demonstrates how the MQD's doctrinal instability leaves its power readily available.

A. Instability in What Counts as a "Major Question"

Capt. Gaston first highlights how the MQD's definition of what counts as a "major question" is so vague that the MQD can be applied to a huge range of statutes. Identifying a major question is crucial to the application of the MQD because it is one of the two prongs that must be satisfied before a court invalidates

75. *See* Deacon & Litman, *supra* note , at 1014, 1049–56 (exploring the criteria for "majorness" and noting that the MQD is "often described as radically indeterminate").
76. *See* Part II.A., *infra*.
77. *See* notes 122–31, *infra*, and accompanying text.
78. *See Capt. Gaston*, 76 F.4th at 299 n.8; *see also*, Part II.B., *infra*.
79. *See* Part II.C., *infra*.
80. *See*, *e.g.*, Beerman, *supra* note 6 (manuscript at 45–60) (reviewing recent MQD cases in the Supreme Court and arguing that "[its] greatest vice is that it suppresses agency innovation just when it is needed most").

a reading of a statute (the other being a lack of clear congressional authorization, which is covered in Part II.C).[81] If there is no major question, the MQD does not apply.[82] To divine the presence of a major question, the Supreme Court has looked, broadly, to the "economic and political significance" of an issue and the "history and the breadth" of the asserted statutory authority.[83] This analysis has implicated a long list of factors. For "economic and political significance," those factors have included: if an asserted authority affects "'a significant portion of the American economy,'"[84] often measured by the sheer dollar amount[85] or number of people affected;[86] if an asserted authority affects an entire market or sector of the economy;[87] and, if an asserted authority will "substantially restructure" the market.[88]

To ascertain the "history and breadth" of an agency's asserted authority,[89] the Court has considered: whether "Congress had conspicuously and repeatedly declined to enact" a solution to the issue similar to the solution created by the

81. *See* West Virginia v. EPA, 597 U.S. 697, 721–23 (2022) ("there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority") (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

82. *Compare*, *e.g.*, Rest. L. Ctr. v. U.S. Dep't of Lab., No. 1:21-CV-1106-RP, 2023 WL 4375518, at *13 (W.D. Tex. July 6, 2023) (holding that an agency rule did not trigger the MQD in part because an average cost of $183.6 million a year was not a major question), *with* Texas v. United States, 50 F.4th 498, 526–28 (5th Cir. 2022) (applying the MQD to the Deferred Action for Childhood Arrivals program because it was a major question in part by virtue of projected economic impacts as high as $460 billion).

83. *West Virginia*, 597 U.S. at 721 (quoting *Brown & Williamson*, 529 U.S. at 159–60).

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

85. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (holding that a debt relief program that would cost taxpayers between $469 and $519 billion implicated the MQD); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (holding that an eviction moratorium providing nearly $50 billion in emergency rental assistance was of "vast 'economic and political significance'").

86. *See Alabama Realtors*, 141 S. Ct. at 2489 (holding that eviction moratorium affecting between 6 and 17 million tenants was of "vast 'economic and political significance'"); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 117 (2022) (holding that a vaccine mandate affecting 84 million people was of "vast economic and political significance").

87. *See Brown & Williamson*, 529 U.S. at 159 (holding that regulations which could result in complete ban on cigarettes and tobacco was an attempt to regulate a "significant portion" of the economy).

88. *West Virginia*, 597 U.S. at 724.

89. Although, as I argue in Part II.B., *infra*, *Capt. Gaston* demonstrates that the MQD has potential to apply to a statutory interpretation offered by any party, not just a government agency. *See also* Walters, *supra* note , at 37–38 ("To the extent that statutory law creates policy, the major questions doctrine is quite literally coextensive with the entirety of statutory law and will depend only on what some third party decides to do with that statute.").

agency;[90] if the authority is "a transformative expansion in [an agency's] regulatory authority";[91] if the authority is based in "the vague language of an 'ancillary provision'" which "had rarely been used" previously;[92] and if the authority creates "a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."[93] The Supreme Court has also suggested that a major question may be present if an asserted authority "intrudes into an area that is the particular domain of state law."[94]

Scholars have criticized the Court's approach to identifying a major question as vague and judicially unmanageable, and worried that "majorness" may be a trojan horse for judges to read their own preferences into a dispute.[95] Others have argued that judicious use and refinement of the "majorness" factors could make the MQD workable.[96] Which perspective is ultimately accurate will depend in part on how lower courts apply the MQD. The outcome in *Capt. Gaston* gives weight to the MQD's critics.

Two areas of vagueness in the doctrine of "majorness" made it easy for the Fourth Circuit to find a major question in *Capt. Gaston*. First, the individual factors themselves are vague. For example, the Fourth Circuit listed the fact that "[f]ishing in America generates hundreds of billions of dollars" as an indicator that an interpretation of the CWA covering all bycatch would be a major question.[97] But the court was not citing a specific dollar amount and was not even pointing to the specific effect of the proposed interpretation, merely that it would affect an industry of a certain size. In other words, the economic effect of regulating bycatch under the CWA was purely speculative. Yet an analysis like this is perfectly defensible under the Supreme Court's majorness factors, which

90. *West Virginia*, 597 U.S. at 724; *see also Nebraska*, 143 S. Ct. at 2373 (holding that the President's loan forgiveness program was a major question in part because Congress had considered and rejected over 80 loan forgiveness bills in a recent session).

91. *West Virginia*, 597 U.S. at 724 (quoting *Utility Air*, 573 U.S. at 324).

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

93. *Id.* at 728 (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)). Justice Gorsuch has additionally suggested that a factor indicating the presence of a major question is if there is a sign that an agency is claiming an authority in an attempt to "'work [a]round' the legislative process." *Id.* at 743 (Gorsuch, J., concurring) (alteration in original) (quoting Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring)).

94. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021); *see also West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring) (noting the Clean Power Plan's "impact on federalism" as a "suggestive factor[]" indicating a major question).

95. *See* Deacon & Litman, *supra* note , at 1049–50 (criticizing the Court's approach to "majorness" as unclear and "transparently and inescapably linked to political judgments made by judges"); *see also* Walters, *supra* note , at 37 ("the major questions doctrine has an extraordinarily broad possible reach . . . depending only on whether an interpreter's reading of that text enables it to act on 'major' questions").

96. *See* Capozzi, *supra* note , at 226–36 (explaining how courts can clarify the MQD's majorness inquiry in the future).

97. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 300 (4th Cir. 2023).

have not set out clear expectations of how big an economic effect must be, or where that effect is located.[98]

Second, the Supreme Court has given little guidance on how to weigh the various "majorness" factors, allowing the Fourth Circuit to assign its own weights. Other factors indicating to the Fourth Circuit a major question included that this interpretation of the statute had never been offered by the EPA,[99] "significant federalism concerns" raised by interference with other federal and state laws,[100] and the potential regulatory impacts on "almost every commercial or recreational fishermen [*sic*] in America," an industry that "employs millions of people, and provides recreational sport for millions more."[101] Each of these considerations fit comfortably within the "majorness" factors the Supreme Court had used previously,[102] but it was unnecessary for the Fourth Circuit—or any lower court—to find all or even most of them. The Fourth Circuit could have mentioned only a few of these factors, and it still could have found a major question.[103]

Maybe it was the sheer novelty of regulating bycatch under the CWA that drove the opinion and that made *Capt. Gaston* such an attractive target for MQD treatment. But cases that are easy targets for the MQD today may nonetheless provide the grounds for analogizing in the future, building solid bridges into the MQD's watery boundaries. For instance, *Capt. Gaston*'s majorness finding jumps off from the Supreme Court's suggestions of various specific dollar amounts of economic effects directly attributable to the regulation—$469

98. Another Comment on this case points out that some of the Fourth Circuit's reasoning may undercut its own analysis of economic effects. The court suggested in a footnote that discarded bycatch might not be a *discharge* of a pollutant because "discharge" requires "addition", which implies *adding* something to the water, whereas bycatch does not add anything to the water that had not already been there. *See* Recent Case, *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, 137 Harv. L. Rev. 1256, 1261 (2024) [hereinafter Comment]; *see also Capt. Gaston*, 76 F.4th at 302 n.14. But under that logic, a bycatch regulation might not have the economic reach the court claims because it would not apply as broadly to all fishermen. *See* Comment, *supra* note 98, at 1261. And, even if the EPA had the authority, "[i]t's also unclear that a permitting scheme would *impose* billions of dollars in costs even if it did apply to all fishermen." *Id*. at 1261 n.74. Put differently, the Fourth Circuit's economic majorness analysis is too speculative, in part because the novel posture of the case has *private* parties arguing over an interpretation of the CWA that *could* give *an agency* newfound power. I argue in Part II.B., *infra*, that although applying the MQD to a dispute between private parties is novel, the MQD as currently articulated does not foreclose that possibility. The Fourth Circuit's economic majorness analysis, although novel and speculative, still fits through the MQD's wide-open doctrinal door.

99. *Capt. Gaston*, 76 F.4th at 300.

100. *Id*. at 298–99.

101. *Id*. at 300.

102. *See supra* notes – and accompanying text.

103. *But see* Comment, *supra* note 98, at 1259–63 (arguing that the *Capt. Gaston* court misapplied its majorness analysis by mixing majorness factors from two competing versions of the MQD outlined by Justices Gorsuch and Barrett).

billion,[104] nearly $50 billion[105]—to authorities that *could* reach *industries or market sectors* that are worth large but *nonspecific* dollar amounts.[106] Such analogizing cannot even be judged as attenuated while majorness continues to be indeterminate in Supreme Court opinions.

Capt. Gaston is also one of the first times that a lower court has held there was a major question because of the federalism concerns at stake.[107] Federalism concerns seem to have implicated majorness in the pre-*West Virginia* case of *Alabama Association of Realtors*,[108] and Justice Gorsuch's concurrence in *West Virginia* also suggested federalism concerns as an indicator of majorness.[109] *Capt. Gaston* suggests that lower courts have been paying attention and that federalism concerns will see continued development as a member of the majorness minefield.

While *Capt. Gaston* confirms that majorness is malleable, it suggests that majorness may be restrained in one important respect: it may require both that an asserted authority be of "economic and political significance" *and* that the "history and the breadth of the authority" represent a "transformative expansion" of the authority.[110] There is some indication lower courts are following this logic,[111] and *Capt. Gaston* is part of this trend; regulating bycatch under the

104. Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

105. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

106. *Capt. Gaston*, 76 F.4th at 300 ("[f]ishing in America generates hundreds of billions of dollars").

107. *See id.* at 298 ("Adopting Fisheries' interpretation would upset the Magnuson-Stevens Act's federal-state balance and raise significant federalism concerns."). One survey of lower court opinions found only one other instance of a court holding that there was a major question because of the federalism concerns at stake. *See* Ritter, *supra* note , at 30–31. In *West Virginia by and through Morrisey v. U.S. Department of the Treasury*, the Eleventh Circuit held that an agency rule prohibiting states from using federal funds to offset reductions in net tax revenue "undoubtedly implicates questions of deep economic and political significance and *alters the traditional balance of federalism* by imposing a condition on a state's entire budget process." West Virginia *ex. rel.* Morrisey v. U.S. Dep't of Treas. 59 F.4th 1124, 1146 (11th Cir. 2023) (emphasis added).

108. *Alabama Realtors*, 141 S. Ct. at 2489 (finding an issue of vast economic and political significance in part because the government action "intrudes into an area that is the particular domain of state law").

109. West Virginia v. EPA, 597 U.S. 697, 745–46 (2022) (Gorsuch, J., concurring) (naming the regulation's impact on federalism as a "suggestive factor" of majorness); *see also* Comment, *supra* note , at 1261 (noting that "it's not clear that federalism alone is enough to invoke the MQD rather than the federalism clear statement rule").

110. *West Virginia*, 597 U.S. at 721–24; *see also* Brunstein & Goodson, *supra* note , at 74–82 (2022) (arguing that the MQD is triggered by agency assertions of authority that are "unheralded" *and* "transformative").

111. For example, the Northern District of Texas held in *Utah v. Walsh* that the MQD did not apply to a challenge to a Department of Labor rule because the rule was similar to previous rules and thus did not call into question the "history and the breadth" prong. No. 2:23-CV-016-Z, 2023 WL 6205926 *4 n.3 (N.D. Tex. Sept. 21, 2023). The district court did not discuss economic or political significance. *Id.*

CWA would have been not only economically or politically significant, but also would have gone beyond EPA's own long-standing interpretations of the Act.[112]

Capt. Gaston's majorness analysis highlights the doctrinal instability of majorness as currently articulated by the Supreme Court. Such instability makes it difficult to assess whether majorness is being applied correctly and, as a result, there is no way to assess whether lower courts are expanding the boundaries of majorness too far—or not enough.

B. The MQD's Uncertain Status as a Statutory Interpretation Tool

Capt. Gaston also highlights that the Supreme Court's majority opinions have not clarified what kind of statutory interpretation tool the MQD is. Justice Gorsuch, joined by only one other Justice, argued in his *West Virginia* concurrence that the MQD is a clear statement rule that serves separation of powers principles.[113] By contrast, Justice Barrett, in a concurring opinion in *Biden v. Nebraska*, argued that the MQD "serves as an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency,'" perhaps situating the MQD as a kind of linguistic canon.[114] Commentators have also offered a wide range of opinions on what kind of tool the MQD is and what authority it arises from.[115] And many commentators argue that, regardless of how the MQD is said to function, it does not have a foundation in any authoritative law.[116]

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112. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 299 (4th Cir. 2023) ("EPA has never sought the authority to regulate bycatch in the fifty years since the Clean Water Act was passed").

113. *See West Virginia*, 597 U.S. at 742 (Gorsuch, J., concurring) ("The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does 'not inadvertently cross constitutional lines.'" (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 175 (2010))).

114. Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

115. *See* Capozzi, *supra* note , at 223 ("There is one version of the major questions doctrine: a clear-statement rule grounded in the 'separation of powers.'"); Randolph J. May & Andrew K. Magloughlin, *NFIB V. OSHA: A Unified Separation of Powers Doctrine and Chevron's No Show*, 74 S.C. L. Rev. 265, 268–69 (2022) (arguing that the MQD is a "standalone canon" of statutory interpretation that, together with the nondelegation doctrine, protects separation of powers); Will Yeatman & Frank Garrison, *FAQ: What is the Major Questions Doctrine?*, Yale J. on Regul.: Notice & Comment Blog (Dec. 2, 2022) ("we prefer yet a third framework for describing the MQD: namely, as-applied nondelegation"); Wurman, *supra* note , at 38–39 (arguing that the MQD "could be defensible as a type of linguistic canon for resolving ambiguities").

116. *See* Beerman, *supra* note , at 6 ("[w]hile the doctrine is drawn from an interpretive methodology that resonates with important constitutional values, it is an unprecedented new judicial creation … [with] no basis in the Administrative Procedure Act or prior law"); Lisa

Capt. Gaston reflects these ambiguities—and applies the MQD nonetheless. The Fourth Circuit referred to the MQD using the vague term of a "background principle" or a "background rule."[117] The court compared this to other "examples of background interpretive principles" such as the rule of lenity, constitutional avoidance, and the presumption against implied repeal, seeming to situate it as a substantive canon.[118] Yet the court acknowledged that "[t]he doctrine's boundaries remain hazy."[119] Expanding on this in a footnote, the court noted that there is an "ongoing debate . . . whether the major-questions doctrine is a clear-statement rule."[120] Gesturing to debates about whether clear-statement rules are compatible with textualism, the court noted that "academics and the Supreme Court have rightfully plumbed the analytical foundations of clear-statement rules."[121] But in the end, the court said, "whatever its analytical foundation, an inferior court must simply apply the major-questions doctrine."[122]

That remarkable rhetorical shrug illustrates the point. The Fourth Circuit did *not* need to apply the major-questions doctrine in this case. The District Court's logic for rejecting the regulation of bycatch under the CWA was clear enough, but the Fourth Circuit decided to forgo all that analysis and reject the bycatch argument with a quick invocation of the MQD.

How *Capt. Gaston* makes sense of the MQD's instability as a statutory interpretation rule matters because *Capt. Gaston* is the first application of the MQD to a dispute between private parties.[123] The doctrine—in its various formulations—has so far only been applied to assertions of authority by federal agencies.[124] Yet the doctrine's exposition in previous case law provides no clear counterpoint to the Fourth Circuit's application outside of that context. Because the MQD has no firm status as a statutory interpretation tool and no firm doctrinal foundation to guide its use, there was no reason the Fourth Circuit could not do this.

Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1938 (2017) (arguing that the proto-MQD in previous MQD cases includes canons that have "no basis in law" and "do not align with the relevant statutes or prior judicial precedents"); Walters, *supra* note , at 42–45 (arguing that the MQD "has no nexus with authoritative law").

117. N.C. Coastal Fisheries Reform Grp. V. Capt. Gaston LLC, 76 F.4th 291, 296 (4th Cir. 2023).
118. *Id*.
119. *Id*.
120. *Id*. at 296 n.5.
121. *Id*.
122. *Id*.
123. *See As Use Of 'Major Questions' Grows, Court Extends Doctrine To Citizen Suits*, Inside EPA, (Aug. 10, 2023), https://perma.cc/X2PP-4KG3 ("[*Capt. Gaston*] is expanding [the MQD's] application beyond direct challenges to those actions to also block private party attempts to compel such action in environmental citizen suits.").
124. *See e.g.*, West Virginia v. EPA, 597 U.S. 697, 719–32 (2022) (applying MQD to action taken by the EPA); Biden v. Nebraska, 143 S. Ct. 2355, 2368–70 (2023) (applying MQD to action taken by the Secretary of Education and the Department of Education).

In fact, the Fourth Circuit acknowledged in a footnote that applying the MQD to a dispute between private parties "makes our case different from other major-questions cases."[125] According to the Fourth Circuit, previous applications of the MQD had been driven by "'both separation of powers principles and a practical understanding' of how Congress legislates".[126] Thus, applying the MQD to this novel context was justified because "[t]he economic and separation-of-powers stakes of our ruling thus mirror those at play in other major-questions cases."[127] "[E]conomic and separation-of-powers stakes,"[128] without any further elaboration, is a vague set of principles to ground use of the MQD; all the more so when, as already demonstrated, the analysis to establish major economic stakes is vague.[129] Yet the Fourth Circuit is simply making the best of the Supreme Court's sparse MQD justifications in its majority opinions[130] and/or taking hints from Justice Gorsuch's concurring opinion in *West Virginia*[131] and Justice Barrett's concurring opinion in *Biden v. Nebraska*.[132]

125. N.C. Coastal Fisheries Reform Grp. V. Capt. Gaston LLC, 76 F.4th 291, 299 n.8 (4th Cir. 2023).

126. *Id*. (quoting *West Virginia*, 597 U.S. at 723).

127. *Id*.

128. *Id.*

129. *See supra* notes – and accompanying text.

130. *See West Virginia*, 597 U.S. at 723 ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there.") (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

131. *Id*. at 735–42 (Gorsuch, J., concurring) (arguing that the MQD exists "to protect the Constitution's separation of powers").

132. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376–83 (2023) (Barrett, J., concurring) (arguing that the MQD "serves as an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency') (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). As another Comment on this case points out, although the *Capt. Gaston* court claims not to be resolving what type of statutory interpretation tool the MQD is, it may be applying the MQD as *both* a clear-statement rule a la Justice Gorsuch *and* a semantic canon a la Justice Barrett. *See* Comment, *supra* note , at 1259–63. If true, this is a flawed application that exposes a contradiction between competing visions of what kind of tool the MQD is: "The MQD cannot be both a clear statement rule and a semantic canon, because a single doctrine cannot advise both straining text toward a normative goal and remaining true to the text regardless of the outcome." *Id.* at 1263. The Comment distinguishes Justice Gorsuch's clear statement MQD and Justice Barrett's linguistic MQD in part through their analytical steps. *Id.* at 1259–60. For Justice Gorsuch, the MQD consists of two formal steps: 1) majorness, and 2) clear authorization; whereas for Justice Barrett, the MQD test is "a sort of sliding scale" that mixes the different factors. *Id.* at 1260. In Justice Gorsuch's framework, the history and breadth of an agency's asserted authority is examined only at step two—clear authorization—whereas in Justice Barrett's framework, those considerations could all be part of "a broad consideration of text and context." *Id.* at 1261–62. The Fourth Circuit mixes these two analytical frameworks by purporting to follow a formalized two-step framework like Justice Gorsuch while allowing considerations of the history and breadth of the agency's authority to bleed into the majorness analysis, more like

Arguably, *Capt. Gaston*'s application of the MQD to a dispute between private parties may be limited to this case. Like previous MQD cases, it applies the MQD to an interpretation of a statute—the CWA—that would give an *agency*—the EPA—massive new authority, and it is this agency authority that threatens separation of powers. This seems to be part of the Fourth Circuit's logic; does it matter if it is a *private* party trying "to foist this authority on [the EPA]" so long as it would give EPA authority Congress did not intend?[133] But this is hardly a limiting principle. Nearly every statute is administered by an agency at some level of detail, which almost always requires an interpretation of the statute's meaning. Arguments about how a statute should be interpreted, whether the agency is a party to the case or not, will often implicate an agency's authority. Following the logic in *Capt. Gaston*, which fits comfortably into the gaps left between previous MQD cases, the MQD is free to apply any time a major question appears, no matter what configuration of parties or facts conjures it.

Capt. Gaston thus illustrates both the instability of these two areas of the MQD, the majorness analysis and the MQD's status as a rule of statutory interpretation, and the consequences of this instability: the MQD appears to be a new, free-standing tool of statutory interpretation that, as Professor Daniel Walters has pointed out, "[p]otentially [a]pplies to [e]very [s]tatute."[134] The majorness analysis is still so vague that it provides few barriers to application. "After all, any policy can, in theory, be major . . . . To the extent that statutory law creates policy, the major questions doctrine is quite literally coextensive with the entirety of statutory law and will depend only on what some third party decides to do with that statute."[135] And because the MQD has no firm limiting principles as a statutory interpretation tool, either in its current formulation or its (potential lack of) doctrinal foundations, that third party can just as easily be a private litigant as an agency. Thus, *Capt. Gaston* demonstrates that the MQD

Justice Barrett. *Id.* at 1261–63. On my read, the Fourth Circuit is applying the MQD more as a clear statement rule than as a substantive canon. Although Justice Gorsuch puts historical and contextual analysis of an authority in the "clear authorization" step of his analysis and the Fourth Circuit does not, the MQD can still be a clear statement rule where that historical and contextual analysis helps to identify "majorness" and other statutory interpretation tools establish clear authorization. *See*, *e.g.*, Deacon & Litman, *supra* note , at 1013 (putting novelty of a policy as a factor in the majorness analysis while describing the MQD as a clear statement rule). This would be a slightly different clear statement rule than the one Justice Gorsuch describes, but a clear statement rule nonetheless. And regardless of whether the analysis in this or that Comment has it right, the fundamental point is similar: the MQD is a confusing and unstable doctrine, and "[g]uidance from the Court on the nature of the MQD would . . . go a long way toward not only defining the boundaries of that doctrine, but also shoring up its legitimacy." Comment, *supra* note , at 1263.

133. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 299 (4th Cir. 2023).

134. Walters, *supra* note , at 511.

135. *Id.* at 512.

may not just apply to all statutes but is available to reject almost anyone's attempt to interpret the statute.[136]

The MQD door, then, seems to almost always be open. But *Capt. Gaston* also illustrates that what happens once a litigant passes through that door will also shape the law. Once the MQD has been activated, it puts up a high barrier for a statutory interpretation to survive.

C. Clear Congressional Authorization

Capt. Gaston highlights another feature of the MQD: the difficult statutory interpretation barrier created by the requirement of "clear congressional authorization."[137] If a court finds that an asserted authority presents a major question, it must then ask whether there is clear congressional authorization for that authority.[138] Although it is not completely clear whether this requirement functions as a clear statement rule or something else,[139] either way, "clear congressional authorization" is a difficult barrier to overcome. This requirement has led the Supreme Court to reject the asserted authority at issue in each of its MQD cases, and most lower courts that have reached this step of the MQD analysis have done the same.[140] *Capt. Gaston* continues this trend and, when contrasted with the district court's much lengthier and involved statutory

136. *See id.* ("[T]he major questions doctrine does not appear to be limited to statutes with particular kinds of legal effects, but rather could conceivably be in play across the full range of legal effects that statutes might theoretically have . . . Agency delegations are how the vast majority of statutory interpretation questions arise in the modern administrative state, so the major question doctrine's clear applicability to this class of cases is, in practical effect, universal.").

137. West Virginia v. EPA, 597 U.S. 697, 723 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

138. *Id.*

139. *Compare id.* at 736–53 (Gorsuch, J., concurring) (referring throughout opinion to the MQD as a "clear-statement" rule) *and* Deacon & Litman, *supra* note , at 1034–47 (describing the MQD as a clear statement rule) *with* Biden v. Nebraska, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring) (distinguishing the MQD from a clear statement rule) *and* Brunstein & Goodson, *supra* note , at 95–100 (arguing that the Supreme Court did not adopt the MQD as a clear statement rule in *West Virginia*).

140. *See* Georgia v. President of the United States, 46 F.4th 1283, 1296–97 (11th Cir. 2022) (striking down executive order because "no statutory provision contemplates the power to implement an across-the-board vaccination mandate"); Kaweah Delta Health Care Dist. v. Becerra, No. CV 20-6564-CBM-SP(X), 2022 WL 18278175 *7–*9 (C.D. Cal. Dec. 22, 2022) (using MQD to strike down Medicare payment rule that "would present a fundamental conflict with the specific provisions in the statute"). *But see* United States v. Rhine, 652 F. Supp. 3d 38, 56 n.5 (D.D.C. 2023) (rejecting MQD challenge to Secret Service decision to restrict access to certain areas in part because statute had specifically allowed for them to restrict those areas); Kovac v. Wray, 660 F. Supp. 3d 555, 566 (N.D. Tex. 2023) (finding clear congressional authorization for terrorist watchlist program because "[t]here's nothing cryptic about that command" in the statute).

analysis, illustrates how powerful the clear congressional authorization prong can be, quickly resolving what might otherwise be a more difficult issue.

The district court took about ten pages in the federal reporter to reject the plaintiff's claim that bycatch is regulated under the CWA; the Fourth Circuit disposed of the claim in about four and a half. And only about one and a half of those pages were dedicated to addressing the text of the CWA; that is how streamlined the "clear congressional authorization" prong can be.[141] Gone was the district court's exhaustive analysis of the plain meaning of the CWA, its statutory context, principles of *lex specialis*, and application of the absurdity canon.[142] Instead, all the Fourth Circuit had to do was ask whether "the Clean Water Act *clearly* regulates returning bycatch to the ocean."[143] Because, "in a major-questions case, more is required" than "an expansive, vaguely worded definition," the Fourth Circuit found that clear congressional authorization was lacking.[144]

D. The Future of the MQD

Capt. Gaston foreshadows a potential future for the MQD where it is a tool of statutory interpretation that can be invoked by any party to apply to almost any statute and that nonetheless decisively rejects any reading of a statute that does not have "clear congressional authorization." This version of the MQD will expand its chilling effects and anti-innovation bias to a broader range of contexts, raise the stakes for actors attempting to coordinate legal change, and heighten concerns of partisan judging.

An MQD that can apply to almost any statute will expand the set of effects commentators have worried the MQD will have on government agencies to a broader range of contexts. Chief among these is the MQD's anti-innovation effect.[145] Because one of the key majorness factors is whether "the history and the breadth" of an asserted authority[146] shows it is "a transformative expansion"

141. N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F. 4th 291, 301–02 (4th Cir. 2023); *see also* Comment, *supra* note , at 1259 ("Combining [the clear-statement and linguistic version of the MQD in *Capt. Gaston*] lowers the MQD's threshold for "majorness" while raising its threshold for authorization. That formulation will lead to more cases being disposed of under the MQD . . .").

142. N.C. Fisheries Reform Grp. v. Capt. Gaston LLC, 560 F. Supp. 3d 979, 997–1006 (E.D.N.C. 2021), *aff'd*, 76 F.4th 291 (4th Cir. 2023).

143. *Capt. Gaston*, 76 F.4th at 302.

144. *Id*.

145. *See*, *e.g.*, Beerman, *supra* note , at 45 ("[t]he MQD's greatest vice is that it suppresses agency innovation just when it is needed most"); Meyer & Sitaraman, *supra* note , at 14–20 (detailing how the MQD could apply to novel attempts to find authority for economic warfare measures under various statutes); Johnson & Tournas, *supra* note , at 169 ("the anti-novelty dimension of the major questions doctrine could pose significant issues for the regulation of emerging technologies").

146. *See* West Virginia v. EPA, 597 U.S. 697, 721 (2022).

of the authority[147] potentially based on provisions that "had rarely been used" previously,[148] the MQD is biased towards being activated against novel interpretations of statutes—like all the agency interpretations at issue in the Supreme Court's recent MQD cases.[149] This stifles agencies' ability to respond to novel situations, which is arguably when that innovation "is needed most."[150] And as the instability of the MQD allows it to be wielded beyond the agency context, this could suppress innovative or creative readings of statutes more broadly. Indeed, that is the trap that the plaintiffs in *Capt. Gaston* fell into when they tried to offer a reading of the CWA that covered bycatch.

The broad future applicability of the MQD also heightens the stakes for anyone attempting to coordinate efforts to influence law and policy. The MQD gives litigants and judges a potentially decisive tool, and if the MQD decides a case, it will foreclose that avenue of statutory interpretation forever. Of course, shooting yourself or an entire community of actors in the foot is always a risk of litigation, but once again, it is the MQD's potentially limitless applicability that makes it a distinct and potent threat to creative interpretive efforts.[151] Keeping tabs on legal developments may be more urgent than ever when the MQD threat can be triggered by anyone against almost any statute.

The MQD's instability also heightens concerns about its manipulability in the hands of judges searching for partisan outcomes.[152] This may not be a helpful doctrinal development for a judiciary that the public has less and less

147. *West Virginia*, 597 U.S. at 724 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

148. *Id.*

149. *See id.* (finding a major question because EPA had located its "newfound power in the vague language of an 'ancillary provision[ ]' of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades") (citation omitted); Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023) ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act.").

150. Beerman, *supra* note , at 45.

151. For an environmental advocate, citizen suits may have a dark side that is not always acknowledged, because they are used not only by environmental groups, but also companies, landowners, and industry. *See* James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 Widener L. Rev. 1, 3 (2003) (finding at the time that "[o]ne in three citizen suits are brought by nontraditional citizens, including companies, landowners, developers, industry, and, ever more frequently, states and faith-based organizations"). This may be a different conception than the rosy view of the citizen suit provision as a tool that primarily keeps government and private actors accountable. *See*, *e.g.*, David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. Colo. L. Rev. 385, 394–95 (2020) (surveying normative arguments for citizen suit provisions). Citizen suits pursued by powerful groups opposed to regulation—or even rogue or injudicious actors like the fishermen plaintiffs in *Capt. Gaston*—can generate changes in the law that inconvenience, damage, or entirely ruin advocates' plans. And as *Capt. Gaston* illustrates, the MQD's broad applicability and decisive power make those concerns particularly acute.

152. *See*, *e.g.*, Brunstein, *supra* note (surveying lower court opinions and arguing that "their applications of the doctrine appear to largely track partisan lines").

confidence in.[153] The Court has framed the MQD in part as serving separation of powers principles.[154] Yet an unstable MQD may instead be allowing the judicial branch to privilege itself above all others.[155] Questions about the perceived legitimacy of the judiciary are unlikely to subside if judges continue to explore the MQD's reach across litigants, statutes, and other branches of government.

Conclusion

Capt. Gaston is just one of many lower-court opinions grappling with how to apply the MQD since *West Virginia*, but it reveals important fault lines in the doctrine that suggest where it is headed. Instability in what counts as a "major question" and confusion over the MQD's place as a tool of statutory interpretation allowed the Fourth Circuit to shortcut the District Court's careful analysis and apply the MQD to a dispute between private parties over an issue of statutory interpretation that had never been proposed by the government. *Capt. Gaston* foreshadows an MQD that can be applied to almost any statute, and to any type of dispute over a statute's meaning, spreading the MQD's anti-innovation effects across the world of statutory interpretation and heightening the risks for citizen suit litigation no matter the intentions of the parties. And perhaps *Capt. Gaston* contains an even more important lesson: this likely will not be the last time that a court dives down the MQD rabbit hole and resurfaces with previously unknown implications.[156] There will be many more *Capt. Gaston*s waiting in the MQD's voluminous wings.

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153. *See, e.g.*, Katy Lin & Carroll Doherty, *Favorable views of Supreme Court fall to historic low*, Pew Rsch. Ctr. (July 21, 2023), https://perma.cc/8CKW-AZ9T (finding that "the share of Americans with a favorable opinion of the U.S. Supreme Court has declined to its lowest point in public opinion surveys dating to 1987").

154. *See West Virginia*, 597 U.S. at 723 ("in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there") (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). Although the Chief Justice's majority opinion is not fully explicit on what branch's powers the MQD is protecting, presumably it is guarding Congress's powers from encroachment by the Executive. *See id.* ("[a]gencies have only those powers given to them by Congress"). Justice Gorsuch's concurring opinion makes this explicit. *See id*. at 737 (Gorsuch, J., concurring) ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine.").

155. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2384 (2023) (Kagan, J., dissenting) ("In every respect, the Court today exceeds its proper, limited role in our Nation's governance."); *see also* Comment, *supra* note , at 1263 ("[Combining the clear-statement and linguistic version of the MQD] will lead courts to decide more cases under the MQD . . . which may enhance perceptions that the MQD is being used as a tool of judicial advocacy.").

156. *See also* Comment, *supra* note , at 1256 ("If the Supreme Court does not provide guidance on the nature of the MQD, more unconvincingly 'major' cases like *Capt. Gaston* will follow.").