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MAJOR FLOODGATES: THE INDETERMINATE MAJOR QUESTIONS DOCTRINE INUNDATES LOWER COURTS

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I. INTRODUCTION

It has been two years since the U.S. Supreme Court formally embraced the Major Questions Doctrine ("MQD") in its groundbreaking decision in *West Virginia v. EPA*.[2] On its face, the doctrine is limited to "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" the authority for the challenged regulation absent "clear congressional authorization."[3] In practice, however, the MQD is an arbitrary doctrine that injects uncertainty into a wide range of administrative law and other cases. Unchecked, the doctrine threatens to overwhelm lower court dockets and disrupt government's ability to function.

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[2] 597 U.S. 697, 724 (2022).

[3] *Id.* at 721–23 (citations omitted) (cleaned up). Whether the MQD is a clear statement rule, a substantive or linguistic canon, or something else remains unclear. *See generally*, *e.g.*, Austin Piatt & Damonta D. Morgan, *The Three Major Questions Doctrines*, 2024 WIS. L. REV. FORWARD 19 (2024); Anita S. Krishnakumar, *What the Major Questions Doctrine is Not*, 92 GEO. WASH. L. REV. (forthcoming 2024), https://ssrn.com/abstract=4778014 [https://perma.cc/MJ67-W4T6].

Among the many criticisms of the MQD is the doctrine's "extreme indeterminacy" due to the "large number of variables of no specified weight."[4] Rather than announcing principles that guide consistent application of the doctrine, the Court's MQD precedents amount to an "I know it when I see it" framework that invites litigants to invoke the doctrine in a growing number of circumstances.[5] Making matters worse, the Court's 2023 opinion in *Biden v. Nebraska*[6] invoked the MQD to invalidate the Biden administration's student debt relief plan without offering much, if any, clarity on how the doctrine should be applied; to the contrary, Justice Barrett's concurrence in that case describes the MQD as something demonstrably different than previously-articulated conceptions.[7]

The doctrine's impact is coming into view. Courts are applying the MQD far beyond high-profile regulations such as the Environmental Protection Agency's ("EPA") Clean Power Plan (*West Virginia*) or the Biden administration's student loan debt relief efforts (*Biden v. Nebraska*). Litigants have raised the doctrine in nearly every conceivable setting, even including a challenge to the criminal prosecution of an alleged participant in the riot at the Capitol on January 6, 2021.[8] In its current form, there is little to lose when litigants raise the MQD and much to gain. Predictably, the MQD floodgates are wide open in lower courts.

This essay explores the profoundly disruptive nature of the MQD by surveying judicial rationales and litigants' arguments to demonstrate the breadth and potential impact of the nascent doctrine, as some emerging arguments will

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[4] Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, STANFORD UNIVERSITY, THE HOOVER INSTITUTION CENTER FOR REVITALIZING AMERICAN INSTITUTIONS 13 (2023), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5215&context=faculty_scholarship [https://perma.cc/9HK8-UVNU]; *see also* Alisa Klein, *Major Questions Doctrine Jujitsu: Using the Doctrine to Rein In District Court Judges*, ADMIN. L. REV. 4 (forthcoming June 2024) ("[A]ny rule that the Supreme Court announces should be clear enough to be consistently applied, lest the outcomes appear political and undermine the legitimacy of the Judiciary.") (citation omitted); *id.* at 4–5 ("A stronger form of this idea is that indeterminacy yields outcomes that *are* political because they become infected by the policy preferences of federal judges, who by constitutional design are unaccountable politically."), https://ssrn.com/abstract=4630449 [https://perma.cc/U7XM-C24L].

[5] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Steward, J., concurring); *see also* Merrill, *supra* note 4, at 26 n.90 (citing U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)); Klein, *supra* note 4, at 6 n.17 (similar).

[6] 143 S. Ct. 2355, 2384 (2023).

[7] *See generally, e.g.*, Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 251, 264 (2024) (contrasting Justice Gorsuch's concurrence in *West Virginia* with Justice Barrett's concurrence in *Nebraska* and noting that each may lead to different outcomes in specific cases), https://ssrn.com/abstract=4503583 [https://perma.cc/YX56-Q86V]; Piatt & Morgan, *supra* note 3 (similar).

[8] Motion to Dismiss Counts Three and Five at 16–18, United States v. Irwin, No. 1:21cr589 (D.D.C. Nov. 13, 2023), ECF No. 71.

likely succeed.[9] The essay begins with a discussion of how the indeterminate nature of the MQD invites litigants to push the doctrine's boundaries. It then surveys post-*West Virginia* MQD arguments in lower courts, categorizing both the types of cases in which the arguments arise and the ways in which creative attorneys are attempting to position the MQD, particularly the factor of "vast economic and political significance." The essay concludes with examples of promising, albeit spotty, instances in which lower courts have rejected the MQD in favor of reasonable statutory interpretation that shows that the agency has authority for the challenged action, which we encourage other courts and litigants to follow in the absence of solutions for limiting or eradicating the application of the MQD. In the near-term, we expect that the current flood of MQD arguments in lower court cases of every stripe will lead to the increased application of the doctrine, even if some courts resist it. In turn, this will lead to even broader invocation of the MQD, and, as a result, further application of the doctrine to invalidate regulatory actions, no matter the relative size. This pattern will likely overwhelm lower court dockets and result in the invalidation of many federal regulatory actions that would otherwise survive judicial review.

II. THE INDETERMINATE NATURE OF THE MQD IS PLAYING OUT IN LOWER COURTS

Although the Supreme Court formally endorsed the MQD in *West Virginia*, it has thus far refused to provide workable guidance for litigants and judges to determine when the doctrine applies.[10] Scholars have attempted to make sense of the new doctrine by identifying three main inquiries to determine whether an agency is acting within the scope of authority that Congress delegated: (1) is the agency action under review "novel," "unprecedented," or "unheralded"?; (2) does the agency action transform the scope of the agency's authority?; and (3) is the agency action one of "vast economic and political significance"?[11]

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[9] Other recent scholarship has surveyed lower court opinions regarding the MQD to assess judicial applications on a circuit-by-circuit basis without exploring arguments made by litigants. *See generally* Sarah A. Schmoyer, *Note: "Major" Challenges for Lower Courts: Inconsistent Application of the Major Questions Doctrine in Lower Courts After* West Virginia v. Environmental Protection Agency, 92 FORDHAM L. REV. 1659 (2024); Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661 (2023).

[10] *See* Jonas Monast, *Emerging Technology Governance in the Shadow of the Major Questions Doctrine,* 24 N.C. J.L. & TECH. 1, 8 (2023) ("Although the MQD requires that Congress 'speak clearly' . . . the Court has provided little specificity itself.").

[11] Merrill, *supra* note 4, at 3 (citations omitted); *see generally* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENVT'L L. & POL'Y REV. 47 (2022). Some courts have recognized the first two factors as the most important. *See, e.g.*, Sweet v. Cardona, 641 F. Supp. 3d 814, 824 (N.D. Cal. Nov. 16, 2022) (concluding that the supposedly "representative decisions cited in *West Virginia* considered 'unusual' and 'unheralded' applications of agency authority") (quoting *West Virginia*, 597 U.S. 697, 722–24 (2022)), *appeal docketed*, Nos. 23-15049, 23-15050, 23-15051 (9th Cir. Jan. 7, 2023).

Scholars' attempts at clarity have provided little help. In practice, courts are all over the map on the MQD factors, as demonstrated in a recent survey of MQD decisions in lower courts:

> There is no one major questions doctrine in the lower courts. Judges have taken vastly different approaches to defining and applying the doctrine both within and across circuits. These differences illustrate that many judges may view the doctrine as a little more than a grab bag of factors, which they seem to be choosing from at their discretion. Lower court judges do not appear to be constrained in how they apply the doctrine.[12]

Inconsistencies among lower courts range from disparate conclusions as to which factors trigger the MQD, to variations in applying the MQD between judges who appear to share similar interpretations of the doctrine, to individual judges failing to apply the doctrine consistent with their own stated understandings of it.[13] Further, "[j]udges who relied on the same triggers for the doctrine also differed in terms of the metrics they used to assess the applicability of those triggers."[14] Some courts have not even limited themselves to the factors identified in Chief Justice Roberts's majority opinion in *West Virginia*, instead relying on the factors identified in Justice Gorsuch's concurrence,[15] which are arguably even less well-defined and could implicate more federal actions than the majority opinion.[16] Courts have even admitted to struggling with the doctrine's indeterminate nature.[17]

Whether styled as doctrinal indeterminacy or judicial inconsistency, the MQD has predictably resulted in conflicting outcomes in lower courts regarding

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[12] Brunstein, *supra* note 9, at 663.

[13] *See id.* at 663–64 (citations omitted).

[14] *Id.* at 664.

[15] *See id.* at 665 (noting "five decisions—all from district courts in the First, Fourth, and Fifth Circuits—seem to rely partly or exclusively on the reasoning" from Justice Gorsuch's concurrence in *West Virginia*).

[16] Merrill, *supra* note 4, at 3 (discussing the Gorsuch factors). Justice Gorsuch asks whether the agency: (1) "claims the power to resolve a matter of great 'political significance,'" (2) "seeks to regulate 'a significant portion of the American economy,'" or (3) "seek[s] to intrude into an area 'that is the particular domain of state law.'" *West Virginia*, 597 U.S. at 743–44 (Gorsuch, J., concurring) (citations omitted). If so, Justice Gorsuch asks whether there is clear congressional authorization for the action, examining: (1) "the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme,'" (2) "the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address," (3) "the agency's past interpretations of the relevant statute," and (4) "when there is a mismatch between an agency's challenged action and its assigned mission and expertise." *Id.* at 746–48 (citations omitted).

[17] *See, e.g.*, United States v. White, 97 F.4th 532, 540 (7th Cir. 2024) (observing that "the precise contours of the doctrine remain hazy") (citation omitted); N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 296 (4th Cir. 2023) (similar).

the same federal agency action. For example, the Ninth Circuit found as a categorical matter that the doctrine does not apply to proprietary actions of the President, specifically a COVID-19 vaccine mandate for federal contractors,[18] while the Fifth, Sixth, and Eleventh Circuits reached the opposite conclusion.[19]

One reason for these conflicting outcomes is the lack of objective parameters for assessing the factor of "vast economic and political significance." While the economic impacts in the Court's MQD cases have generally been $50 billion or higher,[20] the Court has not identified the case-specific facts from its decisions as criteria to be applied in each case, i.e., that impacts above a certain dollar amount qualify for MQD scrutiny and those below do not. While the Court has identified one flawed-but-concrete example of what may constitute "political significance,"[21] it has not clarified what type of information should *not* be considered in this inquiry and has muddied the waters by relying on broad, conclusory language or non-empirical information when evaluating this factor.[22] As with the doctrine as a whole, lower courts have noted this lack of clarity,

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[18] *See* Mayes v. Biden, 67 F.4th 921, 932–39 (9th Cir. 2023), *vacated as moot on other grounds*, 89 F.4th 1186, 1188 (9th Cir. 2023).

[19] *See* Louisiana v. Biden, 55 F.4th 1017, 1029–31 (5th Cir. 2022); Kentucky v. Biden, 57 F.4th 545, 555 (6th Cir. 2023); Georgia v. President of the U.S., 46 F.4th 1283, 1314 (11th Cir. 2022). There are many examples of conflicting MQD outcomes related to the COVID-19 pandemic. *See* Klein, *supra* note 4, at 6 (summarizing cases).

[20] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (concluding that $50 billion was a "reasonable proxy" of the economic impact of the nationwide eviction moratorium that the Court invalidated under the MQD); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2369 (2023) (finding $430 billion in forgiven student loans for forty-three million Americans to be of vast economic and political significance); West Virginia v. EPA, 597 U.S. 697, 716 (2022) (finding the $1 trillion reduction in the U.S. gross domestic product projected to result from the fuel switching required by the Clean Power Plan by 2040 to be of vast economic significance).

[21] *See Nebraska*, 143 S. Ct. at 2373 (noting failed congressional student-loan forgiveness efforts); *West Virginia*, 597 U.S. at 731–32 (pointing to failed cap-and-trade bills for carbon dioxide and other greenhouse gases as evidence that the policy "has been the subject of an earnest and profound debate across the country"). The Court has elsewhere explained that post-enactment legislative failures offer a "'particularly dangerous' basis on which to rest an interpretation of an existing law" and rejected their use. Bostock v. Clayton Cnty., 590 U.S. 644, 670 (2020).

[22] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 595 U.S. 109, 117 (2022) (declaring that "[t]here can be little doubt that [the agency's] mandate qualifies as an exercise of [vast economic and political significance]" because it applied to 84 million Americans, without discussing specific economic impacts or political controversies); *Nebraska*, 143 S. Ct. at 2373–74 (citing a single newspaper article regarding debates about student loan forgiveness as evidence of political significance); *see also* Klein, *supra* note 4, at 51 ("Given this framing, district court judges can seize on the fact that large numbers of 'red states' or 'blue states' have challenged a federal policy as evidence that the issue is politically charged enough to trigger the major questions doctrine.").

conceding that "it is unclear what exactly constitutes 'vast economic significance.'"[23]

Unsurprisingly, multiple district courts adjudicating challenges to the Department of Labor's ("DOL") rule[24] increasing the hourly minimum wage paid by federal contractors and subcontractors reached conflicting conclusions on the factor of economic significance.[25] The U.S. District Court for the District of Arizona concluded, among other things, that the rule was not sufficiently "major" to trigger the MQD because the estimated economic impact of $1.7 billion fell well short of identified dollar amounts from Supreme Court cases.[26] The U.S. District Court for the District of Colorado likewise rejected an MQD argument because, among other reasons, the assessed $1.7 billion was "a small economic impact" in the context of the Supreme Court's MQD cases at the time,[27] and would not "have a measurable effect, in macroeconomic terms, on the gross domestic product."[28] The Southern District of Texas, however, reached the opposite conclusion, focusing on uncertainties identified in administrative comments, without deeming the DOL's response to these comments unreasonable, to extrapolate the economic impact—by a factor of 10—to $17 billion, and concluded the action was economically significant for MQD purposes.[29]

The indeterminate nature of the MQD is therefore well-established. Scholars have recognized indeterminacy as one of the general objections to the MQD, and as especially acute for the specific factor of "vast economic and political significance," and have documented inconsistent application in lower courts. Lower courts have explicitly conceded that they are uncertain about how to

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[23] *See* Rest. Law Ctr. v. Dep't of Labor, No. 1:21-CV-1106-RP, 2023 U.S. Dist. LEXIS 115630, at *37 (W.D. Tex. July 6, 2023) ("[I]t is unclear what exactly constitutes 'vast economic significance.'"), *appeal docketed*, No. 23-50562 (5th Cir. Aug. 7, 2023); Mayfield v. Dep't of Labor, No. 1:22-cv-792-RP, 2023 U.S. Dist. LEXIS 168054, at *20 (W.D. Tex. Sept. 20, 2023) (similar), *appeal docketed*, No. 23-50724 (5th Cir. Oct. 11, 2023).

[24] Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126 (Nov. 24, 2021).

[25] *See* Schmoyer, *supra* note 9, at 1685–86 (discussing some of these cases).

[26] Arizona v. Walsh, No. 00213-PHX-JJT, 2023 U.S. Dist. LEXIS 2649, at *25–26 (Jan. 6, 2023), *appeal docketed sub nom.*, Nebraska v. Walsh, No. 23-15179 (9th Cir. Feb. 9, 2023).

[27] Bradford v. Dep't of Labor, 582 F. Supp. 3d 819, 840–41 (D. Colo. Jan. 24, 2022), *affirmed*, No. 22-1023, 2024 U.S. App. LEXIS 10382, at *35 (10th Cir. Apr. 30, 2024) (accepting the agency's $1.7 billion assessment of economic impact).

[28] Bradford v. Dep't of Labor, No. 21-cv-03283-PAB-STV, 2022 U.S. Dist. LEXIS 16184, at *13 (D. Colo. Jan. 28, 2022).

[29] *See* Texas v. Biden, No. 6:22-CV-00004, 2023 U.S. Dist. LEXIS 171265, at *32–33 (Sept. 26, 2023), *appeal docketed*, No. 23-40671 (5th Cir. Nov. 11, 2023). The court's analysis demonstrates how the MQD gives courts leeway to find vast economic significance as a means to invert the normal review of agency actions. *See Texas*, 2023 U.S. Dist. LEXIS 171265, at *32–33 (noting that "[s]ome commentators criticize" DOL's methodology and that DOL conceded that some costs could be higher, scolding DOL for not changing its estimate, but failing to address whether DOL's estimate was reasonable).

apply the MQD, including and especially the determination of economic and political significance. Litigants challenging government actions in lower courts accordingly have much to gain and little to lose from invoking the MQD.

III. THE MQD FLOODGATES ARE OPEN IN LOWER COURTS

The cases that the Supreme Court has identified as forming the MQD have all involved direct challenges to federal agency regulations of national scope.[30] Many have involved EPA regulations issued under the Clean Air Act;[31] other cases have involved student loan forgiveness and regulatory efforts to address pandemic-related public health or medical issues.[32] Since *West Virginia*, challengers have invoked the MQD for national regulations enacted under the same or similar statutes as in the Supreme Court's MQD cases.[33] These relatively predictable MQD arguments are the tip of the iceberg.

Our tracking efforts show that the breadth of MQD-based challenges to federal regulations knows no bounds. In the labor context, litigants have invoked the MQD to challenge a minimum wage standard for federal contractors,[34] a minimum-salary-test rule for overtime-pay exemptions,[35] a rule regarding tips for restaurant workers,[36] a requirement for the use of project labor agreements

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[30] In *West Virginia v. EPA*, the Court (majority and concurrence) identified previous cases from which the MQD is derived. *See* 597 U.S. 697, 721–25, 740–45 (2022) (discussing Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 758 (2021); King v. Burwell, 576 U.S. 473, 486 (2015); Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 332 (2014); Gonzales v. Oregon, 546 U.S. 243, 267 (2006); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229 (1994)).

[31] *See West Virginia*, 597 U.S. at 697; *Util. Air Reg. Grp.*, 573 U.S. at 302; *Am. Trucking Ass'ns*, 531 U.S. at 457.

[32] *See generally Ala. Ass'n of Realtors*, 594 U.S. at 758; *King*, 576 U.S. at 473; *Gonzales*, 546 U.S. at 243.; Biden v. Nebraska, 143 S. Ct. 2355, 2369 (2023).

[33] For example, challengers have frequently raised MQD challenges to regulations issued under the Clean Air Act. *See, e.g.*, Petitioner's Motion to Stay the Final Rule of the U.S. Environmental Protection Agency Pending Review at 9–13, Enbridge (U.S.) Inc. v. EPA, No. 23-1202 (consol. under No. 23-1157) (D.C. Cir. Aug. 4, 2023), ECF No. 2011121 (raising MQD in challenge to EPA's "Good Neighbor Rule" for ozone emissions). Similarly, litigants have raised the MQD in multiple challenges to the Biden Administration's efforts to reduce student debt in the first half of 2024. *See, e.g.*, Memorandum in Support of Plaintiffs' Motions for a Stay, or in the Alternative, a Temporary Restraining Order and Preliminary Injunction at 29–32, Missouri v. Biden, No. 4:24-cv-00520-JAR (E.D. Mo. Apr. 16, 2024), ECF No. 8-1.

[34] *See* Part II, *supra* notes 24–29 and related text.

[35] Mayfield v. Dep't of Labor, No. 1:22-cv-792-RP, 2023 U.S. Dist. LEXIS 168054, at *23–24 (W.D. Tex. Sept. 20, 2023) (denying summary judgment and addressing MQD arguments in a challenge to Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sept. 27, 2019)).

[36] Rest. Law Ctr. v. Dep't of Labor, No. 1:21-CV-1106-RP, 2023 U.S. Dist. LEXIS 115630, at *38–39 (W.D. Tex. July 6, 2023) (granting summary judgment, including rejection of MQD

in certain federal construction projects,[37] and a recent rule banning most non-compete clauses.[38] Challengers to anti-discrimination and diversity-based regulations have raised the MQD against the EPA's disparate-impact regulations issued under Title VI of the Civil Rights Act,[39] the Securities and Exchange Commission's ("SEC") efforts to promote diversity among corporate boards,[40] and various efforts of the Department of Education and Equal Employment Opportunity Commission.[41] Indeed almost any issue subject to federal agency regulation has drawn MQD challenges, including, but not limited to, national

argument, in a challenge to Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114 (Oct. 29, 2021)).

[37] *See* Complaint at 34–36, Associated Builders & Contractors Fla. First Coast Chapter v. Clark, No. 3:24-cv-00318 (M.D. Fla. Mar. 28, 2024), ECF No. 1 (challenging Exec. Order No. 14063, 87 Fed. Reg. 7363 (Feb. 9, 2022), as implemented by Use of Project Labor Agreements for Federal Construction Projects, 88 Fed. Reg. 88708 (Dec. 22, 2023), and by OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM-24-06, USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS (2023)).

[38] *See* Complaint at 16–17, ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. 2:24-cv-1743 (E.D. Pa. Apr. 25, 2024), ECF No. 1 (challenging Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024)); Complaint at 9–10, 43–44, Chamber of Com. v. Fed. Trade Comm'n, No. 6:24-cv-00148 (E.D. Tex. Apr. 24, 2024), ECF No. 1 (same); Complaint at 3, 16–17, Ryan v. Fed. Trade Comm'n, No. 3:24-cv-986 (N.D. Tex. Apr. 23, 2024), ECF No. 1 (same).

[39] *See* Louisiana v. EPA, No. 2:23-cv-692, 2024 U.S. Dist. LEXIS 12124, at *80–83 (W.D. La. Jan. 23, 2024) (applying the MQD in granting plaintiff's motion for preliminary injunction in part in a challenge to enforcement of 40 C. F. R. § 7.35(b), (c)).

[40] *See* All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226, 256–58 (5th Cir. 2023) (denying petitions for review of Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, 85 Fed. Reg. 80472 (Dec. 11, 2020), as adopted by the SEC), *vacated for en banc hearing*, 2024 U.S. App. LEXIS 3805 (5th Cir. Feb. 19, 2024).

[41] *See, e.g.*, Complaint at 34–35, Louisiana v. Dep't of Educ., No. 3:24-cv-00563 (E.D. La. Apr. 29, 2024), ECF No.1 (challenging Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024)); Complaint at 38, Tennessee v. Equal Emp. Opportunity Comm., No. 2:24-cv-84 (E.D. Ark. Apr. 25, 2024), ECF No. 1 (challenging the implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096 (Apr. 19, 2024)).

security,[42] immigration,[43] guns,[44] retirement benefits,[45] federal loan eligibility,[46] and sentencing guidelines.[47]

Federal regulations may not even be the limit of the MQD's reach. While courts have suggested that the MQD is limited in application to regulations[48] and concluded that the MQD does not apply to executive orders,[49] other courts have applied it to such orders.[50] In light of these uncertainties (or perhaps because of them), litigants have raised the MQD in challenges to executive branch tariff

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[42] *See* Kovac v. Wray, 660 F. Supp. 3d 555, 569 (N.D. Tex. Mar. 9, 2023) (rejecting a challenge to plaintiffs' inclusion on the terrorism watchlist even after concluding that most MQD factors were met), *appeal docketed*, No. 23-10284 (5th Cir. Mar. 22, 2023).

[43] *See* Texas v. United States, 50 F.4th 498, 526–27 (5th Cir. 2022) (applying MQD cases and principles to invalidate the Department of Homeland Security's rule implementing the Deferred Action for Childhood Arrivals ("DACA") immigration policy); Arizona v. Garland, No. 6:22-cv-01130, 2024 U.S. Dist. LEXIS 69561, at *23–25 (E.D. La. Apr. 16, 2024) (holding that the MQD applied in a challenge to a rule establishing a new procedure for adjudicating asylum applications).

[44] *See* Watterson v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 4:23-cv-00080, 2024 U.S. Dist. LEXIS 35973, at *39–40 (E.D. Tex. Mar. 1, 2024) (addressing the MQD in denying a motion to reconsider an earlier order that denied plaintiffs' request for a preliminary injunction in a challenge to Factoring Criteria for Firearms With Attached "Stabilizing Braces," 88 Fed. Reg. 6478 (Jan. 31, 2023)); Miller v. Garland, 674 F. Supp. 3d 296, 311–12 (E.D. Va. May 26, 2023) (rejecting MQD argument in denying plaintiffs' motion for expedited relief in a challenge to the same rule).

[45] *See* Opening Brief for Appellants at 36–41, Utah v. Su, No. 23-11097 (5th Cir. Jan. 18, 2024), ECF No. 127 (invoking the MQD in a challenge to DOL's 2022 Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights Rule, 87 Fed. Reg. 73882 (Dec. 1. 2022), which clarified the duties of fiduciaries for Employment Retirement Income Security Act (or ERISA) benefit plans).

[46] *See* DACO v. U.S. Small Bus. Ass'n, No. 6:22-cvV-01444, 2024 U.S. Dist. LEXIS 33763, at *48–50 (W.D. La. Feb. 22, 2024) (rejecting plaintiffs' challenge to eligibility criteria for Paycheck Protection Program ("PPP") loans).

[47] *See* United States v. White, 97 F.4th 532, 539–41 (7th Cir. 2024) (rejecting MQD challenge to the validity of the career-offender sentencing guidelines in affirming district court's sentence).

[48] *See, e.g.*, United States v. Navarro, No. 23-5062, 2024 U.S. App. LEXIS 7683, at *8 (D.C. Cir. Apr. 1, 2024) (rejecting MQD argument because the case did "not involve an agency's authority to regulate"); United States v. Eisenberg, No. 23-cr-10 (AS), 2023 U.S. Dist. LEXIS 225952, at *11 (S.D.N.Y. Dec. 18, 2023) ("[T]he Court is not reviewing the propriety of any agency action, and Eisenberg cites no authority for applying the major-questions doctrine in the context of a single criminal case.").

[49] *See* Mayes v. Biden, 67 F.4th 921, 932 (9th Cir. 2023) ("There is no relevant agency action here, and the [MQD] does not apply to actions by the President.").

[50] *See generally* Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Kentucky v. Biden, 57 F.4th 545 (6th Cir. 2023); Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022).

and trade actions,[51] agency guidance documents,[52] interpretive rules,[53] and the settlement of a nationwide class action.[54] Litigants have even invoked the MQD in what would normally be considered a preemption setting, i.e., where there is a potential conflict between state and federal law,[55] and in broader challenges to state laws.[56] It is increasingly difficult to identify an area of law or type of government action for which the MQD has not been invoked.

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[51] *See* Petition for Writ of Certiorari, PrimeSource Bldg. Prods., v. United States, No. 23-69, 2023 U.S. S. CT. BRIEFS LEXIS 2152, at *10, 31–32, 34–35 (July 21, 2023) (raising the MQD as part of the nondelegation argument in a challenge to President Biden's claimed authority to legislate tariffs on steel derivatives in Proclamation 9980, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, 85 Fed. Reg. 5281 (Jan. 29, 2020)), *cert. denied*, 144 S. Ct. 345 (Oct. 30, 2023); Corrected Opening Brief of Plaintiff-Appellants HMTX Industries, Halstead New England Corp., Metrofloor Corporation, and Jasco Products Company at 29–30, 55–60, HMTX Industries LLC v. United States, No. 23-1891 (Fed. Cir. July 25, 2023), ECF No. 25 (invoking the MQD in a challenge to tariffs imposed on imports from China by the United States Trade Representative).

[52] *See* Chamber of Com. v. Consumer Fin. Prot. Bureau, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *18–19, 24–25 (E.D. Tex. Sept. 8, 2023) (applying the MQD to invalidate the Consumer Financial Protection Bureau's manual on examining company activity to determine actionable discrimination), *appeal docketed*, No. 23-40650 (5th Cir. Nov. 8, 2023); Complaint at 29–30, Stenson Tamasson, LLC v. Internal Revenue Serv., No. 2:24-cv-01123-SPL (D. Ariz. May 14, 2024), ECF No. 1 (raising the MQD in an action challenging the validity of IRS guidance documents regarding the Employee Retention Credit under the Coronavirus Aid, Relief, and Economic Security Act of 2020, also known as the CARES Act).

[53] *See* Niblock v. Univ. of Ky., No. 5:19-394-KKC, 2023 U.S. Dist. LEXIS 135758, at *8 (E.D. Ky. Aug. 4, 2023) (rejecting MQD arguments in a challenge to an interpretive rule for determining discrimination on the basis of sex in educational programs receiving federal funding).

[54] *See, e.g.*, Appellants' Joint Opening Brief at 2, 25–37, Sweet v. Everglades College, Inc., No. 23-15049 (9th Cir. May 4, 2023).

[55] *See, e.g.*, Cal. Trucking Ass'n v. S. Coast Air Quality Mgmt. Dist., No. LA CV21-06341 JAK, 2023 U.S. Dist. LEXIS 235286, at *101–02 (C.D. Cal. Dec. 14, 2023) (rejecting MQD argument in grant of summary judgment for defendants in challenge to local air rule); Genbiopro, Inc. v. Sorsaia, No. 3:23-0058, 2023 U.S. Dist. LEXIS 149195, at *10–16 (S.D. W. Va. Aug. 24, 2023) (rejecting MQD challenge to federal law that allegedly conflicted with West Virginia's Unborn Child Protection Act), *appeal docketed sub nom.*, GenBioPro, Inc. v. Raynes, No. 23-2194 (4th Cir. Nov. 15, 2023); Bryant v. Stein, No. 1:23-cv-77, _ F. Supp. 3d _ , at *45–47 (M.D.N.C. Apr. 30, 2024) (rejecting argument that the MQD precludes implied preemption of state law regarding the drug mifepristone); Brief for the Petitioner, Idaho v. United States, No. 23-727, 2024 U.S. S. CT. BRIEFS LEXIS 701, at *32–34 (Feb. 20, 2024) (invoking the MQD in a challenge to a preliminary injunction prohibiting enforcement of Idaho Code § 18-6221 (Section 622) that was granted on the sole ground that Section 622 conflicts with the Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd).

[56] *See, e.g.*, United States v. Navarro, No. 23-5062, 2024 U.S. App. LEXIS 7683, at *7–8 (D.C. Cir. Apr. 1, 2024) (rejecting a former Trump administration official's claim that the MQD barred the use of the District of Columbia's replevin statute to compel the return of presidential records); Associated Builders v. Dep't of Tech., Mgmt., & Budget, No. 363601, 2024 Mich. App. LEXIS 881, at *14–23 (Mich. Ct. App. Feb. 1, 2024) (rejecting MQD challenge to a state agency's prevailing-wage requirement).

IV. THE BOUNDLESS INQUIRY INTO ECONOMIC AND POLITICAL IMPACTS IN PRACTICE

Through the lack of objective parameters for determining "vast economic and political significance," the MQD invites litigants to aggregate and extrapolate the direct effects of a relatively discrete government action as a means of demonstrating an impact on a national industry or the triggering of a contested national political issue, no matter how indirect or downstream that impact may be. Nothing in the Court's MQD cases bars a challenger from arguing toward, or courts from considering, economic impacts outside of the actual effect on the challenger or the assessment in the agency record,[57] and, as demonstrated below, courts seem to have discretion to assess political significance based on almost anything. Naturally, litigants are taking advantage, and receptive courts are exacerbating the problem.[58]

A Fifth Circuit three-judge panel's opinion in *Texas v. Nuclear Regulatory Commission*[59] demonstrates the problem. At issue was the Nuclear Regulatory Commission's approval of a single temporary waste storage site in Texas.[60] The United States argued that the action was not of vast economic and political significance because "the license under review is for one facility" with a "primarily localized impact."[61] Without addressing this limited impact, the court alluded to generalized political concerns about the storage of radioactive waste in the United States and applied the MQD to invalidate the action.[62]

The lack of objective parameters that allowed the Fifth Circuit's approach has fueled similar arguments in many contexts. For example, a challenger to an administrative law judge's ruling regarding less than $3 million in costs under the Comprehensive Environmental Response, Compensation, and Liability Act

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[57] *But cf.* Bradford v. Dep't of Labor, No. 22-1023, 2024 U.S. App. LEXIS 10382, at *32 n.5 (10th Cir. Apr. 30, 2024) ("We note that Appellants' framing of the specific 'question' implicating the [MQD] may not be correct. In particular, the primary issue presented on appeal is whether [the statute] grants authority to regulate non-procurement recreational service permittees . . . Yet, in arguing the [MQD] applies, Appellants shift their focus to the economic effects of the broader minimum wage rule. This appears to be in tension with the Supreme Court's jurisprudence—which focuses on the effects of the challenged action to determine whether it presents a purportedly 'major' question . . . If we were instead to frame the 'major' question as DOL's authority to regulate *non-procurement permittees*, that would clearly not pose a question of 'vast economic and political significance.' However, because the Appellees do not challenge the Appellants' framing of the question, we will assume that Appellants' framing is correct for purposes of resolving this appeal.") (citations omitted) (cleaned up).

[58] Some of the opinions discussed herein are also covered briefly in Schmoyer, *supra* note 9, at 1689–93.

[59] 78 F.4th 827 (5th Cir. 2023), *reh'g denied*, 95 F.4th 935 (5th Cir. Mar. 14, 2024).

[60] *See id.* at 831.

[61] Supplemental Brief for Federal Respondents at 5, *Texas*, 78 F.4th 827 (No. 21-60743).

[62] *See Texas*, 78 F.4th at 844 (citations omitted).

("CERCLA") for a single cleanup site argued that the case triggered the MQD due to CERCLA's national scope and the generally high cost of mitigating hazardous waste sites.[63] While one judge has rejected MQD arguments for public-lands actions located entirely within the State of Alaska,[64] such reasonable limitations have not deterred litigants from raising the MQD against discrete public lands actions located within a single state due to purported national political and economic concerns.[65] An individual challenging the results of an agency *adjudication* regarding their right to practice medicine in certain contexts extrapolated to impacts on the entire healthcare industry in an attempt to trigger the MQD.[66] Even the limited, local nature of a single text message received by one person from a local entity did not stop a defendant from arguing that the potential for "high dollar judgments of class action suits" under the relevant statute constituted vast economic significance.[67]

In its most extreme form, extrapolation occurs in enforcement actions and prosecutions against discrete sets of individuals or entities. To be sure, at least one court has indicated that the MQD should not apply in this setting,[68] and most of the enforcement and prosecution cases to date reject the application of the MQD, even as some cases entertain consideration of industry-wide economic

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[63] *See* Plaintiff-Appellant's Response in Opposition to EPA's Motion to Dismiss at 22–23, August Mack Env't, Inc. v. EPA, No. 1:23-cv-36 (N.D. W. Va. Oct. 18. 2023), ECF No. 27.

[64] *See* Alaska v. Fed. Subsistence Bd., No. 3:20-cv-00195-SLG, 2023 U.S. Dist. LEXIS 198328, at *18–21 (D. Alaska Nov. 3, 2023) (rejecting MQD argument in a challenge to a decision to open an emergency subsistence hunt on federal lands), *appeal docketed*, No. 24-179 (9th Cir. Jan. 10, 2024); Alaska Indus. Dev. & Exp. Auth. v. Biden, No. 3:21-cv-00245-SLG, 2023 U.S. Dist. LEXIS 136474, at *25 (D. Alaska Aug. 7, 2023) (rejecting MQD argument because the challenged drilling moratorium "affect[ed] only a total of nine oil and gas leases held by three lessees over a discrete portion of land in northern Alaska, and it is both temporary and limited in nature"), *appeal docketed*, No. 24-2533 (9th Cir. Apr. 22, 2024).

[65] *See, e.g.*, Brief for Pacific Legal Found. as Amici Curiae Supporting Appellants' Petition for Rehearing En Banc at 10–12, Murphy Co. v. Biden, No. 19-35921 (9th Cir. June 20, 2023) (arguing that MQD applies to challenging Presidential Proclamation 9564, which expanded the Cascade-Siskiyou National Monument in southwestern Oregon); Complaint at 17, Heaton v. Biden, No. 3:24-cv-08027 (D. Ariz. Feb. 12, 2024), ECF No. 1 (invoking the MQD in a challenge to President Biden's designation of land located entirely within the State of Arizona as the Ancestral Footprints National Monument under the Antiquities Act).

[66] Baxter v. Becerra, No. 3:23-cv-92, 2024 U.S. Dist. LEXIS 26276, at *18–21 (E.D. Va. Feb. 14, 2024) (rejecting plaintiff's appeal of a five-year mandatory exclusion from federally funded health-care programs, concluding that the MQD was not applicable), *appeal docketed*, No. 24-1203 (4th Cir. Mar. 8, 2024).

[67] Howard v. Republican Nat'l Comm., No. cv-23-00993-PHX-SPL, 2023 U.S. Dist. LEXIS 198558, at *1–2, *6–9 (D. Ariz. Nov. 6, 2023), *appeal docketed,* No. 23-3826 (9th Cir. Nov. 29, 2023).

[68] Fed. Trade Comm. v. Kochava Inc., 671 F. Supp. 3d 1161, 1180 (D. Idaho 2023) ("[T]he FTC is not flexing its regulatory muscles—it is merely asking a court to interpret and apply a statute enacted by Congress. Accordingly, [the major questions] doctrine . . . is inapplicable.").

impacts.[69] Whatever the reason, the increasing trend of invoking the MQD in these settings demonstrates that litigants are undeterred.[70] It is very likely that similar extrapolation efforts will persist, and some will succeed.

V. CONCLUSION

Despite the trends described above, promising precedent has emerged from lower courts that could limit MQD application. For example, some courts have concluded as part of an initial query in the MQD analysis that the challenged action was within the discretion that Congress provided to the agency or executive, allowing the court to forego consideration of the MQD factors, or to make short work of them.[71] Courts have also rejected extrapolation of economic

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[69] *Compare Eisenberg*, 2023 U.S. Dist. LEXIS 225952, at *11–12 (rejecting MQD argument and reasoning that "this case does not involve the [Commodity Futures Trading Commission], the scope of its authority, or whether all digital assets should be treated as commodities," but rather "[i]t involves the specific instruments at issue in this case"), *and* United States v. Stratics Networks, No. 23-cv-0313-BAS-KSC, 2024 U.S. Dist. LEXIS 39520, at *50–51 (S.D. Cal. Mar. 6, 2024) (concluding that the MQD did not apply to "a handful of ringless voicemail providers") (citations omitted), *with* SEC v. Coinbase, No. 23 Civ. 4738, 2024 U.S. Dist. LEXIS 56994, at *40–45 (S.D.N.Y. Mar. 27, 2024) (rejecting MQD argument because "the cryptocurrency industry cannot compare with those other industries the Supreme Court has found to trigger the major questions doctrine") (citations omitted), *and* United States v. Freeman, No. 21-cr-41-jl, 2023 U.S. Dist. LEXIS 147548, at *19–31 (D.N.H. Aug. 22, 2023) (rejecting MQD argument overall yet engaging with defendants' argument that the agency "seeks to regulate a significant portion of the economy through its interpretive guidance because as of November 2021, non-state-issued digital assets had a combined market capitalization of $3 trillion") (citation omitted).

[70] Defendants Green United, LLC and Wright W. Thurston and Relief Defendants True North United Investment, LLC and Block Brothers, LLC Motion to Dismiss Plaintiff's Amended Complaint at 29–31, SEC v. Green United, No. 2:23-cv-00159-BSJ (D. Utah Mar. 20, 2024), ECF No. 88 (arguing that "[t]wenty percent of Americans have owned cryptocurrency; thousands of Americans are employed by digital asset companies; the global market value of cryptocurrency is over $1 trillion; and daily global trading volume is around $100 billion" (citations omitted)); Defendants Bam Trading Services Inc. and Bam Management US Holdings Inc.'s Mem. of Law in Support of Motion to Dismiss at 31–32, SEC v. Binance Holdings Ltd., No. 1:23-cv-01599-ABJ-ZMF (D.D.C. Sept. 21, 2023), ECF No. 117-1 (arguing that "[a]ccepting the SEC's theory in this case would mean, in essence, that the SEC has regulatory authority over the entire digital asset industry—a nascent, transformative, trillion-dollar industry").

[71] *See, e.g.*, Howard v. Republican Nat'l Comm., No. cv-23-00993-PHX-SPL, 2023 U.S. Dist. LEXIS 198558, at *7 (D. Ariz. Nov. 6, 2023), *appeal docketed,* No. 23-3826 (9th Cir. Nov. 29, 2023) ("[R]egardless of how potentially sweeping the agency's authority might be, it is valid if Congress so intended for it to exist"); Mayfield v. Dep't of Labor, No. 1:22-cv-792-RP, 2023 U.S. Dist. LEXIS 168054, at *23 (W.D. Tex. Sept. 20, 2023) (reasoning that, "[e]ven if the there is some argument to be made that the Final Rule's salary-level test does trigger the major questions doctrine" in terms of its economic impact, "the salary-level test is well within th[e] conferred authority"); Coin Ctr. v. Yellen, No. 3:22cv20375-TKW-ZCB, 2023 U.S. Dist. LEXIS 195927, at *20 (N.D. Fla. Oct. 30, 2023) (concluding that there was "nothing 'extraordinary' about this case or the regulatory action taken . . . that would

impacts from the action at issue to an entire industry or other aggregated national impact, especially where other MQD factors are not met.[72] At least one judge has gone further, openly questioning whether the MQD bears any relation to the separation-of-power concerns that the Supreme Court identified in its opinions.[73]

While these developments will not, by themselves, stem the MQD tide in lower courts (and indeed some likely will not survive on appeal), they provide reasonable, useful approaches to be applied as a matter of everyday administrative law in the near term. Specifically, courts should employ ordinary tools of statutory interpretation to satisfy themselves that Congress delegated the authority for a given action to the agency *regardless* of the size or scope of the action at issue. Adding an extra layer of scrutiny merely because an action is of allegedly vast economic or political significance does not comport with any specific tenet of separation-of-power principles. Courts have discretion to reject the broad extrapolation of the impact of limited agency actions to broader contexts. Longer-term, these same principles provide scholars, courts, and litigants with useful leads for critical thinking about how to limit the assessment of economic and political significance and whether the Court should ultimately jettison the MQD altogether.

For now, though, the floodgates will remain open. As will become increasingly clear as MQD arguments continue to explode in lower courts, the reach of the doctrine is nearly limitless, and the factors lack objective parameters that would allow litigants and government officials to reasonably predict whether an action will trigger the MQD, let alone survive it. Absent such guardrails, the MQD will overwhelm lower court dockets, increase the frequency with which courts invalidate government actions, and "frustrate the

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implicate the [MQD] because, unlike other recent cases in which the doctrine has been applied," the agency action at issue fell "squarely within the authority delegated to" to the agency "and is a targeted action directed at a single entity"), *appeal docketed*, No. 23-13698 (11th Cir. Nov. 7, 2023).

[72] *E.g., Howard*, 2023 U.S. Dist. LEXIS 198558, at *8 ("Plaintiff's arguments about the high dollar judgments of class action suits under the [statute] are immaterial to the potential value judgment of his suit, which is not enough by itself to implicate the doctrine."); All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226, 256–58 (5th Cir. 2023) (rejecting challengers' MQD argument that the rule "imposes unprecedented demographic quotas and disclosure requirements regarding race, sex, and sexual preference on companies valued at over 20 *trillion* dollars" based on the nature of the challenged agency action, which was not "unheralded" or "unprecedented" compared with prior actions).

[73] *See* Kovac v. Wray, 660 F. Supp. 3d 555, 564 (N.D. Tex. Mar. 9, 2023) ("It's not clear why the Supreme Court requires clear congressional authorization only for major questions or significant assertions of authority."), *appeal docketed*, No. 23-10284 (5th Cir. Mar. 23, 2023).

administrative state's ability to perform the function for which Congress established it: the regulation of the American economy."[74]

[74] SEC v. Terraform Labs Pte. Ltd., No. 23-cv-1346 (JSR), 2023 U.S. Dist. LEXIS 132046, at *24–25 (S.D.N.Y. July 31, 2023).