

## ‘Major Questions’? Supreme Court Decision in Climate Change Case Sends Ripples Across the Regulatory Landscape

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### Key Points:

- For the first time, the Supreme Court has invoked explicitly the “major questions doctrine”—which requires Congress to speak clearly when authorizing agency action in certain extraordinary cases—to strike down an agency rule.
- The major questions doctrine is likely to apply in rulemakings of vast economic and political significance, like major climate change regulation or other areas Congress arguably did not leave to agency discretion, particularly where the agency action is novel or where Congress has tried but failed to legislate in the same area.
- The decision’s ramifications extend far beyond environmental regulations, as the doctrine is likely to play an important role in major rulemakings across the regulatory landscape, including international trade, tax, securities, immigration, and health.

### Overview

The U.S. Supreme Court’s 6-3 decision in *West Virginia v. EPA* announcing the “major questions doctrine” threatens to limit agency authority in a narrow but exceptionally significant band of administrative rulemakings—i.e., the biggest, most innovative, and most consequential ones. This alert first provides an overview of the doctrine, as elucidated by the Court. It then turns to the decision’s likely disruptive consequences, which are by no means limited to climate change regulation and are likely to affect major administrative actions in any number of fields—international trade, tax, securities, immigration, and health, to name a few.

### Background

Decided on the final day of the Court’s term, *West Virginia v. EPA* “announces the arrival” (in the dissent’s words) of the “major questions doctrine”—a new substantive presumption that overrides ordinary statutory construction principles in certain “extraordinary” cases. In a nutshell, the majority (authored by Chief Justice Roberts, and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett) describes the

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doctrine as a “reluctan[ce] to read into ambiguous statutory text” a delegation of broad agency authority—even where such “regulatory assertions ha[ve] a colorable textual basis.” Founded on “both separation of powers principles and a practical understanding of legislative intent,” the doctrine thus requires Congress to legislate particularly clearly when authorizing an agency to make “decisions of vast economic and political significance.” Although the Supreme Court had arguably applied a form of the “major questions doctrine” in various cases over the years, it had never used that specific phrase, nor had it fleshed out its contours in such detail until now.

Application of the “major questions doctrine” is a two-step inquiry: (i) does the case trigger the “major questions doctrine,” and, if so, (ii) can the agency point to “clear congressional authorization” to regulate in the proposed manner?

As to the first inquiry, the opinion sets forth several (apparently non-exhaustive) considerations to help decide whether a case implicates the “major questions doctrine”:

- Whether the agency discovered in a “long-extant statute an unheralded power” that significantly expands or even “transform[s]” its regulatory authority.
- Whether the agency’s claimed authority derives from an “ancillary,” “gap-filler,” or otherwise “rarely used” provision of the statute.
- Whether the agency adopted a regulatory program that Congress had “conspicuously and repeatedly declined to enact itself.”

Justice Gorsuch’s concurrence, joined by Justice Alito, adds a few other “non-exclusive” factors:

- Whether the agency claims the power to resolve a matter of great political significance.
- Whether the agency attempts to regulate “a significant portion of the American economy” or require massive spending by regulated parties.
- Whether the agency’s rulemaking seeks to “intrud[e] into an area that is the particular domain of state law.”

As to the second inquiry, the Supreme Court did not offer much guidance on precisely how “clear” Congress must speak to permit a rulemaking in a “major questions” case. But it found such a clear statement lacking in *West Virginia v. EPA* despite the textual plausibility of EPA’s assertion. Specifically, the Court held that language in Section 111(d) of the Clean Air Act authorizing EPA to devise the “best system of emission reduction” did not permit EPA to “devise emissions caps based on . . . generation shifting,” i.e., shifting generation away from existing coal-fired power plants by requiring them to “reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.” For such a measure to fall within EPA’s authority, the Court demanded a more-specific congressional mandate. Thus, although the Court did not overturn *Massachusetts v. EPA*, 549 U.S. 497 (2007) or otherwise bar the agency from regulating greenhouse gases generally, it did place real limits on the type of regulations the agency can promulgate.

## Implications

The implications of this decision are far-reaching, both for administrative rulemakings (whether pending or new) and for administrative litigation in the federal courts.

Regulated parties will undoubtedly invoke this case and the major questions doctrine to argue against broad assertions of Executive Branch authority during the notice-and-comment process and, if unsuccessful, in ensuing court challenges under the Administrative Procedure Act.

To be sure, presumably only a small number of rulemakings will fall within the “major questions” bucket. But those rulemakings are, by definition, going to be “major” ones—i.e., “extraordinary” matters implicating broad or “transformative” assertions of Executive Branch power, great political significance or large sums of money. Moreover, such cases will arise “from all corners of the administrative state,” not just from EPA. The opinion itself cites the following historical examples:

- The U.S. Food and Drug Administration’s attempt to regulate or ban tobacco products, see *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
- The Attorney General’s attempt to rescind licenses of physicians who assisted patient suicides, *Gonzalez v. Oregon*, 549 U.S. 243 (2006).
- The Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium in response to the COVID-19 pandemic, *Alabama Assn. of Realtors v. Department of Health and Human Servs*, 594 U.S. \_\_ (2021) (per curiam).
- The Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate, *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. \_\_ (2022) (per curiam).

And it is not hard to imagine the doctrine playing a significant role in other existing, pending or potential rulemakings, such as:

- The U.S. Securities and Exchange Commission’s proposed rule requiring extensive greenhouse gas emissions data reporting among the extensive, granular climate disclosure requirements, see *Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (April 11, 2022).
- Proposed FDA rules banning the manufacture and sale of menthol cigarettes, see *Tobacco Product Standard for Menthol in Cigarettes*, 87 Fed. Reg. 26454 (May 4, 2022).
- Potential rules protecting access to abortion rights in the wake of *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_ (2022).

## Bottom line

Because arguments over the major questions doctrine will likely play a key role in major rulemakings—both during the notice-and-comment process and in follow-on litigation—it is important for regulated businesses to become acquainted with the scope of the doctrine. Akin Gump’s regulatory lawyers and appellate litigators are available to help you understand the doctrine’s application to specific rules, how it might impact your existing or future regulatory burden, and potential litigation options.

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