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Legal Sidebar

The Supreme Court's "Major Questions" Doctrine: Background and Recent Developments

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Congress frequently delegates authority to agencies in general or broad terms to promulgate regulations that advance the goals Congress has identified. In a number of decisions, however, the Supreme Court has declared that if an agency seeks to decide an issue of major national significance, a general delegation of authority may not be enough; instead, the agency's action must be supported by clear statutory authorization. Courts, commentators, and individual Supreme Court Justices have referred to this doctrine as the *major questions doctrine* (or major rules doctrine), although the Supreme Court has never used that term in a majority opinion.

The Supreme Court has recently signaled an increased interest in applying the major questions doctrine as a principle of statutory interpretation in challenges to significant agency actions. This Sidebar provides an overview of the major questions doctrine, discusses cases this term in which the Court has invoked or may invoke the doctrine, and identifies considerations for Congress in crafting legislation against the backdrop of the doctrine.

Overview of the Major Questions Doctrine

Agencies must often interpret statutes that grant them regulatory authority. If an agency acts based on the agency's interpretation, and that action is challenged, courts may be called upon to review such interpretations to determine if the agency has exceeded its authority. Reviewing courts will sometimes defer to an agency's interpretation of an ambiguous statute.

In a handful of cases involving a challenge to agency actions, the Supreme Court has rejected agency claims of regulatory authority under the major questions doctrine when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency. The Court and commentators have sometimes justified the doctrine based on the Court's observation that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." The Court has often applied the major questions doctrine when determining whether to defer to an agency's

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statutory interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which governs the scope of an agency's authority to interpret ambiguities in a statute.

To date, the Supreme Court has not articulated the precise scope of the major questions doctrine, explained when an agency action will raise a question so significant that the doctrine applies, or expressly identified the doctrine by name as a basis for a decision. The Court has nonetheless decided a number of cases in the past three decades based on the principles that commentators and lower courts (and individual Supreme Court Justices) have come to identify as the major questions doctrine. The Court has articulated those principles in its review of:

- The Federal Communication Commission's waiver of a tariff requirement for certain common carriers under its statutory authority to "modify" such requirement;
- The Food and Drug Administration's (FDA's) regulation of the tobacco industry pursuant to its statutory authority over "drugs" and "devices;"
- The Environmental Protection Agency's (EPA's) consideration of costs in regulating air pollutants under its authority to prescribe ambient air quality standards that "are requisite to protect the public health" with "an adequate margin of safety;"
- The Attorney General's regulation of assisted suicide drugs under his statutory authority over controlled substances;
- EPA's determination that the regulation of greenhouse gas emissions from motor vehicles triggered greenhouse gas permitting requirements for stationary sources; and
- The Internal Revenue Service's decision that a federal health care exchange is "an exchange established by the State" for purposes of determining eligibility for tax credits.

In addition, the Court has *rejected* an agency's invocation of the major questions doctrine in at least one case, holding that EPA did have legal authority based on the plain language of the Clean Air Act to regulate greenhouse gas emissions from motor vehicles.

In addition to leaving ambiguities about the scope and applicability of the major questions doctrine unresolved, the Supreme Court has not explained the doctrine's precise relationship to other frameworks for reviewing agency action, including the *Chevron* doctrine. The Court has arguably applied the major questions doctrine in ad hoc manner, with cases applying the doctrine at different points in the *Chevron* two-step analysis or, at times, as a reason to not engage in that analysis. The Court has also not explained the distinction between the major questions doctrine and the non-delegation doctrine, the separation-of-powers principle that limits Congress's ability to confer legislative authority on governmental and private entities.

Recent Cases

In a trio of recent cases, the Supreme Court has signaled its heightened interest in applying the major questions doctrine to the review of agency actions. In the first two cases, the Court used the doctrine to halt actions it considered to be of major national significance without discussing the applicability of deference to the agencies' decisions, possibly signaling that the Court accepts the major questions doctrine as an independent principle of statutory interpretation. The third case is still pending before the Court and could present an opportunity for the Court to clarify the contours of the doctrine.

Alabama Association of Realtors v. HHS

On August 26, 2021, the Supreme Court blocked enforcement of the Centers for Disease Control and Prevention's (CDC's) nationwide temporary eviction moratorium issued on August 3, 2021. For

additional discussion of the Supreme Court ruling, see CRS Legal Sidebar LSB10638, *Supreme Court Blocks Enforcement of the CDC's Eviction Moratorium*, by David H. Carpenter.

The CDC issued two nationwide, temporary federal moratoriums of residential evictions for nonpayment of rent pursuant to Section 361 of the Public Health Service Act (PHSA), which authorizes the CDC director "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." The CDC issued the first order on September 4, 2020, shortly after a narrower set of eviction protections established by the CARES Act expired. Congress extended the order, and the CDC then administratively extended it three times. The CDC issued a new order on August 3, 2021. (For discussion of the first moratorium and related litigation, see CRS Legal Sidebar LSB10632, *Litigation of the CDC's Eviction Moratorium*, by David H. Carpenter.) A district court had determined that the new order exceeded the CDC's statutory authority, but a court of appeals stayed the district court's decision, leaving the moratorium in effect while litigation continued.

On August 26, 2021, the Supreme Court granted an emergency motion to vacate the court of appeals's order. The Supreme Court's order had the practical effect of ending the eviction moratorium. The Supreme Court's unsigned per curiam opinion did not resolve the merits of the case; it applied a four-factor test that is commonly used to consider requests for injunctive relief. The Court concluded that the plaintiffs "are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority," noting that "it is difficult to imagine [the plaintiffs] losing."

In addition to concluding that the text of PHSA Section 361 plainly did not support the CDC's assertion of authority to impose an eviction moratorium, the Court applied the major questions doctrine as one basis for its decision. The Court explained that the CDC's action was of major national significance because it covered 80% or more of the nation; created an estimated economic impact of tens of billions of dollars; and interfered with the landlord-tenant relationship, which the Court explained is "the particular domain of state law." Based on those considerations, the Court held that the CDC's action required a clear statutory basis. The Court noted that the CDC had never before used PHSA Section 361 to justify an action that "has even begun to approach the size and scope of the eviction moratorium." Warning that to uphold the CDC's interpretation of Section 361 "would give the CDC a breathtaking amount of authority," the Court held that the statute "is a wafer-thin reed on which to rest such sweeping power."

The Court in *Alabama Association of Realtors* did not consider whether *Chevron* deference applied to the agency's decision. Instead, it applied the major questions doctrine as an independent principle of statutory interpretation focused on ensuring that Congress bears the responsibility for confronting questions of major national significance. This application may indicate that the Court views the major questions doctrine as more than just an exception to *Chevron*. The lack of a ruling on the merits, combined with some ambiguity in the bases for the Court's reasoning, however, makes the precedential value of the Court's decision unclear.

National Federation of Independent Business v. OSHA

In *National Federation of Independent Business v. OSHA*, another recent case that implicated the major questions doctrine, the Supreme Court halted the enforcement of the Occupational Safety and Health Administration's (OSHA's) COVID-19 vaccination and testing emergency temporary standard (ETS) for employers with 100 or more employees. (For a longer discussion of *National Federation of Independent Business*, see CRS Legal Sidebar LSB10689, *Supreme Court Stays OSHA Vaccination and Testing Standard*, by Jon O. Shimabukuro.)

OSHA promulgated the COVID-19 vaccination and testing ETS pursuant to Section 6(c)(1) of the Occupational Safety and Health Act (OSH Act), which authorizes OSHA to issue an ETS that takes effect

upon publication in the *Federal Register* if the agency determines that employees are exposed to "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and . . . that such emergency standard is necessary to protect employees from such danger." On January 13, 2022, the Court concluded in a per curiam opinion that a coalition of plaintiffs was likely to succeed on the merits of their claim that OSHA lacks the statutory authority to issue such a standard. As a result, the Court stayed OSHA's enforcement of the ETS. Quoting *Alabama Association of Realtors*, the Court concluded, "There can be little doubt that OSHA's mandate qualifies as an exercise" of "powers of vast economic and political significance." Considering whether the OSH Act "plainly authorizes" the ETS, the Court maintained that the statute authorizes the agency to establish only workplace safety standards and not "broad public health measures," which, according to OSHA, would impact approximately 84.2 million employees. The Court indicated that, although COVID-19 is a risk that occurs in many workplaces, it is also transmissible "at home, in schools, during sporting events, and everywhere else that people gather." The Court therefore held that COVID-19 is not an "occupational" hazard in most workplaces and that it did not justify a significant expansion of OSHA's authority without clear congressional authorization.

The per curiam *OSHA* majority opinion did not expressly refer to the major questions doctrine, but a concurring opinion by Justice Neil Gorsuch did. Justice Gorsuch, joined by Justices Clarence Thomas and Samuel Alito, contended that OSHA sought to resolve a "question of vast national significance" when it issued the ETS and that Congress "nowhere clearly assigned so much power to OSHA." Justice Gorsuch opined that the major questions doctrine is a key separation-of-powers principle and argued that, even if Congress had clearly authorized the vaccination mandate, that delegation probably would have violated the constitutional separation of powers (i.e., the non-delegation doctrine), because it contained no meaningful restrictions on OSHA's regulatory power.

As in *Alabama Association of Realtors*, the Court in *OSHA* applied the major questions doctrine without determining the applicability of *Chevron* deference to the agency's decision, further indication that the doctrine is not necessarily simply an exception to *Chevron* deference.

West Virginia v. EPA

A pending case may present another opportunity for the Court to provide guidance on the major questions doctrine. In *West Virginia v. EPA*, the Court is expected to review EPA's authority to regulate greenhouse gas emissions from existing power plants under the Clean Air Act (CAA). (For a more detailed discussion of the Court's grant of certiorari in this case, see CRS Legal Sidebar LSB10666, *Congress's Delegation of "Major Questions": The Supreme Court's Review of EPA's Authority to Regulate Greenhouse Gas Emissions May Have Broad Impacts*, by Linda Tsang and Kate R. Bowers.) The case addresses the Affordable Clean Energy Rule (ACE Rule), which EPA issued in 2019 to replace the 2015 Clean Power Plan (CPP). EPA issued both rules under CAA Section 111, which directs EPA to identify "air pollution which may reasonably be anticipated to endanger public health or welfare," to list categories of stationary sources that the EPA Administrator finds cause or contribute significantly to that pollution, to establish "standards of performance" for new and modified sources (known as new source performance standards) within each listed category, and to establish emission guidelines for states to set "standards of performance" for *existing* sources.

CAA Section 111(a) requires standards of performance to reflect the emissions reductions achievable through "application" of the best system of emission reduction (BSER). EPA also sets emission standards under Section 111(d) based on the selected BSER. Much of the legal debate surrounding the CPP and the ACE Rule centers on the scope of EPA's authority to determine the BSER for existing power plants. In the CPP, EPA had determined that area-wide or regional initiatives to reduce emissions could be a "system" of emissions reduction for purposes of BSER. In the ACE Rule, EPA adopted a narrower interpretation of its authority, asserting that the "application" of the BSER "unambiguously limits the

BSER to those systems" that can be "applied" or "put into operation *at* a building, structure, facility, or installation." Various states and stakeholders challenged the ACE Rule and CPP repeal.

On January 19, 2021, a three-judge panel of the D.C. Circuit vacated the ACE Rule and the CPP repeal in a split decision. In *American Lung Association v. EPA*, the majority held that CAA Section 111 does not "constrain" EPA's authority in determining the BSER to control methods that "apply physically 'at' and 'to' the individual source." The majority concluded that the CAA's text, structure, purpose, and legislative history indicated that Congress conferred upon EPA "ample discretion" to determine the BSER.

The majority in *American Lung Association* specifically rejected EPA's argument that Congress would not have delegated to EPA a "major question" of economic and political significance without a clear statement of its intent to do so. The majority determined that Congress and the courts have "long" recognized EPA's authority to regulate GHG emissions from power plants under Section 111 and that Congress "expressly and indisputably" assigned and constrained EPA's role in determining the BSER. Judge Walker, writing separately, disagreed with that conclusion. He argued that EPA's exercise of authority in the CPP raised "major questions" that he claimed were not clearly delegated by Congress to EPA.

The Supreme Court granted certiorari to review whether Congress constitutionally authorized EPA to consider control measures that can be implemented beyond the specific emission source when determining the BSER and setting emission standards under CAA Section 111(d). The parties and various amicus groups addressed the nature of the major questions doctrine and its applicability in their briefs. At oral argument, a number of Justices asked questions related to the major questions doctrine, including regarding the centrality of the doctrine to the petitioners' argument, the relationship between the doctrine and other tools of statutory construction, whether the CPP or the ACE Rule actually raised major questions, the characterization of the Court's major questions precedent, and whether EPA's regulation under the CPP or ACE Rule is comparable to the FDA's regulation of tobacco or the CDC's eviction moratoriums.

A decision is expected by the end of the Court's 2021-2022 term (i.e., late June or early July). Meanwhile, litigants and judges have invoked the major questions doctrine in other environmental lawsuits, including challenges to vehicle greenhouse gas emission standards, the scope of federal jurisdiction under the Clean Water Act, and federal agencies' use of estimates of the "social cost of greenhouse gas" emissions in their regulatory processes.

Considerations for Congress

Even if the Supreme Court does not clarify the scope of the major questions doctrine in *West Virginia v. EPA*, the increasing frequency of legal arguments about this doctrine suggests that it could continue to be an emerging and important issue in administrative law. If the Supreme Court were to adopt the doctrine as some individual Justices have expressed it, then courts applying the doctrine could potentially determine that an agency lacks the ability to determine authoritatively a major question unless its underlying statutory authority clearly permits or requires it to do so. Therefore, if Congress wants an agency to have the flexibility to address potentially complex and difficult-to-foresee policy issues that courts might consider to be of "vast" economic and political significance, Congress could consider how to clearly specify that intention in the relevant underlying statute, as opposed to relying on vague or imprecise statutory language. Alternatively, if Congress wants to prevent an agency from administratively addressing certain major policy issues, it could consider how to clearly circumscribe the agency's statutory authority. To date, the Court has not provided clear guidance on what can be considered a "major" question or how Congress might state its intent with respect to issues that it cannot now foresee, which could complicate the drafting of such statutes. Given the recent interest in applying the doctrine, however, it is possible that the Court will clarify its scope in a pending or future case.

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