WHOSE LANE IS IT ANYWAY: ANTICIPATING THE EFFECTS OF THE SUPREME COURT'S MAJOR QUESTION DOCTRINE ON THE DEPARTMENT OF LABOR

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Let's make some stuff up!
– Aiysha Tyler[1]

Abstract

The Major Question Doctrine has emerged as an apparently powerful new tool for courts when deciding issues involving federal agencies. In *West Virginia v. EPA*, the Supreme Court bolstered a major questions exception that had operated in the background of previous Court decisions, labeling it the Major Question Doctrine. Under the Major Question Doctrine, courts must ask if the question presented by an agency's rule is an economically or politically significant question. If the court decides that it is, the court must identify clear congressional authorization for the rule to uphold the rule. This Note briefly follows the development of the Major Question Doctrine through the Court's jurisprudence and attempts to explain how the Doctrine functions. This Note also identifies flaws, ambiguities, and confusion resulting from the Court's decision. Finally, this Note attempts to predict the effect that the Major Question Doctrine will have on present and future challenges to rules and regulations promulgated by the Department of Labor and other federal labor agencies.

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INTRODUCTION

Over the last three decades, the Supreme Court decided several cases relying on principles from the major questions doctrine exception.[2] Although no majority opinion formally cited the doctrine as authority for the Court's conclusion, many hypothesized that these principles would cause a rebirth of the long-dead non-delegation doctrine.[3] For years, the Court used the major questions exception as merely another tool in its interpretative toolbox—akin to *Chevron* deference.[4] After several decisions in 2022, that is no longer the case. Enter *West Virginia v. EPA*[5] and company.

Three of the Court's decisions immediately preceding *West Virginia* foreshadowed the major question doctrine's arrival.[6] All three involved regulatory action related to the COVID-19 pandemic and merely laid the groundwork for the major question doctrine.[7] The Court cemented the major question doctrine in its jurisprudence in *West Virginia*.[8] Still, the Court left much to be desired. What is the extent of the major question doctrine? What constitutes a "major" question? What standard is "clear congressional authorization" measured by? Is that standard the same for grants of agency authority before and after the decision?

All these questions and more are important for the future of the administrative state. This Note attempts to resolve some of the questions and predict how the remaining uncertainties will affect both current and future Department of Labor (DOL) regulations.

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2. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

3. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 264–65 (2022).

4. *Id.* at 269–70.

5. 142 S. Ct. 2587 (2022).

6. *See, e.g.*, NFIB v. OSHA, 142 S. Ct. 661 (2022) (per curiam).

7. *See id.*; Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam); Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam).

8. *See West Virginia*, 142 S. Ct. at 2610.

I. THE ORIGINS OF THE MAJOR QUESTION DOCTRINE

A. *The Non-Delegation Doctrine*

The non-delegation doctrine (NDD) was born from the belief that the Constitution limits Congress's ability to delegate power.[9] Specifically, the NDD restricted Congress from delegating its legislative power.[10] The NDD operated as "a sledgehammer" and appeared to be a hard check on the administrative state.[11] That is, the NDD enabled courts "to declare entire statutory provisions unconstitutional."[12] However, the Court swiftly crippled the NDD through the Intelligible Principle Test of *J.W. Hampton, Jr. & Co. v. United States*.[13] Under this test, courts were to look at whether a congressional delegation contained an "intelligible principle to which the [agency must] . . . conform."[14] So long as Congress's delegation included an intelligible principle, courts would allow the delegation of authority.

Predictably, the NDD has been "formally defunct since 1935."[15] The NDD has not been used to strike down a statute in nearly ninety years; repeatedly, the Court held that even the vaguest of regulatory provisions satisfied the intelligible principle test.[16] Still, scholars believed the doctrine would return in light of three cases before the Court in 2022.[17] The NDD, nevertheless, remains shunned.[18]

B. Chevron *Deference and Early Major Question Doctrine Principles*

The major question doctrine (MQD) landed its role in managing the administrative state largely as a result of *Chevron* deference.[19] Under the Court's holding in *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*,[20] courts defer to an agency's interpretation of ambiguities

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9. RONALD M. LEVIN & JEFFREY S. LUBBERS, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 9, 12 (6th ed. 2017).

10. *See id.* at 12–13; *see also* Field v. Clark, 143 U.S. 649, 692 (1892) (explaining the non-delegation doctrine).

11. Clinton T. Summers, *Nondelegation of Major Questions*, 74 ARK. L. REV. 83, 83 (2021).

12. *Id.*

13. 276 U.S. 394 (1928).

14. *Id.* at 409.

15. Sohoni, *supra* note 3, at 292.

16. *See id.*; *see also* Summers, *supra* note 11, at 88 (noting the limitless delegation of the intelligible principle test).

17. *See* Sohoni, *supra* note 3, at 293–94 (noting that the litigants in the CDC, OSHA, and EPA cases raised non-delegation arguments, some of which had won the support of the lower courts).

18. *See id*. at 294 (noting that the Court used the major question doctrine to avoid reaching the issue of unconstitutional delegation).

19. *See id.* at 275.

20. 467 U.S. 837 (1984).

in a statute granting agency authority so long as the agency's interpretation is reasonable.[21] Just as they did when the NDD was introduced, scholars predicted radical changes in the treatment of agencies after *Chevron*.[22] And, just as with the NDD, the prediction was incorrect; since *Chevron*, the Supreme Court has relied on agency deference, as opposed to other interpretive tools, roughly as much as it did before *Chevron*.[23]

One reason—though certainly not the only reason—agency deference did not soar was the introduction of the major questions exception. In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[24] ten years after the Supreme Court decided *Chevron*, the Court began digging out an exception to *Chevron* deference for cases that present a "major" question.[25] This exception effectively allowed courts to ignore the agency's reasonable interpretation and proceed with ordinary interpretative techniques.[26] When determining whether a case presented a major question, the Court considered factors such as the national significance of the question,[27] the regulation's relation to the agency's purpose,[28] and the historical use of the statute.[29]

For years, the major questions exception served a similar function as the NDD—reserving the legislative power for the legislative branch—but

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21. *Id.* at 844. Chief Justice Roberts argues that this deference is only due when Congress has also delegated interpretive authority to the agency. City of Arlington v. FCC, 569 U.S. 290, 316–17 (2013) (Roberts, C.J., dissenting).

22. *See* Peter M. Shane & Christopher J. Walker, Chevron *at 30: Looking Back and Forward*, 83 FORDHAM L. REV. 475, 483 (2014).

23. *See id.* at 483 (including Professor Jack Beermann's discussion on the confusion surrounding *Chevron*); *see, e.g.*, James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 506–09 (analyzing deference to workplace law agencies before and after *Chevron*).

24. 512 U.S. 218 (1994).

25. *Id.* at 231. *See also* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'").

26. *See* Sohoni, *supra* note 3, at 271 ("Yet the common thread connecting these cases is that if the Court regarded a major question to be implicated, the agency's interpretation of the statute would not receive Chevron deference. Instead, the Court reclaimed the 'law-interpreting function' from the agency and itself supplied the best reading of the statute.").

27. *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) ("[T]he issue of physician-assisted suicide . . . has been the subject of an 'earnest and profound debate' across the country . . . mak[ing] the oblique form of claimed delegation all the more suspect.").

28. *See Brown & Williamson*, 529 U.S. at 126, 159 ("The FDCA grants the FDA . . . the authority to regulate . . . 'drugs' and 'devices.' . . . Thus, . . . the FDCA gives the agency no authority to regulate tobacco products as customarily marketed.").

29. *See MCI Telecommunications*, 512 U.S. at 234 (stating that the FCC's claimed modification authority "is effectively the introduction of a whole new regime of regulation . . . [which] is not the one that Congress established").

it operated much differently. Whereas the NDD struck down whole sections of statutes, the major questions exception merely limited the statute's breadth.[30] Additionally, unlike the modern MQD, the major questions exception allowed a court to conclude that a question was "major" and determine that "clear congressional authorization" was absent yet still find in favor of the agency.[31]

II. The Modern Major Question Doctrine

A. *The Early Cases*

The modern MQD developed in the wake of the COVID-19 pandemic. Three cases, most notably *National Federation of Independent Business v. OSHA*,[32] laid the foundation for the Court's decision in *West Virginia*.[33] In *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[34] the Court struck down the Center for Disease Control and Prevention's (CDC) eviction moratorium.[35] In *Biden v. Missouri*,[36] the Court held that the Secretary of Health and Human Services did not exceed their statutory authority by requiring staff at healthcare facilities participating in Medicare and Medicaid to receive a COVID-19 vaccination.[37]

In *OSHA*, the Court struck down the agency's emergency workplace vaccine mandate.[38] The Court emphasized that the temporary regulation veered outside the lane of workplace safety and encroached into the lane of general public health.[39] For example, the Court highlighted that the vaccine could not be undone after an employee left the office.[40] The Court

30. *See* Summers, *supra* note 11, at 95 ("While the nondelegation doctrine would strike down the statute itself, the major questions doctrine would strike down an agency's rule interpreting the statute.").

31. *See, e.g.*, King v. Burwell, 576 U.S. 473, 485–86, 498 (2015).

32. 142 S. Ct. 661 (2022) (per curiam).

33. *See id.* at 665–66. Like the major questions exception cases, the Court did not explicitly rest its holding on the doctrine. *Id.* Rather, the Court included the doctrine's general principles amongst its reasoning. *Id.*

34. 141 S. Ct. 2485 (2021) (per curiam).

35. *Id.* at 2490 ("If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.").

36. 142 S. Ct. 647 (2022).

37. *See id.* at 654 ("The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have.").

38. *OSHA*, 142 S. Ct. at 666.

39. *See id.* at 665–66 ("[I]mposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not 'part of what the agency was built for[]' … the mandate takes on the character of a general public health measure, rather than an '*occupational* safety or health standard.'").

40. *Id.* at 665.

also stressed that Occupational Safety and Health Administration (OSHA) had never used this claimed statutory authority to issue any similarly far-reaching regulations.[41] Throughout the opinion, the Court emphasized the major nature of the mandate, and although the majority did not explicitly cite the MQD, the Court's reasoning is littered with its early principles.[42] The MQD was coming soon.

B. West Virginia v. EPA

Sure enough, six months after *OSHA*, the Court announced the MQD in *West Virginia v. EPA*.[43] In *West Virginia*, the central issue was the authority of the EPA to implement the Clean Power Plan (CPP)—which the agency had abandoned far before the Court's decision.[44] Specifically, the Court analyzed whether section 111(d) of the Clean Air Act (CAA)[45] granted the EPA the authority to implement the generation-shifting method of reducing greenhouse gas emissions imagined in the CPP.[46] The Court did not begin its analysis by determining whether the CAA was ambiguous.[47] The Court did not discuss whether the EPA's interpretation of the CAA was reasonable.[48] The Court did not cite *Chevron* at all.[49] Rather, it explained that ordinary statutory interpretation methods were inappropriate.[50]

Ordinary statutory interpretive methods were inappropriate because the "EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory

41. *See id.* at 666 ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind. . . .").

42. *See id.* at 665–66. Ilya Somin argued that no grave danger existed which would allow OSHA to pass the emergency temporary standard, and therefore, the Court could have struck the mandate down without the MQD principles. *See* Ilya Somin, *A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority*, 2022 CATO SUP. CT. REV. 69, 78–79. Instead, the Court chose to support its holding almost exclusively on MQD principles. *See OSHA*, 142 S. Ct. at 665–66.

43. 142 S. Ct. 2587 (2022).

44. *See id.* at 2604. *See generally* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) [hereinafter Clean Power Plan] (to be codified at 40 C.F.R. pt. 60) (establishing carbon dioxide emission performance rates representing the best system of emission reduction for fossil fuel-fired electric utility steam generating units and stationary combustion turbines).

45. 42 U.S.C. §§ 7401–675.

46. 42 U.S.C. § 7411(d); *West Virginia*, 142 S. Ct. at 2610.

47. *See West Virginia*, 142 S. Ct. at 2607.

48. *See id.*

49. *See id.* At 2587–616.

50. *See id.* At 2609 ("The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of 'clear congressional authorization,' confirms that the approach under the major questions doctrine is distinct.") (internal citation omitted).

authority.'"[51] Under the EPA's interpretation of the CAA, Congress tasked it with "deciding how Americans will get their energy."[52] The economic and political ramifications of this policy would be significant.[53] For all these reasons, the Court held that whether the CAA authorized the EPA's CPP was a major question and required "clear congressional authorization."[54] Thus, the MQD was finally born.

C. *The Doctrine and Its Flaws*

The Court described the general framework for the MQD but failed to provide much guidance for future MQD cases.[55] Presumably, the lower federal courts will struggle with the precise application of the doctrine for the foreseeable future. Nevertheless, the MQD analysis will proceed in two parts.[56] First, courts will ask if the question is a "major" one.[57] Second, if it is, courts will ask if there is "clear congressional authorization" for the claimed authority.[58]

West Virginia and the cases that preceded it suggest that whether a question is major hinges on the "history and breadth" as well as the "economic and political significance" of the agency authority asserted.[59] Thus, future courts will likely ask three questions: (1) how has the agency used the section of the statute in the past; (2) how substantial is the authority the agency claims; and (3) how significant are the political and economic effects of the policy?

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51. *Id.* At 2610.

52. *Id.* At 2612.

53. *See id.* At 2604 ("The rule would entail billions of dollars in compliance costs . . . , require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."); *id.* At 2621 (Gorsuch, J., concurring) ("Whether these plants should be allowed to operate is a question on which people today may disagree, but it is a question everyone can agree is vitally important."); *see also* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520, 32529 (July 8, 2019) [hereinafter Repeal of Clean Power Plan] (to be codified at 40 C.F.R. pt. 60) ("At the time the CPP was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy. . . .").

54. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

55. Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022 CATO SUP. CT. REV. 37, 38–39. Although the majority chose not to offer significant guidance, Justice Gorsuch explained how he believes the lower federal courts should handle potential MQD cases. *See West Virginia*, 142 S. Ct. at 2620–23 (Gorsuch, J., concurring).

56. *See West Virginia*, 142 S. Ct. at 2610, 2614 (majority opinion); *see also* NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam) (identifying OSHA's exercise of authority as significant before determining whether Congress plainly authorized the exercise of authority).

57. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

58. *Id.* at 2621.

59. *Id.* at 2608 (majority opinion).

Nevertheless, more questions linger for the lower courts to answer. Courts are left to define economic and political significance precisely. Justice Gorsuch categorized economic significance as "regulat[ing] 'a significant portion of the American economy,'"[60] but that hardly narrows the phrase's meaning. Almost any DOL regulation could be considered economically significant under this definition. The DOL's role is "[t]o foster, promote, and develop the welfare of wage earners, job seekers, and retirees of the United States."[61] Thus, a rule regulating when an employer can pay tipped workers the lower $2.13 minimum wage under the Fair Labor Standards Act (FLSA)[62] may qualify as economically significant under Justice Gorsuch's broad definition.[63] Moreover, Justice Gorsuch defined political significance as "end[ing] an 'earnest and profound debate across the country.'"[64] A DOL regulation raising the federal minimum wage would surely fit within this definition.[65] But maybe not if the wage requirement only applies to federal contractors.[66]

Further, courts must also determine what qualifies as clear congressional authorization. This determination may be less challenging to lower federal courts, as "[c]ourts have long experience applying clear-statement rules."[67] Still, agencies evolve, society progresses, and needs

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60. *Id.* at 2622 (Gorsuch, J., concurring) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). Justice Gorsuch alternatively adds that a regulation "requir[ing] 'billions of dollars in spending' by private persons or entities" qualifies as economically significant. *Id.* (quoting King v. Burwell, 576 U.S. 473, 485 (2015)).

61. *About Us*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/general/aboutdol [https://perma.cc/FB2B-QDRP] (last visited Feb. 19, 2023).

62. Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

63. *See* Rebecca Rainey, *Labor Department Challenges Test Limits of* West Virginia v. EPA, BLOOMBERG L. (July 29, 2022), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X3DTA1VK000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/9FQ6-8YXC] (discussing a pending suit against the DOL for this rule); Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114 (Oct. 29, 2021) [hereinafter Tipping Rule] (to be codified at 29 C.F.R. pt. 10, 531); *see generally* Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. filed Dec. 03, 2021) (challenging the DOL's authority to regulate when an employer can pay tipped workers the lower $2.13 minimum wage).

64. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting Gonzales v. Oregon, 546 U.S. 243, 267–69 (2006)).

65. *See* Amina Dunn, *Most Americans Support a $15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), https://www.pewresearch.org/fact-tank/2021/04/22/most-americans-support-a-15-federal-minimum-wage/ [https://perma.cc/T3A4-SY6N] (acknowledging that about sixty percent of Americans support raising the minimum wage and about forty percent oppose raising it).

66. *See, e.g.*, Bradford v. DOL, 582 F. Supp. 3d 819, 840–41 (D. Colo. 2022) (rejecting plaintiffs' MQD attack on a DOL rule that increases the minimum wage for federal contractors). It is worth mentioning that *Bradford* was decided before the Court's decision in *West Virginia*, and the decision is currently being appealed to the Tenth Circuit. Bradford v. DOL, No. 21-cv-03283-PAB-STV, 2022 WL 266805, at *1 (D. Colo. Jan. 28, 2022).

67. *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

change. "Pragmatically, Congress is not going to be able to provide the clear statement [that] the Court is requiring."[68] Congress cannot write clear statements that capture situations Congress cannot envision.[69] Must the legislature continuously amend statutes to add a clear statement as these situations arise? Such a requirement seems impractical.

Regulations currently in place will not be exempt from this explicit authorization. Yet, Justice Kavanaugh previously suggested that they should be exempt.[70] A major reason is that "when the Court applies a new canon retroactively to an old statute, it imposes a cost rather than a benefit on the unsuspecting legislature."[71] The level of deference that lower courts give to current agency rules when applying the MQD will be something to follow.

D. *Agencies' Authoritative Lanes*

Finally, the Supreme Court advanced arguments in both *National Federation of Independent Business v. OSHA* and *West Virginia v. EPA* that the agencies' asserted powers fell outside their lane of authority.[72] In *West Virginia*, the Court offered up the following example:

> We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.[73]

But disputed administrative rules and regulations are unlikely to belong to one agency over another as clearly as in the Court's illustration. Thus, lower courts will be left to determine whether an agency veered from its lane in promulgating the challenged regulation. If vaccine and testing requirements for workplaces are not within OSHA's lane of authority, then whose lane is it? The Court noted in *OSHA* that the agency was

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68. Mark B. Seidenfeld, Professor of Law, Florida State University, Remarks at the University of Florida Law Review Allen L. Poucher Lecture: The Major Question: The Implications of West Virginia v. EPA on the Administrative State (Oct. 20, 2022) [hereinafter Poucher Lecture].

69. *Id.*

70. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2156 n.188 (2016).

71. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142–43 (2002).

72. *See* NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam); *West Virginia*, 142 S. Ct. at 2612–13.

73. *West Virginia*, 142 S. Ct. at 2613.

encroaching on general public health rather than staying in its lane of workplace safety.[74]

When one agency's regulation merges into another agency's lane, which of the two agencies (if either) can proceed? Take the example the Court used in *West Virginia*. Under the EPA's reading of the CAA, it had the authority to regulate the transition from coal to natural gas.[75] This reading would require "projecting system-wide . . . trends in areas such as electricity transmission, distribution, and storage."[76] Of course, this is not within the EPA's traditional area of expertise.[77] But it would likely be within the Department of Energy's (DOE) area of expertise.[78] Could the DOE have required generation-shifting then? The answer is probably not.

With the above uncertainties in mind, the DOL (and other agencies) must now defend the authority that it currently wields and any future authority it claims to have in the lower federal courts.

III. THE MQD'S LIKELY EFFECT ON DOL AUTHORITY

Much was made of the NDD and *Chevron* deference when the Court announced each, but neither had the monumental effect on agency deference that scholars predicted.[79] The NDD was immediately crippled by the intelligible principle test—a test that even the vaguest of regulatory provisions satisfies.[80] Although *Chevron* deference was not immediately curbed the way the NDD was, deference to agencies did not significantly increase after *Chevron* was decided.[81] In fact, agency deference under the Roberts Court is lower than under both the Burger and Rehnquist Courts.[82] Moreover, the Supreme Court has begun to ignore *Chevron*.[83]

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74. *OSHA*, 142 S. Ct. at 665.

75. *West Virginia*, 142 S. Ct. at 2606.

76. *Id.* at 2612.

77. *See id.* at 2612–13 ("EPA itself admitted when requesting special funding, 'Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage' requires 'technical and policy expertise not traditionally needed in EPA regulatory development.'") (internal citation omitted).

78. *See About Us*, U.S. DEP'T OF ENERGY, https://www.energy.gov/about-us [https://perma.cc/3SXY-PXRB] (last visited Feb. 19, 2023) ("The mission of the Energy Department is to ensure America's security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions.").

79. *See* Summers, *supra* note 11; Shane & Walker, *supra* note 22.

80. *See* J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 409 (1928).

81. *See* Brudney, *supra* note 23, at 503.

82. *See id.* (stating that agency deference was 17.1% under the Burger Court, 17.4% under the Rehnquist Court, and 15.9% under the Roberts Court).

83. *See* Richard J. Pierce, Jr., *Is* Chevron *Deference Still Alive?*, THE REGUL. REV. (July 14, 2022), https://www.theregreview.org/2022/07/14/pierce-chevron-deference/ [https://perma.cc/

A. *Deference to the DOL Before the MQD*

The Supreme Court, specifically the current Court, is increasingly skeptical of the administrative state.[84] "It is no secret that the [Court] has particular disdain for certain agencies and the EPA [is] pretty high on [this Court's] list."[85] The DOL is lower on this imagined hierarchy of agency disdain.[86]

Prior to *Chevron*, Court deference to the DOL was a mixed bag. Because Congress gives the DOL broad authority to regulate, the Court often deferred to this congressional delegation.[87] However, the Court was less deferential when the DOL used informal mechanisms to interpret its authorizing statutes.[88] Since *Chevron*, the Court has continued to take a similar approach.[89] The Court applies *Chevron* to the DOL's interpretations when the "interpretation is conveyed through some form of regulation."[90]

Deference to workplace law agencies has actually declined since *Chevron* was decided.[91] The Court supported the DOL's interpretations eighty-three percent of the time before *Chevron* but only sixty-seven percent since *Chevron*.[92] Nevertheless, the Court still defers to the DOL in two out of every three cases.[93] And the Court is even more deferential to the DOL when the regulation favors employers rather than employees.[94]

It is worth noting that the Supreme Court and circuit courts treat *Chevron* deference differently. While the Court has seemingly abandoned *Chevron*, agencies succeed at roughly the same rate under *Chevron*

PWL9-XLQC]; Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 4 (2017) (explaining that from 1984 to 2006, the Supreme Court did not apply *Chevron* deference in three quarters of cases that it would have seemed to apply").

84. Adam Liptak & Ephrat Livni, *Supreme Court Seems Poised to Streamline Challenges to Agency Power*, N.Y. TIMES (Nov. 7, 2022), https://www.nytimes.com/2022/11/07/us/supreme-court-agencies-sec-ftc.html [https://perma.cc/ZZE2-RSDF].

85. Jessica Owley, Professor of Law and Faculty Director for the Environmental Law Program, University of Miami, Poucher Lecture, *supra* note 68.

86. *See id.*; *see also* Brudney, *supra* note 23, at 498 (discussing judicial deference to various agencies, including the DOL).

87. Brudney, *supra* note 23, at 505–06.

88. *Id.* at 506.

89. *Id.* at 508.

90. *Id.*

91. *See id.* at 508–09 ("When invoking agency deference as a probative resource, the Court is less likely to support agency interpretations since Chevron than it was in the prior fifteen years.").

92. *Id.* at 509.

93. Brudney, *supra* note 23, at 509.

94. *See id.* at 512 (stating that the Supreme Court approved agency determinations fifty-three percent of the time for employees and seventy-two percent of the time for employers).

deference as under other standards of review in the Supreme Court.[95] In contrast, agencies in circuit courts are significantly more likely to prevail under *Chevron* deference than under other standards.[96] Circuit courts also give agencies *Chevron* deference at a higher rate than the Supreme Court.[97] The circuit courts will play a key role in the size of the MQD's effect.

It remains to be seen whether the lower federal courts will continue to defer to agencies in the aftermath of *West Virginia*. As discussed, the Court did the lower courts no favors when it described the standard for a major question. Therefore, the lower court will probably remain conservative in the number of rules and regulations they strike down—at least until the MQD is more developed. And challengers will give the courts plenty of opportunities to develop the MQD.

B. *Current Challenges to the DOL*

In the aftermath of *West Virginia*, it is "open season on final rules."[98] Challenges in the lower federal courts are already underway. There are currently three significant challenges to DOL rules and regulations. Some challenges preceded the Court's holding in *West Virginia*, and the challengers' have since submitted notices of supplemental authority to bolster their MQD arguments.[99] Lower courts decided on other challenges years before the Court formally announced the MQD in *West Virginia*.[100] Nevertheless, more challenges are certainly coming.

The first challenge attacks a regulation that further defines tipped workers.[101] Specifically, the rule defines work "in a tipped occupation" as work that produces tips and work that directly supports tip-producing work so long as the directly supporting work does not exceed twenty percent of the work week or thirty consecutive minutes.[102] In *Restaurant*

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95. Barnett & Walker, *supra* note 83, at 4.

96. *See id.* at 6 ("First, agency interpretations were significantly more likely to prevail under Chevron deference (77.4%) than Skidmore deference (56.0%) or, especially, de novo review (38.5%)").

97. Pierce, Jr., *supra* note 83.

98. Andrew Hammond, Associate Professor of Law, University of Florida, Poucher Lecture, *supra* note 68.

99. *See, e.g.*, Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. filed Dec. 3, 2021).

100. *See, e.g.*, N.Y. State Bar Ass'n v. FTC, 276 F. Supp. 2d 110, 118 (D.D.C. 2003), *aff'd*, ABA v. FTC, 430 F.3d 457, 470–71 (D.C. Cir. 2005) (holding that the FTC's interpretation of an ancillary provision in the Financial Services Modernization Act fundamentally alters the regulatory scheme established by the legislature because it essentially allows the FTC to police the ethical conduct of attorneys).

101. *See* Complaint for Declaratory and Injunctive Relief at 2, Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. Dec. 3, 2021) ("Specifically, the statute speaks in terms of a 'tipped employee.' 29 U.S.C. § 203(m)(2)(a).").

102. 29 C.F.R. § 531.56(f)(1); 29 C.F.R. § 531.56(f)(4).

Law Center v. DOL,[103] the plaintiffs contended that whether the DOL has the authority to issue this rule is a major question and that Congress has not given the DOL clear authorization.[104] The plaintiffs pointed out that the regulation "assert[s] the authority to regulate at a task level the work of all tipped employees in the United States" because of the statutory language of "engaged in an occupation."[105] According to the plaintiffs, the regulation raises a major question because it "affects close to 500,000 different workplaces across the country and imposes on businesses more than two billion dollars in familiarization and compliance costs."[106]

However, nearly all DOL regulations will affect a significant number of workplaces and impose high cumulative costs on the affected business—the DOL is the federal agency tasked with regulating the workplace. The plaintiffs' attempt to elevate the significance of standard DOL duties by asserting that the new rule regulates at the task level and carries high monetary costs,[107] but the plaintiffs' argument on its own is unlikely to sway a court. Economic significance is only a single factor used to determine whether a question is major.

For example, this new rule does not stem from discovering unheralded power in a long-extant statute section representing some transformative expansion of the DOL's regulatory authority. Instead, the DOL merely offers clarification to a phrase in the FLSA as the workplace evolves and employers attempt to take advantage of ambiguity. Moreover, there is no evidence that this regulation silences intense debate throughout the United States. Climate change and COVID-19 vaccinations are hotly contested political issues, and the Court rejected administrative agencies' attempts to take these major questions away from the legislative branch.[108] Tipped employee compensation—specifically what tasks qualify—is not a comparable political issue.

The FLSA allows employers to pay employees a wage below the federal minimum wage if the employee is "engaged in an occupation in which he [or she] customarily and regularly receives" tips so long as the sum of the paid wages and tips are greater than or equal to the federal minimum wage.[109] However, the FLSA does not define what it means to be engaged in an occupation where workers are ordinarily tipped. Thus, a gap exists in the statute, and the DOL merely fills in this gap by defining

103. *Rest. L.* Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. Dec. 3, 2021).

104. *See* Notice of Supplemental Authority in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 2, Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. filed July 11, 2022).

105. *Id.*

106. *Id.* (citations omitted).

107. *See id.*

108. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2486, 2486 (2021) (per curiam); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

109. 29 U.S.C. § 203(m)(2); 29 U.S.C. § 203(t).

the phrase. The regulation of compensation for tipped workers falls clearly within the DOL's lane, is not a major question, and does not require clear congressional authorization.

A second court challenge to DOL authority is *Bradford v. DOL*.[110] In *Bradford*, the plaintiffs sought a preliminary injunction to enjoin the enforcement of a DOL rule—86 Fed. Reg. 67,126—that raised the minimum wage for federal contractors through authority granted by the Federal Property and Administrative Services Act.[111] Among other things, the regulation raised the minimum wage for federal contractors from $10.10 per hour to $15.00 per hour.[112] The increase is estimated to total "$1.7 billion per year over ten years" and "affect 327,300 employees."[113]

In support of their challenge to the DOL rule, the plaintiffs cited the MQD.[114] The district court rejected this argument.[115] The plaintiffs appealed to the Tenth Circuit and now have *West Virginia*—which had not been decided before the district court's ruling—to bolster their position.[116] Despite the Court's formal recognition of the MQD, the likelihood that the plaintiffs' claim will be successful on appeal remains bleak. *West Virginia* was not a sudden, massive transformation of court-made law; it was rooted (at least to some degree) in the major questions exception principles.[117] In fact, Chief Judge Philip A. Brimmer used many of these principles to conclude that the MQD did not apply in *Bradford*.[118]

Moreover, unlike the CPP or the OSHA vaccine mandate, this rule affects a significantly more limited portion of the United States economy. Whereas OSHA's vaccine mandate implicated massive amounts of employees, this DOL rule only raises the minimum wage for federal contractors.[119] The plaintiffs in *Bradford* contended that the increase was economically significant.[120] However, the regulation's economic effect is

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110. 582 F. Supp. 3d 819 (D. Colo. 2022), *appeal docketed*, No. 22-1023 (10th Cir. Jan. 28, 2022).

111. *Id.* at 826–27; 29 C.F.R. § 23.10.

112. *Bradford*, 582 F. Supp. 3d at 826. The $10.10 per hour minimum wage was a regulation promulgated by the DOL under the Obama administration. *Compare* 48 C.F.R. § 22.1902(a), *with* 29 C.F.R. § 23.10.

113. *Bradford*, 582 F. Supp. 3d at 840.

114. *Id.* at 839.

115. *See id.* at 840–41.

116. Bradford v. DOL, No. 21-cv-03283-PAB-STV, 2022 WL 266805, at *1 (D. Colo. Jan. 28, 2022).

117. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

118. *See Bradford*, 582 F. Supp. 3d at 839–41.

119. *Compare* NFIB v. OSHA, 142 S. Ct. 661, 662 (2022) (per curiam) ("The mandate . . . applies to roughly 84 million workers . . . ."), *with Bradford*, 582 F. Supp. 3d at 840 ("[T]he rule will affect 327,300 employees . . . .").

120. *Bradford*, 582 F. Supp. 3d at 840.

below the range that will have a "measurable effect" "in macroeconomic terms, on the gross domestic product."[121] Not only is the economic impact comparably insignificant, but the regulation is also neither politically significant nor a discovery of unheralded power. No great debate exists throughout the country as to how federal contractors should be compensated. Further, this is not an entirely new regulation. The DOL utilized the same statutory authority the agency used to promulgate a $10.10 per hour minimum wage under the Obama administration.[122]

The Court in *OSHA* rejected the agency's contention that the agency could issue the broad vaccine mandate and testing requirement, but the Court had no doubts that "OSHA [could] regulate risks associated with working in particularly crowded or cramped environments."[123] The narrower mandate and requirement would avoid veering outside of OSHA's regulatory lane. Similarly, it is unlikely that the DOL could unilaterally set the federal minimum wage for all workers across the United States. Such a regulation would likely exceed the agency's delegated authority and would undoubtedly be both economically and politically significant.[124] However, raising the minimum wage for federal contractors is more appropriate within the agency's authoritative lane.

The third challenge to DOL authority is the least compelling from an MQD perspective. In *Sun Valley Orchards, LLC v. DOL*,[125] the plaintiff challenged the DOL's H-2A enforcement procedures.[126] The plaintiff is a family-run vegetable farm that relied primarily on seasonal workers until 2015.[127] In 2015, the plaintiff joined the H-2A visa program to

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121. *Id.* (citing Increasing the Minimum Wage for Contractors, 86 Fed. Reg. 67,224 (Nov. 24, 2021) (to be codified as 29 C.F.R. pts. 10, 23)). Appellants (Bradford) argue in their brief, which was submitted after the COVID-19 MQD cases but before *West Virginia*, that economic significance does not require a measurable economic effect. Appellants Brief in Chief at 34, Bradford v. DOL, 582 F. Supp. 3d 819 (D. Colo. 2022), *appeal docketed*, No. 22-1023 (10th Cir. Mar. 14, 2022). Appellants assert that the MQD is applicable "whenever a court cannot say with certainty that Congress meant for the outcome implicated by the rule." *Id.* But this is not the test. Although the Appellants are correct that a lack of a measurable economic impact is not dispositive, courts need not always be certain that the outcome of a rule is exactly as Congress intended either. Rather, once a court determines that a rule implicates a major question, then the agency must point to clear congressional authorization. *See West Virginia*, 142 S. Ct. at 2610, 2614.

122. *See Bradford*, 582 F. Supp. 3d at 841 (noting that the Obama, Trump, and Biden administrations all used authority from the Procurement Act to regulate the minimum wage of federal contractors).

123. *OSHA*, 142 S. Ct. at 666.

124. Looking outside of the MQD context, the DOL could not increase the minimum wage for employees covered by the FLSA's minimum wage section because Congress explicitly enumerated the minimum wage. *See* 29 U.S.C. § 206(a).

125. No. 1:21-cv-16625 (D.N.J. Sept. 8, 2021).

126. *See* Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 20, 24–25, *Sun Valley Orchards*, No. 1:21-cv-16625.

127. *Id.* at 8–9.

maintain sufficient workers for the farm.[128] The following year, DOL officials assessed the plaintiff a fine of "over $550,000 for alleged H-2A violations—including a civil monetary penalty of over $200,000 and over $350,000 in back wages."[129] The plaintiff challenged the assessment before a DOL administrative law judge (ALJ), and the ALJ affirmed the fine.[130] The plaintiff then appealed the decision from the ALJ to the DOL's Administrative Review Board (ARB), which affirmed the ALJ's decision.[131] The plaintiff subsequently filed an action in the United States District Court of New Jersey.[132]

In the complaint, the plaintiff alleged (among other things) that the enforcement procedures are not within the DOL's statutory authority under 8 U.S.C. § 1188.[133] After the Court decided *West Virginia*, the plaintiff urged the district court to invalidate the enforcement procedures under the MQD.[134] Yet, the procedures are neither economically nor politically significant. In 2019, the DOL identified a record number of violations of the H-2A program—a mere 12,000.[135] These violations resulted in only $2.4 million in back wages to workers and $2.8 million in civil penalties.[136] Moreover, this, again, is not a hot-button political issue throughout the country. It simply does not rise to the level of an employer vaccine mandate or a national eviction moratorium. Not only are the DOL's enforcement procedures not economically or politically significant, but the procedures are not new. The agency did not seize on a previously ignored section of the statute to wield extraordinary power; the DOL has implemented these procedures for nearly thirty-five years.[137]

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128. *Id.* at 9–10.

129. *Id.* at 10.

130. *Id.* at 15–16.

131. *Id.* at 18.

132. Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 1, *Sun Valley Orchards*, No. 1:21-cv-16625.

133. *See id.* at 25 ("But [§ 1188] does not say that that [sic] the Secretary may assess penalties or secure such other relief in proceedings before agency judges.").

134. *See* Defendant's Response to Plaintiff's Additional Notice of Supplemental Authority at 1, Sun Valley Orchards, LLC v. DOL, No. 1:21-cv-16625 (D.N.J. July 22, 2022).

135. Daniel Costa et al., *Federal Labor Standards Enforcement in Agriculture*, ECON. POL'Y INST. (Dec. 15, 2020), https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/ [https://perma.cc/X43B-UUYR].

136. *Id.* Both back wages owed and civil money penalties assessed for H-2A violations peaked in fiscal year 2013, at $4.9 and $6.6 million, respectively (all in constant 2019 dollars). *Id.*

137. *See id.*; Plaintiff's Combined Reply in Support of Its Partial Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment at 15, Sun Valley Orchards, LLC v. DOL, No. 1:21-cv-16625 (D.N.J. May 18, 2022); Defendants' Response to Plaintiff's Additional Notice of Supplemental Authority at 2, Sun Valley Orchards, LLC v. DOL, No. 1:21-cv-16625 (D.N.J. July 22, 2022).

Interestingly—and unlike the previous two challenges—there is also a solid argument that Congress clearly authorized the DOL's enforcement procedures in this case. The FLSA does not clearly authorize the DOL to regulate when workers are tipped employees;[138] the Procurement Act[139] does not clearly authorize the DOL to set the minimum wage for federal contractors.[140] But 8 U.S.C. § 1188(g)(2) specifically authorizes the Secretary of Labor to take actions that "may be necessary to assure employer compliance with terms and conditions of employment under this section," such as "imposing appropriate penalties."[141] Although what will qualify as clear congressional authorization remains to be seen, § 1188(g)(2) seems to explicitly empower the DOL to implement its own H-2A enforcement procedures. Thus, the DOL's enforcement procedures fall within the DOL's authoritative lane delegated by Congress.

None of the current three challenges described above appear to be major questions. The MQD is a doctrine reserved for extraordinary cases. These challenges do not meet that criterion. The challenge in *Restaurant Law Center* comes the closest because the rule is economically significant to a degree, but the rule does not rise to levels of economic and political significance as the rules and regulations at issue in *West Virginia* and *OSHA*. Still, challenges will continue to be thrown at the DOL, and some will eventually be successful. Therefore, the DOL must be careful in drafting new rules and regulations—paying particular attention to where the agency garners the authority for such rules and regulations.

C. *Potential Future Challenges to the DOL*

The most effective challenges to DOL rules and regulations will fall into one or both of two categories: (1) novel rules that veer outside of the Department's ordinary lane and (2) far-reaching regulations that have substantial effects the courts expect Congress to authorize clearly. Although both cases have characteristics of both categories, *OSHA* offers

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138. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–262.

139. Federal Property and Administrative Services Act, 40 U.S.C. §§ 101–1315.

140. *See id.*

141. 8 U.S.C. § 1188(g)(2). The language of § 1188(g)(2) does not explicitly authorize adjudication by ALJs for fines, and 28 U.S.C. § 2461(a) provides that "[w]henever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it *may* be recovered in a civil action." (emphasis added). Thus, some doubt lingers as to whether the use of ALJs is clearly authorized in the eyes of the adjudicating federal court.

lower courts an example of what the first category may look like,[142] while *West Virginia* provides guidance for the second category.[143]

One potential future challenge to DOL efforts could be to define independent contractors.[144] Like the rule in *Restaurant Law Center*, this proposed rule for independent contractors seizes on an undefined phrase in the FLSA. The FLSA defines an employee, employer, and employ, but the FLSA does not define an independent contractor.[145] Although the FLSA does not define an independent contractor, the Internal Revenue Service (IRS) distinguishes independent contractors from employees,[146] and courts have well-developed case law distinguishing the two types of workers under the FLSA.[147]

In 2021, the DOL introduced the Independent Contractor Status Under the Fair Labor Standards Act Rule (IC Rule).[148] This introduction was the Agency's first attempt at defining independent contractors. The rule was similar to the economic realities test used (with some variation) by courts nationwide.[149] However, unlike the economic realities test, the IC Rule elevated two factors—"core factors"—that are unlikely to be outweighed by the other three factors.[150] Subsequently, in 2022, the DOL proposed a

142. *See* NFIB v. OSHA, 142 S. Ct. 661, 663, 666 (2022) (per curiam) (finding that the challenged rule, which was temporary and intended for emergencies, trespassed into the sphere of public health).

143. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (emphasizing the billion-dollar impact of the CPP).

144. *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795).

145. *See* 29 U.S.C. § 203.

146. *Independent Contractor Defined*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined [https://perma.cc/R8FQ-WREL] (last visited Apr. 9, 2023) ("The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. . . . What matters is that the employer has the legal right to control the details of how the services are performed.").

147. *See, e.g.*, Heath v. Perdue Farms, Inc., 87 F. Supp. 2d 452, 457 (D. Md. 2000) (describing the economic realities test, which is used to determine whether a worker is an employee or an independent contractor for FLSA claims).

148. *See* Bassam Kaado, *The Definition of Independent Contractor Is About to Change*, BUS. NEWS DAILY (Nov. 8, 2023), https://www.businessnewsdaily.com/what-is-an-independent-contractor [https://perma.cc/9PTQ-Z2PE].

149. *Compare* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218, 62,219 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795) (identifying two core factors and three less-probative factors to consider when determining the economic reality of the worker), *with Heath*, 87 F. Supp. 2d at 457 (identifying six factors to consider when determining the economic reality of the worker).

150. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218, 62,219 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795). There are six factors to the economic realities test: opportunity to profit or lose depending on managerial skill; investments by the worker and the employer; permanence of the

new rule that would rescind the 2021 rule and essentially codify the economic realities test.[151]

The DOL's attempts to define an independent contractor will likely be challenged, and the MQD will certainly be cited in the challenge. Although the IRS and the courts have definitions and tests for independent contractors, the proposed rule is not novel or clearly outside the DOL's lane of authority. Instead, the DOL seeks to clarify ambiguity within the FLSA by adopting the common law definition. A successful challenge to this proposed rule would hinge on its significant effect across the country.

The proposed rule is expected to result in millions of workers attaining employment status.[152] With employment status, the new employees will be entitled to healthcare, retirement benefits, and more.[153] Unfortunately, many companies may choose to reduce their workforce rather than accept the increased costs. Companies like Uber and Lyft, which rely on gig workers, may struggle to find success under the new definition.[154] Small businesses may suffer as well. Furthermore, there is a ripe debate throughout the country over the definition of an independent contractor.[155] Nevertheless, the ultimate outcome of any potential challenge to the DOL's authority to define independent contractors will turn on how broadly courts read economic and political significance. This proposed rule is not as expensive and polarizing as the generation-shifting method of reducing greenhouse gas emissions imagined in the CPP or the workplace vaccine and testing requirement ordered by OSHA. Still, it is unclear whether lower courts will read *West Virginia* and *OSHA* as floors or examples.[156]

Another potential challenge to future rules and regulations could come in the artificial intelligence (AI) landscape. Jobs across the United States

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work relationship; nature and degree of control; whether the work performed is integral to the employer's business; and skill and initiative. *Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. WAGE & HOUR DIV. (Mar. 2024), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship [https://perma.cc/HZZ2-AWP8].

151. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62, 218, 62,219–20 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795).

152. Kaado, *supra* note 148.

153. *Id.*

154. *Id.*

155. Marianna Curtis, *Employee or Independent Contractor? The Debate Continues*, BERGER SINGERMAN (June 21, 2023), https://www.bergersingerman.com/news-insights/employee-or-independent-contractor-the-debate-continues [https://perma.cc/L3LS-X9L6].

156. At least one lower court has read economic significance narrowly, noting that the challenged regulation was less than $52.3 billion—the amount that the Office of Management and Budget quantifies as a measurable economic effect. Bradford v. DOL, 582 F. Supp. 3d 819, 840 (D. Colo. 2022).

are being automated. It started with assembly line workers and is expected to impact truck drivers next, but AI will continue to improve.[157] Stores and restaurants across the country utilize self-checkout and ordering machines. Some believe that AI will eventually be able to perform the work of surgeons.[158] These changes would significantly impact the labor market, but is there room (outside of future statutes offering clear congressional authorization) for the DOL to regulate AI? Any promulgated rule would likely fall into the novel rule category.[159] Such a rule would likely seize onto a long-extant statute to increase the DOL's authority. Additionally, the rule could easily drift out of the DOL's defined lane.

One way the DOL could approach some AI regulation would be through OSHA—both the agency and the Act. The Occupation Safety and Health Act (OSH Act)[160] charges OSHA, a part of the DOL, with "ensur[ing] safe and healthful working conditions for workers by setting and enforcing standards."[161] OSHA can use the OSH Act to regulate AI to the extent that it harms working conditions. Although this is unlikely to be particularly useful in the form of AI that is replacing workers, it may help regulate productivity monitoring tools that negatively affect working conditions, such as by deleteriously affecting mental health.[162] Still, these regulations could incidentally restrict AI meant to replace workers.

Future challenges to the DOL's authority and its promulgated rules will continue to occur. Many challenges will cite the MQD. Nevertheless, it is only the exceptional and extraordinary cases that the DOL will struggle to defend, and these cases are few and far between. For every promulgated vaccine mandate rule, there will be many more rules, like the increase in the minimum wage for federal contractors. Eventually, another monumental and highly polarizing event will overtake the country. Maybe it's the rise of AI in the workforce. Perhaps it is

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157. Sean Flemming, *A Short History of Jobs and Automation*, WORLD ECON. F. (Sept. 3, 2020), https://www.weforum.org/agenda/2020/09/short-history-jobs-automation/ [https://perma.cc/9H6C-V53C]; ANDREW YANG, THE WAR ON NORMAL PEOPLE 43–44 (2018).

158. YANG, *supra* note 157, at 58.

159. The rule could also be economically and politically significant, but that determination would be highly dependent on the specifics of the rule.

160. 29 U.S.C. §§ 651–678.

161. *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/aboutosha [https://perma.cc/6E9U-Y43T] (last visited Apr. 10, 2023).

162. *See* Tanya Goldman, *What the Blueprint for an AI Bill of Rights Means for Workers*, U.S. DEP'T OF LAB. BLOG (Oct. 4, 2022), https://blog.dol.gov/2022/10/04/what-the-blueprint-for-an-ai-bill-of-rights-means-for-workers [https://perma.cc/TUU8-BL4L] ("For instance, call center agents, who are often electronically monitored and held to similarly intensive productivity standards as warehouse workers, report high levels of stress, difficulties sleeping, and repetitive stress injuries.").

something completely different. Regardless, it is with regard to these events that the DOL will struggle the most to adapt to the MQD.

D. *Other Potential Future Challenges in the Labor Field*

Although the DOL is the primary federal agency in labor and employment, other agencies also affect the field.[163] These agencies include the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), and the Federal Trade Commission (FTC).[164] Each agency will also have to weather numerous MQD challenges to rules and regulations.

A prime example of a future employment regulation from a non-DOL agency ripe for challenge is the FTC's proposed rule that bans non-compete agreements.[165] The Non-Compete Clause Rule (NCCR) prohibits not only standard non-compete agreements but also any "contractual term that is a de facto non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[166] The NCCR asserts that the Federal Trade Commission Act (FTC Act)[167] directs the FTC "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce" and "'make rules and regulations for the purpose of carrying out the provisions of' the FTC Act."[168] Under the FTC's interpretation of the FTC Act, non-compete clauses are an unfair method of competition.[169]

The NCCR is ripe for an MQD challenge. Roughly thirty million workers across the country are bound by a non-compete agreement, and the NCCR would immediately void all of them.[170] Moreover, the NCCR is expected to increase worker earnings by almost $300 billion annually.[171] This growth sounds economically significant and far surpasses the $52.3 billion standard noted by the district court in

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163. *See Related Agencies*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/resources/related-agencies [https://perma.cc/Y3YC-5FZN] (last visited Feb. 5, 2024).

164. *U.S. Department of Labor, National Labor Relations Board, U.S. Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers' Rights*, EEOC (Jan. 10, 2021), https://www.eeoc.gov/newsroom/us-department-labor-national-labor-relations-board-us-equal-employment-opportunity [https://perma.cc/7R77-7F9B].

165. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

166. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3509 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

167. 15 U.S.C. §§ 41–58.

168. Non-Compete Clause Rule, 88 Fed. Reg. at 3482; 15 U.S.C. §§ 45(a)(2), 46(g).

169. Non-Compete Clause Rule, 88 Fed. Reg. at 3482.

170. Non-Compete Clause Rule, 88 Fed. Reg. at 3485, 3513.

171. Non-Compete Clause Rule, 88 Fed. Reg. at 3537.

Bradford.[172] Further, there is a politically considerable edge as well. Congress has rejected multiple bills that would curb or limit non-compete agreements.[173] A primary purpose of the MQD is to prevent federal agencies from acting where Congress has chosen not to act.[174]

Although Congress has tasked the FTC with policing unfair methods of competition, this regulation likely goes too far. The similarities between this rule and those at issue in *West Virginia* and *OSHA* are immense. This kind of rule will have a massive effect on employers across the nation, just like OSHA's vaccine mandate. The primary difference, and what the FTC will probably cling to when the rule is challenged, is that NCCR is more clearly authorized by statute. Nevertheless, a challenge to the NCCR is one in many cases that squarely fits into the "extraordinary case"[175] category that the Supreme Court calls major questions.

CONCLUSION

Ultimately, the effect of the MQD on DOL authority will be, ironically, minor. The DOL will face (and currently is facing) a barrage of court challenges on MQD grounds, but little change in deference to the DOL will likely result—especially at the Supreme Court level. The Supreme Court created the power to strike down administrative policies that it feels are too big for an agency to decide outside of some clear congressional authorization. Nevertheless, the MQD is another tool for the Court to play with while announcing its decision.[176] The Court did not need *Chevron* to defer to an agency's interpretation; the Court does not need the MQD to ignore an agency's interpretation.

The most prominent effect of the MQD will be on challenges to DOL at the circuit court level. All challenges are unlikely to make it to the Supreme Court; thus, how the circuit courts handle those challenges will be of utmost importance. Still, the lower courts will be more cautious than the Supreme Court in deciding that a federal agency's regulation is major and not clearly authorized by Congress. After all, the United States Court of Appeals for the District of Columbia Circuit determined that the CPP did not implicate the MQD before the Supreme Court reversed in *West*

172. Bradford v. DOL, 582 F. Supp. 3d 819, 840 (D. Colo. 2022).

173. Russell Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION L. (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/ [https://perma.cc/2EGX-CWN3].

174. *See* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. 693, 694 (2022).

175. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

176. *Id.* at 2641 (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards.").

Virginia.[177] The MQD is for unusual and significant agency action. Therefore, standard DOL rules and regulations will be more or less left alone by the courts applying the MQD.

The novel, unusual, and groundbreaking rules will be the most vulnerable to MQD challenges. Thus, the DOL's rulemaking process must work harder and more creatively to sneak these regulations past MQD challenges. As most of the DOL's rules will be economically and politically significant, the DOL must root its new rules in previously recognized authority to avoid any claims that it is seeking to expand its regulatory authority. Yet, this is not enough. The DOL must also avoid using previous authority in new and controversial contexts to expand its power. Ultimately, some goals of the DOL, such as attempts to regulate AI in the labor force, may be impractical in the face of the MQD and will require Congress to act. For example, as AI continues to take over the workplace, Congress can amend or enact legislation that authorizes the DOL to regulate AI in the workforce.[178] Therefore, the MQD is unlikely to noticeably curb the DOL's power to issue rules and regulations.

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177. Am. Lung Ass'n v. EPA, 985 F.3d 914, 959 (D.C. Cir. 2021), *rev'd*, West Virginia v. EPA, 142 S. Ct. 2587 (2022).

178. Yes, easier said than done.