Fighting Fire with Fire: Proactive Constructions of the Major Questions Doctrine to Defend Climate Action

By Emma Yip[1]

Hegemony mystifies power relations, camouflages the causes of public issues and events, encourages fatalism and political passivity, and justifies the deprivation of the many so that a few can live well. Hegemony works to induce oppressed people to consent to their own exploitation and misery.

Richard Peet & Elaine Hartwick, *Theories of Development: Contentions, Arguments, Alternatives* 199-200 (Guilford Press 3rd ed., 2015).

[1] Emma is an Honors Attorney at the U.S. Environmental Protection Agency, Region 10's Air, Toxics, RCRA, and Criminal Law Branch. She graduated from UC Davis, King Hall in 2023. Prior to law school, Emma co-captained Delta Collaborative's TIMESHIP #39 with Elena Ricciardi, touring the nation to reshape how we envision our future. She has worked with Earthjustice, the Center for Biological Diversity, and Advocates for the West. Thank you to Professor Albert Lin, Ian Fein, Anna Yip, Billy Lee, and Zach Crvarich for helping brainstorm and edit this paper. Emma can be contacted at yip.emma@outlook.com. This work is not a product of the United States Government or the U.S. Environmental Protection Agency. Emma is not doing this work in any governmental capacity. The views expressed are her own and do not necessarily represent those of the United States or U.S. EPA.

INTRODUCTION

The "major questions doctrine" has arrived. In *West Virginia v. EPA*, the Supreme Court solidified this doctrine as a threshold inquiry for assessing agency authority in certain "extraordinary" cases.[2] As applied in *West Virginia*, "agency interpretations of statutes that trigger 'major' questions aren't just denied deference, they are actively suspect."[3] There, the Court found that the Environmental Protection Agency (EPA) lacked sufficient authority to implement the Clean Power Plan (CPP) under the Clean Air Act (CAA). In a modern era of worsening climate change and deregulatory political agendas, this doctrine works to entrench the executive branch in inertia absent decisive legislative action. Here, I explore a more commonsense interpretation[4] of the major questions doctrine: if agencies are prevented from taking extraordinary actions to solve the climate crisis, then agencies should also be prohibited from taking extraordinary actions that would *worsen* the climate crisis. This paper outlines two possible situations that could foster proactive major questions litigation in defense of climate action and the hurdles that are characteristic of the doctrine's deregulatory and politicized nature. Ultimately, there may be a disconnect between what could be a logical implementation of the major questions doctrine (which could robustly serve the purposes of climate change litigation) and the likely as-applied version of this doctrine by a highly politicized Supreme Court.

It is worth noting at the outset that academic writers have widely criticized the major questions doctrine as lacking legitimacy. Lisa Heinzerling has argued that it unnecessarily limits Congress's ability to solve complex problems.[5] Natasha Brunstein and Richard Revesz have reasoned that the major questions doctrine is overly distortable by litigants and government bodies.[6] Nathan Richardson has

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[2] West Virginia v. Env't Prot. Agency, 597 U.S. 697 (2022).

[3] Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 195 (2022).

[4] A commonsense interpretation of the major questions doctrine has even been heralded by Justice Barrett. *See* Biden v. Nebraska, 143 S.Ct. 2355, 2378, 2384 (2023).

[5] *See* Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC (July 26, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/.

[6] *See* Natasha Brunstein & Richard Revesz, *Mangling the Major Questions Doctrine*, 74

shown that it is inherently entangled with politics and bias by the courts that will implement it.[7] Even Justices Barrett and Scalia have highlighted that canons such as the major questions doctrine may ultimately "'load[] the dice for or against a particular result' in order to serve a value that the judiciary has chosen to specially protect."[8] The purpose of this essay is not to legitimize the major questions doctrine. Recognizing that it is a framework intended to propel deregulatory and conservative politics, I aim to explore the possibility of applying major questions arguments to a pro-environmental agenda as much as they have been applied to an anti-environmental agenda.

There are at least two viable avenues that environmental litigants may pursue in applying this doctrine to curtail climate change: situations where an agency enacts anti-environmental regulations (such as the Trump administration's NEPA rollbacks), and instances where an agency permits a highly polluting activity (such as oil and gas expansion projects). Exercising the major questions doctrine in defense of the environment will be an uphill battle and will rest heavily on how the finer details of major questions are decided in the coming years. Recognizing the unsettled nature of this doctrine, this essay begins first with a discussion of the major questions doctrine as set forth in *West Virginia*. I then turn to possible pro-environmental constructions of the major questions doctrine as a tool for climate change litigants and policymakers.

I. APPLYING THE *WEST VIRGINIA* COURT'S MAJOR QUESTIONS DOCTRINE

Chief Justice Roberts wrote *West Virginia* with a six-three majority. There, the Court held that the CPP surpassed EPA's statutory authority under the CAA's Section 111.[9] The Court claimed that "extraordinary cases" call for a unique approach to statutory construction. "[E]xtraordinary cases" are those in which "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress meant to confer such authority.'"[10] Where an agency's assertion of authority can be deemed "extraordinary," the Court requires the agency to "point to 'clear congressional authorization' for the

ADMIN. L. REV. 217, 220 (2022) ("the Trump Administration distorted the doctrine by raising whichever factors and metrics it found most helpful in any given case, however devoid of established doctrinal support, often contradicting arguments that it made in other cases").

[7] *See* Richardson, *supra* note 3, at 200 ("the atextualism of the major questions canon lets us see it for what it is: a license for judicial aggrandizement, in the hands of a profoundly anti-administrative Court").

[8] *Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (1997)).

[9] West Virginia v. Env't Prot. Agency, 597 U.S. 697, 734-735 (2022).

[10] *Id.* at 700 (quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000)).

power it claims."[11] In *West Virginia*, the Court found that the agency failed to carry its burden to show sufficient statutory authority for the CPP, stating that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[12] Because EPA was unable to identify a clear delegation of the extraordinary power it sought to exercise, the Court reasoned that this power was vested in Congress alone.

To reach this conclusion, the Court found that the EPA's promulgation of "generation shifting" regulations for existing coal plants under Section 111(d) of the CAA merited "skepticism."[13] In this context, generation shifting regulations refer to policies that move energy production from higher emitting to lower emitting sources. Under the CPP, this meant shifting coal production to natural gas and renewable energy sources.[14] The Court deemed this generation shifting structure "extraordinary" because of its economic, political, and historical significance. Then, the Court explained that EPA failed to "overcome that skepticism" where it could not point to a clear congressional authorization directing its course of action.[15]

The major questions doctrine can thus be broken into a two-part test. First, ask whether the agency's assertion of authority is extraordinary, weighing politics, economics, and history. If so, the second step calls for the Court to review the statutory authorization with skepticism to determine whether there exists clear congressional authorization for the action. Where no such authority exists, the agency action is found in violation of the major questions doctrine. The sections below discuss the two prongs of this test in turn, first characterizing "extraordinary cases" and next describing how the Court searches for "clear congressional authorization." It concludes with a discussion of the modern major questions doctrine as a deregulatory tool.

A. Characterizing "Extraordinary Cases"

In *West Virginia*, the Court described three factors that characterized EPA's action as extraordinary: the political significance of the agency's action, the overall economic impacts of the action, and the historical indicators of the agency's authority.[16]

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[11] *Id.*

[12] *Id.* at 735.

[13] *Id.* at 732.

[14] *Id.* at 712.

[15] *Id.* at 732 (citation omitted).

[16] *Id.* at 721 ("[O]ur precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." (citations omitted)).

In the Court's consideration of the CPP's political implications, it noted that the CPP came "long after the dangers posed by greenhouse gas emissions 'had become well known, [and] Congress [had] considered and rejected' [action] multiple times."[17] The Court found this issue important and stressed that "the same basic scheme EPA adopted 'has been the subject of an earnest and profound debate across the country, . . . mak[ing] the oblique form of the claimed delegation all the more suspect.'"[18] In other words, the Court reasoned that the significant political debate on generation shifting and the energy sector made it more unlikely that Congress wanted EPA to make a final decision on this topic.

Assessing the economic impact of the CPP, the Court could not fathom that Congress had assigned EPA with the task of "balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy."[19] Although safeguards had been written into the CPP, requiring EPA to curtail the impacts of the CPP to avoid results that would have been "exorbitantly costly" or that would have "threaten[ed] the reliability of the grid," the Court saw such limits as more harrowing than reassuring.[20] The Court interpreted these safeguards as red flags, warning that the EPA should not have the power to decide "how high energy prices can go as a result before they become unreasonably 'exorbitant'."[21]

Finally, in the Court's assessment of EPA's history, it noted that Section 111(d) had never been used as a generation shifting mechanism.[22] This factor, understood as asking whether the agency's action is novel, assesses the patterns and trajectory of the agency's historical application of the statute in comparison with the challenged action. The Court concluded that "EPA's authority was. . . unprecedented" and a "'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."[23]

In Justice Gorsuch's concurring opinion, joined by Justice Alito, he offered a slightly different list of triggers that indicate a major question: (1) where "an agency claims the power to resolve a matter of great 'political significance,' . . . or end an 'earnest and profound debate across the country'"; (2) where an agency "seeks to regulate 'a significant portion of the American economy' . . . or require 'billions of dollars in spending' by private persons or entities"; and (3) where "an agency seeks to 'intrud[e] into an area that is the particular domain of state

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[17] *Id.* at 731. Here, the Court pointed to the American Clean Energy and Security Act of 2009 (H. R. 2454, 111th Cong., 1st Sess.), the Clean Energy Jobs and American Power Act (S. 1733, 111th Cong., 1st Sess. (2009)), the Climate Protection Act of 2013 (S. 332, 113th Cong., 1st Sess.), and the Save our Climate Act of 2011 (H.R. 3242, 112th Cong., 1st Sess.). *Id.* at 731-732.

[18] *West Virginia*, 597 U.S. at 732 (quoting Gonzales v. Or., 546 U.S. 243, 267-268 (2006)).

[19] *Id*. at 729.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 726-727.

[23] *Id.* at 728 (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)).

law'."[24]

In sum, the majority found that "extraordinary" exertions of agency authority are politically profound, costly, and novel. Justice Gorsuch would de-emphasize the novelty factor, and instead consider whether an action intrudes into a state's domain. It is not clear to what extent these factors may be weighed differently, or whether they must take certain considerations into account. Nonetheless, where the Court finds them present, all bets are off.

B. Characterizing "Clear Congressional Authorization"

After the Court characterized the CPP as extraordinary, it proceeded to the second step under the major questions doctrine. There, the Court searched skeptically for "clear congressional authorization" for EPA's assertion of authority.[25] It found none.

The Court first recognized that EPA is authorized to establish the best "system" of emission reduction under the CAA.[26] The word "system" was deemed "a vague statutory grant" far from "the sort of clear authorization required" under this test.[27] That is, the CAA merely authorized EPA to implement certain "system[s]," but Congress did not clearly state that the system implemented should be the one that EPA attempted to implement here. The Court rejected arguments asserting that other programs under the CAA (such as the Acid Rain and NAAQS programs)[28] were relevant in assessing the sort of "system" advanced by the EPA under Section 111.[29] The Court concluded that "the only interpretive question before us, and the only one we answer, is [] narrow: whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. And for the reasons given, the answer is no."[30]

Justice Gorsuch's concurrence provides four factors to characterize whether Congress has issued a clear statement authorizing the action: (1) the legislative provisions within the overall statutory scheme; (2) the "age and focus of the statute the agency invokes in relation to the problem the agency seeks to address"; (3) the agency's prior "interpretations of the relevant statute"; and (4) whether "there is a mismatch between an agency's challenged action and its

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[24] *Id.* at 744 (Gorsuch, J., concurring) (citations omitted).

[25] *Id.* at 732-735.

[26] *Id.* at 732 (citation omitted).

[27] *Id*.

[28] The Acid Rain Program, known as title IV of the CAA, established a cap-and-trade system for sulfur and nitrogen oxides. *See* 42 U.S.C. §§ 7651-7651o. The National Ambient Air Quality Standards (NAAQS) Program requires EPA to establish upper limits for six common criteria pollutants. *See* 42 U.S.C. § 7409.

[29] *West Virginia*, 597 U.S. at 733-734.

[30] *Id.* at 734-735.

congressionally assigned mission and expertise."[31]

The search for clear congressional authorization under the major questions doctrine may prove to be a harrowing journey for many regulatory bodies seeking to assert authority. Where a statute deems broad authority to an agency, any extraordinary action taken under that authority will likely fail the major questions doctrine. The majority opinion fails to specify precisely how it would characterize a "clear" congressional authorization, and Justice Gorsuch's four factors add little clarity, running the gamut of the agency's mission and historical application of the statute, the age of the statute, and the overall statutory scheme.

C. The West Virginia Court's Major Questions Doctrine Is a Deregulatory Tool

At its core, the major questions doctrine *purports* to be a tool of statutory interpretation. It seeks to determine whether Congress clearly authorized an agency to pursue an extraordinary action. However, in terms of climate change regulations, and given the context of a highly politicized federal court system, for conservative judges and justices this doctrine may be less about statutory interpretation and more about deregulation.[32]

The purpose of deregulation is evident for highly politicized issues, such as climate. This is because regulatory programs that seek to mitigate emissions are very likely to trigger the first prong of the major questions doctrine: climate regulations raise a strong presumption of veering from an agency's historical trajectory and can be construed as having profound effects on society and the economy. Climate change is, after all, "the most pressing environmental challenge of our time" and will require dramatic transformations across the nation.[33] The deregulatory purpose for highly politicized issues holds true for other topics like COVID-19 (where the Court struck down both the eviction moratorium and the vaccine mandate as major questions)[34] and physician-assisted suicide.[35] Thus, the nature of highly politicized issues such as climate change may be prone to triggering major question review. Will the second prong of the doctrine, which encompasses the actual statutory interpretation provisions of this test, ever work in favor of climate change regulations deemed extraordinary? Probably not. Climate change is, after all, a topic that has evaded decisive congressional action

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[31] *Id.* at 746-749 (Gorsuch, J., concurring) (citations omitted).

[32] *See* MARK LEMLEY, RED COURTS, BLUE COURTS 9 (Stanford Law School, 2022) ("We are headed for a world in which we have, not a single federal judiciary, but a system of red courts and blue courts that parallels our red state-blue state division.").

[33] *West Virginia*, 597 U.S. at 753 (Kagan, J., dissenting) (quoting Massachusetts v. Env't. Prot. Agency, 549 U.S. 497, 505 (2007)).

[34] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022).

[35] Gonzales v. Oregon, 546 U.S. 243 (2006).

and skirted substantial incorporation into statutes like the CAA.[36] When presented with questions implicating these politicized issues, courts will have ample discretion to gauge whether congress granted an agency authority over them. With unusually sharp teeth, the second prong of the major questions doctrine becomes a smokescreen to legitimize the Court's deregulatory agenda and prevent action on climate change.[37]

As a prime example, take the Securities and Exchange Commission's (SEC) rulemaking on climate-related disclosures.[38] At the time of this paper's publication, this long-awaited rule had recently been finalized, set to come into effect May 28, 2024, and stayed by the 5th Circuit Court of Appeals amidst a number of quickly-filed lawsuits.[39] Needless to say, the regulations have already caused a major questions uproar.[40] SEC's regulations seek to require climate-related disclosures from public companies and investors. Although not a generation shifting or economy transforming program like the CPP was portrayed as, these regulations may be found to have satisfied the first prong of the major questions doctrine simply because SEC has not historically sought disclosures relating to climate change in the past. Moreover, the political significance of climate is undisputable, and the economic impacts of a rule by the SEC are bound to be large. If this rule is deemed extraordinary, the second prong of the doctrine is unlikely to save the SEC's regulations, where none of the authorizing statutes implicated can be said to have contemplated climate change disclosures.[41] In this way, where climate change regulations are deemed "extraordinary," the major questions doctrine is not likely to protect them under its second prong. In practice, it seems that any sort of climate-related action by an agency would face severe scrutiny under the major questions doctrine. In the climate context, the doctrine becomes less-so a tool of statutory interpretation and more-so a tool for deregulation.

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[36] Recent CAA amendments offer grant programs for climate change but do not substantively change the statute. *See* Mark McGuffey & Melissa Horne, *Clean Air Act Amendments Minimally Impact EPA's Authority to Pass Climate Change Regulation*, ENVIRONMENTAL LAW AND POLICY MONITOR (Aug. 31, 2022), https://www.environmentallawandpolicy.com/2022/08/clean-air-act-amendments-minimally-impact-epas-authority-to-pass-climate-change-regulation/.

[37] *See* Richardson, *supra* note 3, at 199 ("the allegedly extraordinary nature of the regulations at issue trumps any need to seriously engage with statutory text").

[38] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

[39] *Id.*; Clark Mindock, *US appeals court temporarily pauses SEC climate disclosure rules*, REUTERS (Mar. 15, 2024, 3:53 PM PDT), https://www.reuters.com/sustainability/us-appeals-court-temporarily-pauses-sec-climate-disclosure-rules-2024-03-15/.

[40] *See* Lesley Clark, *SEC Climate Disclosure Rule Faces Legal Gantlet*, E&E NEWS (Mar. 11, 2024, 6:08 AM EDT), https://www.eenews.net/articles/sec-climate-disclosure-rule-faces-legal-gantlet/.

[41] *See* Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*; Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.*; and Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq*.

II. PRO-ENVIRONMENTAL CONSTRUCTIONS OF THE MAJOR QUESTIONS DOCTRINE

Despite the deregulatory nature of the major questions doctrine, a commonsense interpretation of the doctrine may enable its use for a pro-environmental agenda. If *West Virginia* held that an agency may not pursue extraordinary actions to mitigate climate change without clear congressional authorization, environmental petitioners may have viable paths forward to argue that agencies must also be prohibited from taking extraordinary actions that would *worsen* climate change. This argument could be implemented (1) when an agency promulgates anti-environmental regulations or (2) when an agency permits polluting activities. Each of these applications are discussed in turn.

A. Anti-Environmental Regulations

The first argument for affirmatively using the major questions doctrine in defense of climate action targets anti-environmental agency rulemakings. Here, I characterize anti-environmental regulations as those that roll back previously established environmental protections under implementing statutes that seek to provide environmental safeguards.[42] Generally, this may be the strongest target for pro-environmental major questions litigation. Petitioners would need to show that the anti-environmental rulemaking has profound political implications, results in exorbitant costs, and constitutes a novel agency action. As is thematic of this essay, there is a rift between what would be a theoretical application of this test and the likely application of the test by a highly politicized Court.

A prime example of an anti-environmental regulation that could have triggered the major questions doctrine is the Council on Environmental Quality's (CEQ) 2020 rulemaking modifying NEPA regulations (2020 Rule).[43] The 2020 Rule was challenged in at least five separate actions.[44]

Generally, CEQ's NEPA regulations were largely untouched since they were

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[42] Although I define anti-environmental agency rulemakings quite narrowly here (agency rollbacks to already established environmental statutes), there may be avenues for addressing a larger swath of anti-environmental regulations under this framework of the major questions doctrine that I do not address here. This could include anti-environmental rulemakings that are generally expected to have adverse impacts on the environment and climate.

[43] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at pts. 1500-1508, 1515-1518).

[44] *See* Wild Va. v. Council on Env't Quality, 544 F.Supp.3d 620 (W.D. Va. 2021, dismissed on standing grounds); Alaska Cmty. Action on Toxics v. Council on Env't Quality, No. 3:20-cv-05199-RS ECF No. 68 (N.D. Cal., stayed); California v. Council on Env't Quality, No. 3:20-cv-06057 ECF No. 108 (N.D. Cal., stayed); Env't Just. Health All. v. Council on Env't Quality, No. 1:20-cv-06143-CM ECF No. 92 (S.D.N.Y., stayed); Iowa Citizens for Cmty. Improvement v. Council on Env't Quality, No. 1:20-cv-02715-TJK ECF No. 30 (D.D.C., stayed).

first promulgated in 1978, making the 2020 Rule an abrupt shift.[45] Challengers described the Rule as an effort by the Trump administration to roll back NEPA.[46] Specifically, it eliminated environmental review for entire classes of projects by removing the definitions of cumulative and indirect impacts and discarding the requirement for agencies to discuss all reasonable alternatives, among other changes.[47] Through this deregulatory rulemaking, CEQ would have permitted federal agencies to disregard environmental impacts that those agencies had been required to assess for over forty years.

Plaintiffs that challenged the 2020 Rule raised numerous claims, many of which asserted that CEQ exceeded its statutory authority in issuing the regulation.[48] A similar claim would have alleged that the Rule raised major questions issues. To apply *West Virginia*'s test, we must first inquire whether CEQ's assertion of authority was extraordinary by assessing the political, economic, and historical factors. If so, we then search for clear congressional authorization. As is discussed below, there are major hurdles to applying the major questions doctrine in this fashion. Many of these hurdles, however, arise simply from the politicized nature of the Court and the deregulatory objectives of the major questions doctrine. Where politics and deregulation can be set aside, a commonsense application of the major questions doctrine could be well suited for a legal challenge of this sort.

1. Political Factor

First, the political impacts factor asks whether the agency action implicates an important political issue. The Court has not differentiated the various ways that a matter could be deemed political, although some confirmed topics include physician-assisted suicide, COVID-19, and climate change. Nevertheless, major questions precedent indicates that characterizing something as political could hinge on one of two things: whether Congress has failed to (or decided not to) address an issue, and whether the topic is in some way controversial. In *West Virginia*, the Court noted that Congress "has consistently rejected proposals to amend the Clean Air Act to create [a cap-and-trade scheme]" or to enact a carbon tax.[49] The Court also noted that EPA's action was political because it was "the subject of an earnest and profound debate across the country."[50] Thus, the Court

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[45] *Wild Va.*, 544 F.Supp.3d at 626.

[46] *See*, *e.g.*, Complaint for Declaratory and Injunctive Relief at 84-89 (N.D. Cal., stayed), Alaska Cmty. Action on Toxics v. Council on Env't Quality, No. 3:20-cv-05199-RS ECF No. 68.

[47] *Wild Va.*, 544 F.Supp.3d at 627.

[48] *See*, *e.g.*, Complaint at 64, Env't Just. Health All. v. Council on Env't Quality, No. 1:20-cv-06143-CM ECF No. 92 (S.D.N.Y., stayed) ("CEQ has no authority to overrule [] precedent [requiring agencies to consider cumulative effects].").

[49] West Virginia v. Env't Prot. Agency, 597 U.S. 697, 731 (2022).

[50] *Id.* (quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997))).

reasoned that the CPP was political where climate change and energy transitions had been debated and not enacted by congress, and where it could be characterized as a "profound," and thus controversial debate.

The Court's reliance on the propensity for a matter to be "the subject of an earnest and profound debate across the country," is a particularly useful device for environmental litigants. This quote, utilized by the Court in *West Virginia*, originates from two cases that dealt with physician-assisted suicide. In *Gonzales*, the Court found that Congress had not granted the Attorney General the authority to determine that using controlled substances for physician-assisted suicide was illegitimate.[51] The "profound debate" referenced in *Gonzales* was "about the morality, legality, and practicality of physician-assisted suicide."[52] The holding in *Gonzales* stood to ensure that the Attorney General could not, in effect, prohibit states from legalizing physician-assisted suicides under the Controlled Substances Act (CSA). What is implied at a higher level, is that the Attorney General lacks the authority to decide the "profound debate" of physician-assisted suicide, an extremely polarizing topic at the time. Read in this way, the Attorney General is also prohibited from *requiring* states to legalize physician-assisted suicides, given there is a similar statutory scheme in the CSA that enabled her to do so. Put another way, where the major questions doctrine prevented the Attorney General from dictating the outcome of the debate of physician-assisted suicide one way, she must necessarily be precluded from deciding the debate the other way as well, absent clear authorization from Congress. According to the *Gonzales* Court, Congress could not have intended the Attorney General to have "the power to effect a radical shift of authority from the States to the Federal Government."[53]

In the context of *West Virginia*, it is not immediately clear what the "profound debate" at issue entails. The Court may be referencing the highly technical issue at play (whether EPA has sufficient authority under the CAA Section 111 to implement the CPP), but it seems more likely that the Court is referencing the broader debates of America's energy transition and climate change.[54] If this is true, then one may read *West Virginia* as finding that no federal agency may implement a costly and unprecedented program on climate change without clear

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51 *Gonzales*, 546 U.S. at 267.

52 *Glucksberg*, 521 U.S. at 735.

53 *Gonzales*, 546 U.S. at 275.

54 *See West Virginia*, 597 U.S. at 731-732 ("[W]e cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times. [citations omitted] ... Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. See, *e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., 1st Sess.; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009). It has also declined to enact similar measures, such as a carbon tax. See, *e.g.*, Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H.R. 3242, 112 Cong., 1st Sess.").

authorization from Congress. However, like *Gonzales v. Oregon* and the COVID-19 cases[55]—this holding has a logical counterpart. Where EPA may not institute a regulation of extreme political significance to mitigate climate change without authorization from Congress, it follows that agencies may also not single-handedly implement a novel and costly program that would *worsen* climate change. This line of reasoning could support a robust argument for the political factor in anti-environmental regulations under the major questions doctrine.

Using the aforementioned 2020 Rule as an example, the political nature of the 2020 Rule was remarkable. It was described by news sources as a "landmark measure that touches nearly every highway, pipeline and other major federal construction in the country."[56] It also directly implicated climate change, which, according to the *West Virginia* Court, constitutes a profound debate that is taking place across the country. Notably, CEQ's removal of the words "cumulative" and "indirect" from its definitions marked a tremendous shift from requiring agencies to assess climate impacts to requiring little to no climate assessment whatsoever.[57] CEQ's rulemaking was profound and controversial in a similar way as in both *Gonzales* and *West Virginia*, because it altered the status quo on a matter of great political importance. It sought to decide the debate of climate change in favor of worsening climate change. And it amounted to a decision by an agency to *reduce* already-established mitigation or assessment mechanisms where Congress had failed to address this issue.

One major hurdle that arises under the political factor is whether an agency's stated purpose must implicate climate action. The CPP was explicitly targeted at reducing greenhouse gasses to mitigate climate change. However, most agency decisions that worsen climate change cannot be said to have the *purpose* of worsening climate change. Precedent does not make clear whether an explicitly stated intent is a consideration under the political factor. However, one major concern that arises if intent is not considered is that any agency action that has the unintended effect of reducing greenhouse gasses (such as limiting a pollutant under the CAA), could then trigger skepticism under this test. This concern may be addressed in considering the other factors of the test, like the fact that the EPA has a long history of limiting pollutants under the CAA, and many similar agency actions that may have the unintended effect of reducing emissions are routine and not unprecedented. It may also be true that if an agency action did not intend to worsen climate change, it at least likely *considered* climate change impacts during

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[55] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022).

[56] Lisa Friedman, *Trump's Move Against Landmark Env't Law Caps a Relentless Agenda*, N.Y. TIMES, https://www.nytimes.com/2020/01/09/climate/trump-nepa-environment.html (last updated Jan 13, 2020).

[57] *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,306, 43,343 (July 16, 2020) (to be codified at 40 C.F.R. pts. 1500-1508, 1515-1518).

NEPA procedures, or it was forced to consider them to some extent during notice-and-comment rulemaking.

The political debate on climate change may be a strong triggering factor under the major questions doctrine, but it does not stand alone. The other factors (namely, the history of the agency's conduct and the economic impact of the action) will also determine how skeptically a reviewing court will search for clear congressional authorization. Nevertheless, anti-environmental rulemakings that implicate climate change may be rooted in a profound debate and be well positioned for major questions arguments.

2. Economic Factor

Next, the economic cost factor would ask whether the anti-environmental regulation was "exorbitantly costly."[58] Calculating the cost of an anti-environmental regulation would likely be difficult and imprecise, but by many measures, almost certainly exorbitant.

Justice Kagan's dissent in *West Virginia* outlines the costs of climate change. Namely, "[t]he rise in temperatures brings with it 'increases in heat-related deaths, coastal inundation and erosion, more frequent and intense hurricanes, floods, and other extreme weather events, drought, destruction of ecosystems, and potentially significant disruptions of food production."[59] Climate change may be responsible for "4.6 million excess yearly deaths" by the end of the century.[60] Other sources quantify the cost of climate change in economic terms: climate change will cost the American economy $14.5 trillion in the next fifty years, and the loss of nearly 900,000 jobs per year.[61] The projected costs that were associated with the CPP pale in comparison: the CPP was feared for its potential to inflict "billions of dollars in compliance costs," although even this figure was shown to be a tremendous overestimation.[62]

Where the *West Virginia* Court found that Congress could not have sought to authorize such far-reaching and significant authority over power production in "so cryptic a fashion," it stands to reason that Congress could also not have intended to allow a climate catastrophe to proceed.[63] However, the economic impacts of climate change were not discussed in the majority opinion of *West Virginia*.

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58 *West Virginia*, 597 U.S. at 729.

59 *Id.* at 753 (Kagan, J., dissenting) (citation and quotation marks omitted).

60 *Id.* at 754.

61 *The turning point: A new economic climate in the United States*, DELOITTE 6, 17 (Jan. 2022), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-the-turning-point-a-new-economic-climate-in-the-united-states-january-2022.pdf.

62 *West Virginia.*, 597 U.S. at 714; *see also id.* at 755 (Sotomayor, J., dissenting) ("[T]he Clean Power Plan never went into effect. The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated.")

63 *West Virginia*, 595 U.S. at 721.

Instead, the Court focused solely on the reach of the agency's action and possibilities for overreach into the industry. This evidences the political nature of the major questions doctrine, where its application in practice focuses on one part of economic impact while refusing to acknowledge anything else. A more justifiable and commonsense interpretation of the economic factor within the context of the major questions doctrine would holistically assess all economic impacts.

Returning to the 2020 Rule as an example, characterizing its economic impacts would have proved challenging. If a court took the *West Virginia* approach to cost-calculating, it would only consider the costs imposed on private industry and consumers. Alternatively, as articulated in Justice Gorsuch's concurrence, one might question whether the agency action "seeks to regulate 'a significant portion of the American economy' . . . or require[s] 'billions of dollars in spending' by private persons or entities."[64] Whereas the 2020 Rule was clearly a deregulatory mechanism, it is not clear that it would have resulted in increased regulatory costs to industry or private persons. In fact, it is not clear that changes to NEPA regulations can be said to have a direct impact on private costs at all: "NEPA itself does not mandate particular results," instead it "imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions."[65] As a procedural framework, costs attributable to its implementing regulations are likely speculative and indirect.

On the other hand, a court could decide to proceed with its economic assessment through a more holistic analysis. The costs attributed to a regulation should not be pigeonholed to only those borne by industry and consumers. Regulatory changes can impact insurance costs, healthcare costs, environmental cleanup costs, and climate disaster costs, just to name a few—all externalized by industry and borne by society as a whole. Where calculating the cost of environmental harms attributable to the 2020 Rule would necessarily be imprecise, so too were the calculations of costs attributable to the CPP in *West Virginia*. Justice Gorsuch cited an estimate claiming the CPP would create a net increase of over $200 billion to consumer electricity costs.[66] But Justice Gorsuch's feared utility Armageddon never occurred. Instead, the generation shifting goals and standards of the CPP were achieved by market forces alone, despite its repeal.[67] Ultimately, although the large-scale economic impacts of an

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64 *Id.* at 744 (Gorsuch, J., concurring).

65 Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756-757 (2004).

66 *West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring).

67 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. 32520-01 (July 8, 2019) ("the most likely result of implementation of the CPP would be no change in emissions and therefore no cost or changes in health benefits"); *West Virginia*, 597 U.S. at 755 (Sotomayor, J., dissenting) ("[T]he Clean Power Plan never went into effect.

environmental regulation are imprecise, so too are all major economic questions, but this has not prevented our courts from considering these costs. The same should hold true for anti-environmental regulations, where there is good reason to believe that they should trigger major questions analysis.

3. Historical Factor

Finally, the historical assessment factor asks whether the agency's assertion of authority is novel. This factor could easily serve as either a component of a robust "extraordinariness" argument for anti-environmental regulation or its downfall, depending on the circumstances. Like the other factors, this one is imprecisely defined: it may be implicated where an agency action "raise[s] an eyebrow," or where it would be surprising to find the action in the agency's "toolbox."[68]

Returning to the 2020 Rule as an example, petitioners could show that the Rule departed substantially from prior practice. NEPA's implementing regulations were issued in 1978, and it was not until 2020 (over forty years later), that CEQ made "wholesale revisions" to them.[69] Making such dramatic changes to NEPA had far-reaching effects, forcing all federal agencies to adopt revised NEPA procedures to implement CEQ's changes. Never before had CEQ demanded such far-reaching revisions of NEPA.

This factor loses much of its charm for other anti-environmental regulations where agency histories may have fluctuated with changes in administrations. However, creative lawyers may be successful in highlighting novelties in regulations, especially given that the *West Virginia* Court assessed this factor very narrowly. There, the Court rejected consideration of an earlier Section 111 rulemaking as irrelevant because it was "controversial" and "never addressed by a court." Instead, the Court restricted its historical analysis to regulations with generation shifting mechanisms under Section 111, finding none.[70] Again, this is likely the result of a highly politicized court seeking to rationalize its deregulatory agenda—but commonsense interpretations could steer a ship elsewhere. A narrow historical assessment would allow petitioners to sketch the boundaries of the relevant history and to define the parameters of the assessment. It may be that the novelty of the agency's assertion of authority should be assessed since the last statutory amendment, or since the Inflation Reduction Bill was passed, or since the last congressional findings on climate change were released. Alternatively, it may be that the anti-environmental regulation in question puts forth some sort of

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The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated.").

[68] *West Virginia*, 597 U.S. at 730.

[69] CEQ NEPA REGULATIONS, https://ceq.doe.gov/laws-regulations/regulations.html (last accessed Mar. 13, 2024).

[70] *West Virginia*, 597 U.S. at 724-728.

novel mechanism or jurisdictional component. Ultimately, the history factor is vaguely defined by the Court. However, this may work to the benefit of creative petitioners who can show that an anti-environmental regulation raises eyebrows and veers from precedent.

4. Searching for Clear Congressional Authorization

Where agency authority is deemed "extraordinary," petitioners must next show that the agency lacks clear congressional authorization. As major questions cases make clear, this is less-so a question of statutory interpretation, and more so a question of arriving at the outcome that the Court craves. Nevertheless, an equitable application of the major questions doctrine would result in the same level of "skepticism" being applied to both pro-climate and anti-climate agency actions.

At this final act of rationalization, the Court does not ask whether the agency action can fit within a reasonable interpretation of its delegating statute.[71] Instead, it asks whether the matter is "*within* the authority granted to the [a]gency" by statute.[72] Where an agency action has been deemed extraordinary, the Court seems poised to strike it down as outside the authority granted to it, especially where the statute is broad or vaguely worded. Unnervingly, the *West Virginia* Court found the word "system" too imprecise, leaving countless other grants of rulemaking authority on shaky ground.[73]

Returning to the 2020 Rule for a final time, and presuming a court could have found it extraordinary, then it is possible that it may have also lacked clear congressional authorization. Section 101 of NEPA establishes the following national policy:

[T]o use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in

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[71] *Cf. Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984) (*Chevron* provides that where Congress explicitly leaves a gap for an agency to fill, the agency has an express delegation of authority to do so.).

[72] *West Virginia*, 597 U.S. at 734-735 (emphasis added).

[73] Many statutes grant general rulemaking authority to agencies. Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 Geo. Wash. L. Rev. 1079, 1104 n.181 (2021) ("*See, e.g.*, 21 U.S.C. § 371(a) (authorizing the Secretary and Health and Human Services "[t]he authority to promulgate regulations for the efficient enforcement of" the Federal Food, Drug, and Cosmetic Act); 26 U.S.C. § 7805(a) (authorizing the Treasury Secretary to "prescribe all needful rules and regulations for the enforcement of" the Internal Revenue Code); 29 U.S.C. § 156 (giving the National Labor Relations Board the power "to make, amend, and rescind ... such rules and regulations as may be necessary to carry out the provisions of" the National Labor Relations Act); 42 U.S.C. § 7601(a)(1) (granting the EPA Administrator the authority "to prescribe such regulations as are necessary to carry out his functions under" the Clean Air Act); 47 U.S.C. § 201(b) (authorizing the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Communications Act, as amended).").

productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[74]

Section 202 establishes CEQ, directing it to "develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation."[75] These provisions, among many others, make the goals and intentions of NEPA and CEQ clear: they are intended to compel broad, far-reaching procedures to protect the environment and human health. Because the 2020 Rule was an attempt to strip NEPA of its statutory purpose, without clear congressional authorization, CEQ lacked the authority to implement it.

Environmental litigants should not need to lift heavy weights at the second prong of the major questions doctrine to show that an anti-environmental regulation lacks clear congressional authorization. Environmental statutes were written to protect and enhance, not degrade. Without clear statutory directives from congress to roll back protections, agencies should be prevented from doing so. However, where courts prefer to use the major questions doctrine as a political tool for deregulation, this step, like those preceding it, may be unsuccessful.

B. Permitting Polluting Activities

The second argument for using the major questions doctrine in defense of climate action would target climate-worsening government approvals. Framing this argument as a major question poses challenges. It will be difficult for petitioners to show that the agency approval has profound political implications, seeing as discretionary permits may be viewed as less profound than rulemakings. Further, it will be difficult to show that agency approvals result in high costs because permitting an action to proceed is usually attributed to gains rather than costs. Finally, it would be difficult to prove that the agency approval is a novel agency action, given most agencies' long history of permitting polluting industries. If petitioners can overcome these hurdles and successfully show that an agency approval is extraordinary, they may face additional challenges to show that it lacked clear congressional authorization. Despite these obstacles, large-scale projects that clearly implicate climate change may be suitable for challenges using the major questions doctrine.

Federal agencies are frequently tasked with approving or rejecting climate-worsening projects. The Bureau of Land Management (BLM), for example, administers the leasing and permitting of oil wells. In one example of a potentially extraordinary agency action, BLM oversaw the approval of the Converse County Oil and Gas Project in Wyoming, which will result in 69.5 million metric tons of

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[74] 42 U.S.C. § 4331(a).

[75] *Id.* § 4344(4).

carbon dioxide equivalent annually, or 2.2% of total direct annual U.S. greenhouse gas emissions from oil and gas.[76] As another example, the Surface Transportation Board (STB) oversees the permitting of railways to move minerals like oil and coal. In 2021, STB authorized the approval of the Uinta Basin Railway in Utah, expanding access to Uinta crude oil and quadrupling extraction from 90,000 to 350,000 barrels per day.[77] Construction of that project will result in an increase of 53 million metric tons per year of GHG emissions, or nearly one percent of total U.S. emissions.[78] Neither of these agency actions fit effortlessly within *West Virginia*'s major question framework, but this should not stop us from trying.

1. Political Factor

Beginning with the political factor, it would be difficult to show that the political nature of BLM or STB's authorizing projects are profound. First, agency decisions to approve a permit are unique from agency rulemakings or similar decisions that impact more than a single actor, which have been the subject of most major questions cases.[79] While the Court has never drawn a hard line in the sand regarding the type of agency action that triggers the major questions doctrine, it seems logical that the political factor may rely to a certain extent on the number of people impacted. Nevertheless, not all agency permits are singular projects that can be sidelined so easily. BLM's Converse County project, for example, would authorize 5,000 oil and gas wells to be drilled over the course of 10 years, impacting numerous private landowners and drillers,[80] and STB's Uinta Basin Railway project would more than quadruple oil production in the Uinta Basin.[81]

An additional challenge petitioners may encounter under this factor is showing

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[76] BUREAU OF LAND MANAGEMENT, ENV'T IMPACT STATEMENT FOR CONVERSE COUNTY OIL AND GAS PROJECT at 5-24, 25 (2020). This decision is currently being litigated. *See* Powder River Basin Res. Council v. Bureau of Land Mgmt., 2024 WL 4110819, 1:22-cv-2696-TSC (D.D.C.).

[77] *Federal Lawsuit Challenges Forest Service OK of Oil Railway Right-of-Way: Railway Will Quintuple Oil Production in Utah's Uinta Basin*, CENTER FOR BIOLOGICAL DIVERSITY (Sep. 8, 2022), https://biologicaldiversity.org/w/news/press-releases/federal-lawsuit-challenges-forest-service-ok-of-oil-railway-right-of-way-2022-09-08/; *see* SURFACE TRANSP. BOARD, UINTA BASIN RAILWAY FINAL ENV'T IMPACT STATEMENT at 3.15-36 (2021).

[78] SURFACE TRANSP. BOARD, UINTA BASIN RAILWAY FINAL ENV'T IMPACT STATEMENT at 3.15-36 (2021).

[79] *See*, *e.g.*, Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (Food and Drug Administration's regulation of tobacco); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2002) (EPA's factors of consideration in setting air quality standards); Gonzales v. Oregon, 546 U.S. 243 (2006) (Attorney General's regulation of drugs used for physician-assisted suicide); Ala. Ass'n of Realtors, 141 S. Ct. 2485 (Centers for Disease Control and Prevention's eviction moratorium).

[80] ENV'T IMPACT STATEMENT FOR CONVERSE COUNTY OIL AND GAS PROJECT, *supra* note 76, at ES-5.

[81] *See Federal Lawsuit Challenges Forest Service OK of Oil Railway Right-of-Way: Railway Will Quintuple Oil Production in Utah's Uinta Basin*, *supra* note 77.

that the agency action is "the subject of an earnest and profound debate across the country."[82] The *Gonzales* Court held that the Attorney General may not decide the debate of physician-assisted suicide, and the *West Virginia* Court held that EPA may not decide the debate of climate change.[83] While BLM and STB's actions certainly impact climate change, they are farther from a decisive choice than other major questions precedent. Nevertheless, a commonsense application of this factor could support a favorable finding. Climate change certainly constitutes a profound debate taking place across the country and neither BLM nor STB should have the authority to decide to worsen it. Like the legality and morality of physician-assisted suicide and the government's response to COVID-19, BLM's authority over a ten-year oil and gas drilling plan and STB's authority over a railroad expansion that would increase oil production by 260,000 barrels per day works to lock in our nation's dependence on burning fossil fuels beyond the point that we can sustainably do so. Unless Congress has given clear authorization to worsen climate change, agencies should not be allowed to step in and decide to do so.

2. Economic Factor

The next factor is the economic impact of agency approvals. Unlike an industry-shifting regulation like the CPP that would have caused increased costs for implementation, the approval of a project is more intuitively linked with gains for industry. Nevertheless, the commonsense analysis for economic impact discussed under section II(A)(b) above could easily be applied to BLM or STB's projects: industries may receive an advantage, but the externalized costs borne by society should also be calculated. Additionally, petitioners will be able to identify more direct costs associated with the agency's approval of a project, because calculating the externalized costs of an actual project instead of a general rulemaking is relatively straightforward. The social cost of carbon, for example, calculates the present cost of each ton of carbon emitted at around $190.[84] Using

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[82] West Virginia v. Env't Prot. Agency, 597 U.S. 697, 732 (2022) (quoting Gonzales v. Oregon, 546 U.S. 243, 267-68 (2006)).

[83] *See* discussion *supra* section II(A)(a).

[84] Niina H. Farah & Lesley Clark, *EPA floats sharply increased social cost of carbon*, E&E NEWS (Nov. 21, 2022, 6:27 AM EST), https://www.eenews.net/articles/epa-floats-sharply-increased-social-cost-of-carbon/#:~:text=That%20document%20estimates%20the%20social,future%20impacts%20of%20climate%20change; *EPA's "Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances"* EPA (Dec. 2, 2023), https://www.epa.gov/environmental-economics/scghg; *Supplementary Material for the Regulatory Impact Analysis for the Supplemental Proposed Rulemaking, "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review"*, EPA (Sep. 2022), https://www.epa.gov/system/files/documents/2022-11/epa_scghg_report_draft_0.pdf; Kevin Rennert et al., *Comprehensive evidence implies a higher social cost of CO2*, 610 NATURE 687 (2022).

this metric, the costs of the Converse County Oil and Gas Project and Uinta Basin Railway reach tens of billions of dollars.

3. Historical Factor

Finally, one should assess the historical significance of the agency action in question. This factor will present the largest hurdle to using the major questions doctrine against agency actions that permit polluting activities. Neither the STB's Uinta Basin Railway nor BLM's Converse County Plan can easily be characterized as novel. BLM and STB have authorized similar projects for decades. However, a slightly amended framework for the historical analysis would take changing background conditions into consideration. To do so is not incompatible with Supreme Court precedent.

Certain major questions precedent like *Gonzales v. Oregon* appeared to weigh this factor lightly (or not consider it at all), where it is not novel for the Attorney General to issue interpretive rules about a statute. Even Justice Gorsuch's concurrence refused to include this factor in its framework for extraordinariness.[85] Given the background condition of climate change, it may be reasonable for courts to assess the history of an agency's authority within the recent framework of a climate emergency or to weigh this factor lightly.

4. Searching for Clear Congressional Authorization

If a petitioner succeeds in showing that an agency's permit-granting authority is extraordinary, the final step is to show that the agency lacks clear congressional authorization. Given that courts are directed to perform this step "skeptically," it is a low bar. Here however, petitioners will likely face the challenge of a relatively clear statutory authorization and accompanying decision-making metrics for issuing the challenged permits.[86]

One possible pathway around this challenge may be to evidence the agency's lack of statutory authority to *cause* climate change. This is relevant to a commonsense interpretation of the major questions doctrine because at its core, the doctrine is intended to prevent an agency's usurpation of decision-making power over big questions better left to the legislature. Where congress has largely failed to address climate change, courts should take this into consideration when searching for clear congressional authorization. Are agencies like SBT or BLM statutorily obliged to mitigate their climate impacts? Have they been statutorily permitted to authorize projects regardless of climate change? Or is this a matter

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[85] *See* West Virginia, 597 U.S. at 735-753 (Gorsuch, J., concurring).

[86] *See*, *e.g.*, 33 U.S.C. § 1342 (the Clean Water Act's NPDES authorizing language, stating that "the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants… upon condition that such discharge will meet" all applicable requirements).

that simply lacks clear congressional authorization? At least regarding BLM's issuance of applications for permits to drill and lease lands for oil and gas and SBT's authority over railroad construction and operations, Congress has not delineated whether the agencies must, or need not, mitigate climate impacts.[87]

CONCLUSION

A commonsense application of the major questions doctrine is a viable path for environmental litigants. Where extraordinary agency actions to curtail climate change lack sufficient authority under the major questions doctrine, so too must extraordinary agency actions that have the effect of worsening climate change. Under this framework, the major questions doctrine could be utilized against anti-environmental regulations and highly polluting permit approvals. A comprehensive application of the framework discussed here means that neither polluting activities *nor* climate-benefiting agency actions will take place. This is, overall, less than ideal. Nonetheless, if conservative judges and justices aim to prevent agency action on climate change, a fair and just application of the major questions doctrine demands that it be applied holistically, and to both ends of the spectrum of climate change-implicating actions.

It is true that Congress has not achieved substantive statutory guidance to mitigate climate change. However, Congress has also not implemented substantive statutory guidance voicing its decision to march steadfast towards climate catastrophe. It is absurd to presume that any one agency has sufficient authority to invite climate disaster if EPA lacks sufficient authority to mitigate it. If the best that the major questions doctrine can get us is a stale mate, let the game of chicken begin.

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[87] *See* 30 U.S.C. § 226 (applications for permits to drill and lease oil and gas wells); 49 U.S.C. § 10901 (SBT authorization for permitting railroads); 49 U.S.C. § 10502 (SBT authorization to exempt railroad pursuant to "transportation policy"); 49 U.S.C. § 10101 (SBT "transportation policy").