

# Unconstrained Judicial Aggrandizement: Major Questions Doctrine in *ALA v. EPA*

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*While the Supreme Court’s traditional Chevron framework for reviewing agency rules grants agencies deference for reasonable interpretations of ambiguous statutory authority, the Court’s more recent “major questions” doctrine threatens the ability of agencies to make meaningful rules that protect the public. This is because when a reviewing court deems an issue to be a question of great “economic and political significance” under the major questions doctrine, it cuts off the agency’s ability to regulate in the area. This Note calls on the Court to renounce its major questions doctrine because: (1) it is imprecise and lacks analytical rigor; (2) it aggrandizes the judiciary at the expense of the executive and legislative branches in contravention of the separation of powers; (3) existing administrative judicial review mechanisms without the major questions doctrine offer more than adequate oversight to ensure that agency actions are justified; and (4) it calls into question the integrity of judicial decision making by infusing judicial oversight with a conservative ideology that seeks a weakened administrative state. This Note will demonstrate how the doctrine is imprecise and lacks analytical rigor using Judge Walker’s separate opinion in American Lung Association v. Environmental Protection Agency as well as four petitions seeking certiorari from the D.C. Circuit’s decision on Clean Air Act section 111(d).<sup>1</sup> Analysis of the case and petitions shows how unelected judges may aggrandize the judiciary’s power, overruling both elected branches, by independently determining the meaning of a statute. Judge Walker’s separate opinion in that case and the arguments raised in the*

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DOI: <https://doi.org/10.15779/Z383F4KP3G>

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1. Am. Lung Ass’n v. EPA (ALA), 985 F.3d 914, 995 (D.C. Cir. 2021), *rev’d sub nom.* W. Virginia v. EPA, 142 S. Ct. 2587 (2022); N. Am. Coal Corp. v. EPA, 142 S. Ct. 417 (2021), *cert. granted sub nom.*, 985 F.3d 914 (2021) (No. 20-1531); N.D. v. EPA, 142 S. Ct. 418 (2021), *cert. granted sub nom.*, 985 F.3d 914 (2021) (No. 20-1780); Westmoreland Mining Holdings LLC v. EPA, 142 S. Ct. 418 (2021), *cert. granted in part sub nom.* 985 F.3d 914 (2021) (No. 20-1778); W. Va. v. EPA, 142 S. Ct. 420 (2021), *cert. granted sub nom.*, 985 F.3d 914 (2021) (No. 20-1530). After this Note was completed, the Supreme Court reversed and remanded *ALA* on major questions doctrine grounds. 142 S. Ct. at 2610, 2616.

*petitions show how decisions reached through the major questions doctrine have the dangerous capacity to undermine the integrity of the judiciary. This discussion illustrates why the Court's major questions doctrine is sufficiently risky to merit its immediate renunciation.*

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## INTRODUCTION

Climate change is perhaps the most extraordinary global challenge of our lifetimes. As we increasingly encounter its many effects in our daily lives, we can only hope that the U.S. Congress will respond by passing meaningful legislation to protect us against this ongoing crisis. Yet, the climate crisis requires more than legislation alone. It demands an all-of-society, all-of-government, all-of-planet approach.

As with all federal legislation and governance, administrative agencies play critical roles in ensuring laws become reality. To do this, federal executive agency scientific and technical experts interpret Congress's legislation and create meaningful rules to implement it. This is the federal government's normal process for applying Congress's laws to the real world. Executive agencies depend on subject area experts to carry out laws in all spaces, from infrastructure and food safety to antitrust regulation. Because the causes and solutions to climate change are complex and wide-reaching, administrative agencies play critically important roles in meeting the multifarious challenges we currently face.

However, agencies' ability to make regulations to protect Americans from the impacts of climate change—and from many non-climate related harms for that matter—has been severely undermined by judicially created law. The U.S. Supreme Court has developed the “major questions” doctrine to limit agencies in their ability to interpret legislation and make new rules to serve the American public.<sup>2</sup> Under the doctrine, a court will not defer to an agency's interpretation of a statutory provision when the case in question involves an issue of deep economic or political significance.<sup>3</sup> The Court's major questions doctrine overrides the normal legal process for reviewing agency rules, which tends to grant deference to agencies' interpretations based on their superior technical expertise in the subject matter.<sup>4</sup> When it comes to important questions, however, the Court's doctrine is a significant obstacle to agency rulemaking. When a reviewing court deems an issue to be a major question of great “economic and political significance” with insufficiently clear statutory textual support or congressional purpose, it cuts off the agency's ability to regulate in the area.<sup>5</sup>

As a result, the major questions doctrine poses a significant obstacle to executive agencies' attempt to protect our country from the worst impacts of the climate crisis. But it doesn't only affect the climate. The doctrine also potentially blocks agencies from developing important rules to solve any “major” societal

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2. See, e.g., *Util. Air Regul. Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014) (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ *Brown & Williamson*, 529 U.S., at 159, 120 S.Ct. 1291, we typically greet its announcement with a measure of skepticism.”).

3. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

4. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

5. *Brown & Williamson*, 529 U.S. at 160–61.

problem. The doctrine is thus a much larger concern since it may preclude agencies from responding to new information by creating an innovative regulatory intervention or changing an existing rule to improve its efficacy.

This Note argues that the Court should renounce its major questions doctrine because it is imprecise and lacks analytical rigor. In Part I of this Note, I offer an overview of the Court's major questions doctrine. Part II illustrates the deleterious effects of the major questions doctrine by exploring a case where the doctrine's application would block administrative action to control power plant greenhouse gas (GHG) emissions which contribute to climate change, *American Lung Association v. Environmental Protection Agency (ALA)*.<sup>6</sup> Subparts II, B and C comment on Judge Walker's separate opinion in *ALA*, and Part III discusses four petitions seeking Supreme Court review of the same case. These Parts each illustrate the potential risks from the continued and potentially increasing use of the major questions doctrine in judicial review of agency rulemaking.<sup>7</sup> More broadly, the discussion demonstrates how the federal judiciary, one of three coequal branches in our constitutional structure, is significantly enlarging its power through the doctrine while reducing the power of the executive branch. This problem is thus not only about the efficacy of executive agency attempts to mitigate the climate crisis but also about how the major questions doctrine threatens the balance of powers of our constitutional democracy.

I consider how enlarging the judicial power with such an imprecise doctrine risks permitting bias to enter the legal process, staining the integrity of decisions and public perception of the courts. Finally, I call on the Court to renounce the doctrine because the Court's existing review of administrative rules without the major questions doctrine is fully sufficient to protect against unreasonable regulations and unconstitutional delegations of power.

#### I. MAJOR QUESTIONS DOCTRINE OVERVIEW: THE COURT'S MAJOR QUESTIONS DOCTRINE IS IMPRECISE AND LACKS ANALYTICAL RIGOR

Traditionally, judicial review of agency rules centers on the adequacy of the administrative record—ensuring the competence of an agency's factfinding, consideration of public comments, justification and consideration of alternatives, and consideration of statutorily required factors.<sup>8</sup> Where the agency must interpret an ambiguous statutory provision, the Court employs its doctrine under

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6. *ALA*, 985 F.3d 914 (D.C. Cir. 2021), *rev'd sub nom.* *W. Virginia v. EPA*, 142 S. Ct. 2587 (2022). *See, e.g.*, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) ("CPP") (providing the text of one of the GHG emission rules discussed in *ALA*).

7. *ALA*, 985 F.3d at 995.

8. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 706(2) (providing the basis for arbitrary and capricious judicial review); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing the standard for hard look review of agency decisions under the arbitrary and capricious framework).

*Natural Resources Defense Council v. Chevron* (*Chevron*) to decide whether an agency's chosen construction is reasonable.<sup>9</sup> Step one of the *Chevron* test asks whether the statutory provision is ambiguous.<sup>10</sup> If the Court determines that the statutory provision is ambiguous, the analysis proceeds to step two.<sup>11</sup> Alternatively, if the Court determines that the provision is unambiguous, then the unambiguous meaning is controlling.<sup>12</sup> Step two asks whether the agency's chosen interpretation is within a zone of reasonableness.<sup>13</sup> If the agency's interpretation is reasonable, the Court grants the agency deference and allows its regulation to stand.<sup>14</sup>

Over the last two decades, the Court has developed its "extraordinary" or "major questions" doctrine, upsetting its traditional review of administrative actions. The Court explained the doctrine in *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, a case that involved the Food and Drug Administration's regulation of tobacco products.<sup>15</sup> Under the major questions framework, the Court denies deference to an agency when it determines that: (1) Congress has not spoken to the regulated issue with sufficient specificity; (2) the regulation would impose significant economic impacts; and (3) the topic is subject to political controversy.<sup>16</sup> Once these requirements are met, the Court may choose its own construction of the statutory provision at issue and, by doing so, essentially freeze the meaning of the statute.<sup>17</sup> As a result, the Court denies the executive agency the power to interpret the statute.<sup>18</sup> This more dramatic option is the primary focus of this Note. Application of the major questions doctrine effectively adds a kind of *Chevron* step zero.<sup>19</sup> Rather than doing a two-step *Chevron* analysis to determine whether deference should be afforded to the administrative agency that executes a statutory provision, courts that choose to apply the major questions doctrine engage, in the first instance, in an analysis that aims to determine whether Congress was sufficiently specific about the regulated issue, whether the statutory provision may have significant economic impact, and whether it is politically controversial. This initial analysis derails the Court's traditional

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9. See *Chevron*, 467 U.S. at 844, 865.

10. *Id.* at 842–43.

11. *Id.* at 843.

12. *Id.* at 842–43.

13. *Id.* at 843 (remarking that where a court finds a statute ambiguous, "the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation") (citation omitted).

14. *Id.* at 844–45.

15. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000).

16. *Id.*

17. See *id.* at 160–61.

18. *Id.* at 160.

19. See *Chevron*, 467 U.S. at 844, 865. Under *Chevron* analysis, the Court decides whether the agency interpretation fits within a broader zone of reasonableness in light of the general statutory purpose as well as other principles of statutory construction.

*Chevron* analysis of whether an agency interpretation is permissible, circumventing deference.<sup>20</sup>

In applying the major questions doctrine, the Court is relieved from granting the agency deference under the *Chevron* test.<sup>21</sup> Instead, the Court sets its preferred statutory meaning as the only permissible interpretation, overruling the agency.<sup>22</sup> Because this interpretive precedent is binding on the agency, it obliterates agency flexibility to craft different regulatory solutions to meet changing needs.<sup>23</sup> In this way, the major questions doctrine poses a significant risk of reallocating power from the agencies to the courts.

The imprecision of the major questions model only exacerbates the risk of such judicial aggrandizement. Just what is needed to meet the threshold requirement for an issue to be “major?” How much economic impact is needed? How politically controversial must the subject be? The answers are all up to the discretion of the particular federal court reviewing the case. The open-ended nature of the major questions inquiry is therefore cause for great concern.

Below, I explore these and other risks to effective governance posed by the major questions doctrine in the climate change context.

## II. CRITIQUE OF MAJOR QUESTIONS DOCTRINE IN JUDGE WALKER’S SEPARATE OPINION IN *ALA*: INQUIRY UNDER THE DOCTRINE IS ANALYTICALLY DEFICIENT, ENCOURAGING UNCONSTRAINED JUDICIAL DISCRETION

### A. Background and D.C. Circuit Decision

On January 19, 2021, the D.C. Circuit decided *American Lung Association v. Environmental Protection Agency (ALA)*, a case that challenged the Trump-era Environmental Protection Agency (EPA) Affordable Clean Energy (ACE)

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20. The Court may also decide to use the *Chevron* framework after finding a major question. If so, the major questions determination weighs heavily against the reasonableness of agency interpretations. See, e.g., *UARG*, 573 U.S. 302, 324, 328 (2014) (determining that EPA interpretation should be greeted “with a measure of skepticism” because it is a major question and then denying interpretation under *Chevron*).

21. Several justices have recently expressed ambivalence or outright skepticism towards this test, and its future is uncertain. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157–58 (10th Cir. 2016) (Gorsuch, J. concurring) (listing “practical problems” in the administration of *Chevron* and uncertainty over the rigor of step one); *Pereira v. Sessions*, 138 S.Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (discussing as “troubling” the “reflexive deference” sometimes provided to agencies under *Chevron*, and finding it necessary to reconsider the doctrine); *Michigan v. E.P.A.*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring) (calling into question the constitutionality of granting deference to agencies).

22. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (deciding that the statute forbids FDA’s regulation of tobacco products); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1934 (2017) (explaining that the Court may reject the agency’s statutory interpretation where it finds the major question doctrine applicable).

23. *Chevron* determinations merely uphold or reject a specific agency interpretation. This leaves the agency free to adopt different interpretations in the future. Major questions determinations, by contrast, bar the agency from regulating the general subject matter in the future. See, e.g., *Brown & Williamson*, 529 U.S. at 159 (prohibiting FDA from regulating tobacco).

Rule that regulated power plant GHGs.<sup>24</sup> Holding that the Trump EPA relied on an impermissible reading of the Clean Air Act (CAA), the D.C. Circuit vacated and remanded the ACE Rule to EPA for reconsideration.<sup>25</sup>

In the ACE Rule, the Trump administration maintained that only on-site control measures were permissible as the “best system of emission reduction” (BSER) under CAA section 111(d).<sup>26</sup> This restriction of the best system of emission reduction to onsite control measures effectively precluded the agency from encouraging more robust, generation shifting emissions reductions measures, such as natural gas cofiring and the prioritization of alternative renewable energy sources.<sup>27</sup> By contrast, the Clean Power Plan (CPP) Rule, issued during the Obama administration and later repealed by the ACE Rule, included generation shifting measures meant to transition the energy system to cleaner power generation sources.<sup>28</sup> The Obama EPA designed the CPP so that its purpose could be accomplished through non-source-specific state compliance programs, such as carbon trading.<sup>29</sup>

The Trump administration’s ACE Rule limited states’ ability to design non-source-specific control measures because the Trump EPA determined that only physical improvements at and to existing pollution sources could qualify to be the “best system of emission reduction.”<sup>30</sup> The D.C. Circuit reasoned that the language of section 111(d) did not limit state emissions reduction programs to only on-site measures.<sup>31</sup>

The court decided that the major questions doctrine did not restrict EPA’s ability to consider non-source-specific options.<sup>32</sup> It emphasized that allowing such an interpretation would not expand EPA’s “regulatory domain” since EPA was justified in considering the “nature of the electricity grid” in developing an emissions control strategy.<sup>33</sup> The court also reasoned that arguments suggesting EPA lacked expertise in the energy sector were overcome by the statutory command for the agency to consider “energy requirements,” as well as Supreme

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24. See *ALA*, 985 F.3d 914, 995 (D.C. Cir. 2021); 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. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

25. *ALA*, 985 F.3d at 995.

26. 84 Fed. Reg. at 32,524 (interpreting section 111 to limit the BSER to “those systems that can be put into operation at a building, structure, or installation”).

27. See *ALA*, 985 F.3d, at 957.

28. CPP, *supra* note 6, at 64,663.

29. See *ALA*, 985 F.3d. at 936–37; CPP, *supra* note 6, at 64,665.

30. *ALA*, 985 F.3d at 938.

31. *Id.* at 957–58. The court found that the Trump EPA’s policy argument—that a non-source-specific approach may lead to asymmetrical regulation where the control standards could vary between sources—did not overcome the lack of statutory support. *Id.*

32. *Id.* at 967–68.

33. *Id.*



Court precedent.<sup>34</sup> In addition, the court illustrated the internal contradiction in EPA's logic: if EPA finds that generation shifting would be impermissible as lacking a "valid limiting principle," since "any action affecting a generator's operating costs could impact its order of dispatch and lead to generation shifting," EPA would also be barred from implementing its proposed on-site controls because they could cause an increased cost of business and therefore impact dispatch and the energy sector, as well.<sup>35</sup> Thus, in vacating the ACE Rule and remanding the issue to EPA, the D.C. Circuit did not limit a future agency rule under section 111(d) to exclusively on-site control measures.<sup>36</sup>

After the decision, EPA clarified that it did not interpret the D.C. Circuit opinion as reinstating the CPP, nor did it expect states to submit new implementation plans, since the decision left no section 111(d) regulation in place for GHG emissions from power plants.<sup>37</sup> EPA added that these submissions would be superfluous, since industry trends independent of any regulation had already achieved the GHG reductions the CPP required of power plants through 2030.<sup>38</sup>

On October 29, 2021, the Supreme Court granted certiorari to petitioners seeking review of the D.C. Circuit decision.<sup>39</sup> As a result, the Court will consider whether EPA can incorporate off-site control strategies in its future rulemaking. Each of the four petitions for certiorari includes a major questions doctrine challenge to the D.C. Circuit holding.<sup>40</sup>

*B. Judge Walker's Analysis of Economic Significance in His Separate Opinion is Analytically Deficient and an Example of Unconstrained Judicial Discretion*

Judge Walker's opinion in *ALA*, a concurrence in part, concurrence in the judgment in part, and dissent in part, offers an example of how relatively easily a court may find an agency's regulation barred as a major question because it seeks to address the climate crisis.<sup>41</sup> As other commentators have noted, the climate crisis is fertile ground for finding major questions.<sup>42</sup> Judge Walker

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34. *Id.* at 967 (citing Clean Air Act, 42 U.S.C. § 7411(a)(1)); *id.* (quoting *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 427 (2011) (requiring EPA to consider "the environmental benefit potentially achievable," as well as "our Nation's energy needs and the possibility of economic disruption")). [30]

35. *Id.* at 966.

36. *See id.* at 995.

37. *See* Joseph Goffman, Memorandum: Status of Affordable Clean Energy Rule and Clean Power Plan (Feb. 12, 2021), [https://www.epa.gov/sites/default/files/2021-02/documents/ace\\_letter\\_021121.doc\\_signed.pdf](https://www.epa.gov/sites/default/files/2021-02/documents/ace_letter_021121.doc_signed.pdf).

38. *Id.*

39. *See ALA*, 985 F.3d at 914.

40. *Id.*

41. *Id.* at 995 (Walker, J., concurring).

42. *See, e.g.,* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 447–48 (2016) (discussing the major questions doctrine in relation to the Clean Power Plan, the same rule at issue in *ALA*).

determined that the Obama EPA's interpretation of the CAA under its 2015 CPP rulemaking is barred as a major question because it implicates "decisions of vast economic and political significance."<sup>43</sup>

As this Subpart will illustrate, Judge Walker's discussion of the economic implications of the CPP relies on several problematic premises by: (1) adopting the industry-funded estimate of costs while failing to provide the regulating agency's estimates; (2) failing to interrogate and contextualize the industry's wholesale electricity cost projections; (3) emphasizing the enormous scope of climate change and the difficulty of quantifying the benefits from its regulation, while deemphasizing EPA's cost-benefit analysis; and (4) failing to acknowledge that concerns over possible large costs were, at least six years into the rule, completely incorrect. As a result, the following discussion shows why the major questions economic inquiry is prone to producing arbitrary results.

*1. Merely Referencing Regulated Industry Concerns that a Climate Regulation Will Entail Significant Economic Costs Demonstrates the Analytical Deficiency and Unconstrained Judicial Discretion of Major Questions Analysis*

The nature of the unknowns regarding the effects of climate change makes estimating the costs of impacts particularly susceptible to the exercise of significant judicial discretion.<sup>44</sup> Discretion is required to determine which impacts to include in the analysis. For example, judges must weigh differing estimates from agencies, environmental organizations, and the regulated industry. Discretion is also required to determine whether one believes the calculated values. And finally, discretion is required to attempt to reconcile conflicting values.

Choosing what to include in an economic analysis necessarily favors easily accessible information.<sup>45</sup> This includes ready-to-quantify aspects of a problem. It also privileges succinct reports from deep-pocketed regulated industries. However, environmental justice groups, consumer protection groups, and others may not have the ability to invest so heavily in promoting their priorities. And in a case like climate change, it is far easier for a judge to find it too difficult to calculate impacts than to make a good faith effort to draw on existing

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43. *ALA*, 985 F.3d at 998–99 (Walker, J., concurring). Judge Walker also agreed with the majority's determination to vacate the Trump administration's ACE Rule, although he reached this result in a different manner. Judge Walker would have vacated the ACE rule based on his finding that § 112 bars regulating coal-fired plants under § 111. *Id.* at 996.

44. See, e.g., David Gawith et al., *Climate Change Costs More Than We Think Because People Adapt Less Than We Assume*, 173 *ECOLOGICAL ECON.* 1 (2020) (finding that even economic models significantly underestimate the "costs of adaptation to climate change, the benefits of reducing greenhouse gas emissions, and the residual loss and damage that climate change will cause").

45. See, e.g., Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 *HARV. ENV'T L. REV.* 1, 6 (2017) (listing challenges to agency cost-benefit analysis in environmental matters, including "limitations in available information").

frameworks.<sup>46</sup> In this way, judges exercise significant discretion in determining what counts.

Judge Walker's use of an industry-funded analysis of costs, without providing EPA's estimates, demonstrates how the major questions inquiry is analytically deficient and invites unconstrained judicial discretion.<sup>47</sup> To support his finding of the CPP's "unfathomable" economic costs, Judge Walker cited to a National Mining Association-funded analysis projecting that as a result of the CPP, wholesale electricity costs would rise by \$214 billion and plant replacement costs by \$64 billion.<sup>48</sup> Judge Walker counterbalanced these costs with the \$36 billion in benefits estimated by EPA in a fact sheet promoting the rule, repeatedly underscoring that EPA estimated a \$10 billion "margin of error."<sup>49</sup> However, Judge Walker did not include EPA's cost estimates.<sup>50</sup> Instead, he wrote that EPA "predicted its rule would cost billions of dollars and eliminate thousands of jobs."<sup>51</sup> Providing actual figures only from a single industry report and failing to provide the corresponding agency findings does not support a well-informed economic balancing. In addition, providing only vague references to EPA's figures does not allow a reader or a reviewing court to learn what threshold number was ultimately dispositive for the court.<sup>52</sup> Since Judge Walker's opinion does not include EPA's cost estimates but instead relies exclusively on the regulated industry estimates, the opinion demonstrates both the analytical

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46. See, e.g., Renee Cho, *Social Cost of Carbon: What Is It, and Why Do We Need to Calculate It?*, COLUM. CLIMATE SCH. (Apr. 1, 2021), <https://news.climate.columbia.edu/2021/04/01/social-cost-of-carbon/> (explaining a complex economic framework to value GHG impacts EPA incorporated into its CPP regulatory analysis).

47. *ALA*, 985 F.3d at 1000 (Walker, J., concurring).

48. *Id.* at 1000 n.37 (citing NAT'L MINING ASS'N & ENERGY VENTURES ANALYSIS, EPA'S CLEAN POWER PLAN: AN ECONOMIC IMPACT ANALYSIS 2 (2015), [http://nma.org/attachments/article/2368/11.13.15%20NMA\\_EPAs%20Clean%20Power%20Plan%20%20An%20Economic%20Impact%20Analysis.pdf](http://nma.org/attachments/article/2368/11.13.15%20NMA_EPAs%20Clean%20Power%20Plan%20%20An%20Economic%20Impact%20Analysis.pdf)). Judge Walker only provides the dollar figures, not the specifics, of these projections. *Id.* For example, the 2015 industry-funded study projects a \$214 billion increase in total wholesale electricity rates over the first 15 years of the regulation, until 2030. NAT'L MINING ASS'N, at 4. EPA's estimates were much more modest. See CPP, *supra* note 6, at 64,934–35 tbls.21, 22 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (estimating industry compliance costs under two illustrative approaches to be between \$5.1 and \$8.4 billion over the same period).

49. *ALA*, 985 F.3d at 1001 (Walker, J., concurring).

50. See *id.* at 1000.

51. *Id.* As to the job losses, recent federal reporting indicates significant growth projections in green energy jobs. See, e.g., DEP'T OF ENERGY, 2017 U.S. ENERGY AND EMPLOYMENT REPORT 37 (2017) (finding that nearly 375,000 American workers involved in the solar energy sector).

52. Due to the nature of the information, it is not possible to compare EPA's "billions" with the \$280 billion industry estimate. Rather than dealing with discrete economic figures, as the doctrine would suggest, readers are instead left in the "no man's land" of dollars ranging from two to 999 billion and a similarly expansive number of jobs. Perhaps as a rule of thumb, we could assume a major question would be reached where an agency forecasts its regulation to impose at least two billion dollars, as Judge Walker's reference to "billions" would suggest. See *ALA*, 985 F.3d at 1000 (Walker, J., concurring). The economic prong of the major questions doctrine would thus potentially reach many, if not most, federal regulations.

deficiency and unacceptable level of judicial discretion in major questions analysis.<sup>53</sup>

Similarly, Judge Walker's economic analysis minimizes the importance of EPA's estimates of the CPP's benefits, illustrating a judicial rejection of agency technical staff findings and demonstrating the exercise of further inappropriate judicial discretion.<sup>54</sup> The EPA fact sheet the judge cited provides possible projected benefits: climate benefits of \$20 billion, health benefits of \$14-34 billion, and net benefits of \$26-45 billion.<sup>55</sup> These projections attempt the challenging task of accounting for the many unknown variables at play with climate change; they are imperfect, but quantify impacts to virtually every aspect of American society.<sup>56</sup>

Judge Walker took EPA's attempt to conduct an honest analysis of the benefits as evidence of the major economic implications of climate regulation, stating that "minor rules do not calculate \$10 billion in net benefits as their margin of error."<sup>57</sup> This issue raises the special relevance of major questions doctrine to climate regulation. The uncertain nature of the harms, the uncertain timing, and the uncertain economic effects of climate change call into question whether any meaningful agency intervention could ever cross the major questions hurdle. By injecting his personal beliefs in place of the agency's reasoned analysis, Judge Walker illustrates how major questions economic analysis encourages deficient reasoning and invites inappropriate judicial bias, posing serious dangers to administrative regulations.

2. *Judges Lack Appropriate Technical Expertise to Conduct Meaningful Analysis that Contextualizes and Interrogates Complex Economic Impacts Such as Future Electricity Rates*

Because the costs of regulating the electricity market are difficult to model and quantify, it is necessary that agencies, as opposed to the judiciary, be given the discretion to model and measure costs.<sup>58</sup> While Judge Walker cited projected

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53. *See id.*

54. *See id.* (citing *Fact Sheet Overview of the Clean Power Plan*, EPA (2015), <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html>).

55. EPA, *supra* note 54, at 3.

56. *See CPP supra* note 6, at 64,933 (describing EPA's use of social cost of carbon to estimate climate impacts).

57. *ALA*, 985 F.3d at 1001 (Walker, J., concurring).

58. Accurately answering even fairly routine economics questions, like how to calculate future retail electricity rates, is fairly onerous. States have adopted different forms of retail electricity regulation, impacting how readily utilities could pass on higher wholesale costs to retail customers. *See, e.g.*, EPA, *Understanding Electricity Market Frameworks & Policies*, <https://www.epa.gov/repowertoolbox/understanding-electricity-market-frameworks-policies> (explaining regulated and deregulated electricity markets in the U.S.). Some states, like California, use traditional ratemaking proceedings to set the retail electricity rates investor-owned utilities (IOUs) may charge end users. *See* Cal. Pub. Utils. Comm'n, *Electric Rates*, <https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-rates>. In ratemaking proceedings, customers are insulated from higher wholesale costs (utilities purchasing power from generators to ultimately resell to retail customers). *See, e.g.*, Cal. Pub. Utils. Comm'n, *Electric Costs*,

wholesale electricity prices as an indicator for the larger economy, the bluntness of his treatment of the economic issues yields an analytically vague and problematic standard for those seeking certainty.<sup>59</sup> The industry report Judge Walker cited to makes the unsupported assumption that wholesale costs will necessarily translate to higher retail rates by equivalent amounts.<sup>60</sup> Judge Walker did not clarify whether he adopted this assumption.<sup>61</sup> Even so, his opinion relied on the industry report to provide the primary economic data establishing the CPP's high costs.<sup>62</sup> Thus, the opinion did not analyze whether industry operating business-as-usual would absorb the wholesale rates, whether subsidies to electricity generators or consumers would offset them, or whether electricity generators would pass costs on to end-users.<sup>63</sup> The reader is left wondering whether the opinion stands for the proposition that \$280 billion imposed on industry is sufficient to trigger a major question or whether that amount must be imposed on consumers.<sup>64</sup> The opinion's uncertain meaning, created by a judge

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<https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-costs> (describing California's "just and reasonable" requirements to protect customers against unaffordable retail rates). In addition, a calculation of future retail electricity rates under the CPP would depend on the specifics of the state implementation plans that would have been created under the CPP (which are actually unknowable before they are created, since states would have had free reign to design them); national and localized energy market conditions; as well as the stringency of existing state GHG policies.

59. See *ALA*, 985 F.3d at 1000 (Walker, J., concurring).

60. NAT'L MINING ASS'N, *supra* note 48, at 4 (equivocating wholesale price increases for utilities with higher prices for consumers).

61. *ALA*, 985 F.3d at 1000 (Walker, J., concurring).

62. *Id.*

63. The complexity of electricity cost modeling can be further illustrated by a hypothetical. If a coal plant was decommissioned while the CPP was in place, a generator or utility would likely commit capital investment to replace the lost generation with lower-GHG-emitting sources, like natural gas or renewables. See, e.g., JOEL B. EISEN ET AL., *ENERGY, ECONOMICS AND THE ENVIRONMENT, CASES AND MATERIALS* 808 (5th ed. 2020) (citing AM. WIND ENERGY ASS'N, *Wind Energy Facts at a Glance* (source no longer available online) (finding 41 percent of 2015 power capacity additions in wind)). If the higher-GHG facility was owned by a private firm, the costs to the utility to purchase the power on the wholesale market may have remained unchanged, especially with the low generation costs of renewables and cheap and plentiful natural gas. See, e.g., Hiroko Tabuchi, *Private Equity Funds, Sensing Profit in Tumult, Are Propping Up Oil*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/10/13/climate/private-equity-funds-oil-gas-fossil-fuels.html> (reporting over \$1.1 trillion private equity investment in energy sector since 2010); Gavin Bade & Peter Maloney, *Updated Tucson Electric Signs Solar & Storage PPA for Less Than 4.5 Cents/kWh*, UTIL. DIVE (May 23, 2017), <https://www.utilitydive.com/news/updated-tucson-electric-signs-solar-storage-ppa-for-less-than-45kwh/443293/> (discussing City of Tucson's very affordable power purchase agreement with a generator for solar photovoltaic power and storage). However, if an IOU replaced one of its own generation facilities, it may have suffered losses from nonrecoverable amortized capital costs it planned to recoup over a longer operation period ("stranded costs"). See 18 C.F.R. § 35.26. In this case, the utility may eventually propose higher electricity costs to state public utility regulators in ratemaking proceedings. See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301–02 (1989) (affirming constitutionality of state denial of additional compensation sought by utility for nuclear facility planning where facilities never built and not used and useful).

64. But then again, perhaps knowing whether the figures refer to retail or wholesale costs is not important, because once a court establishes that a question has large enough economic costs, the exact contours of those costs need not be fully understood. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (finding FDA's regulation of tobacco industry a major question because tobacco has a "unique place in American history and society" and represents "a significant portion of the

lacking the relevant technical expertise, illustrates one reason why it is problematic for the judiciary to determine economic considerations.

Judge Walker's discussion of electricity price increases without considering important factors like actual electricity costs also shows a lack of analytical rigor or intention to interrogate and contextualize the data meaningfully.<sup>65</sup> In addition to aspiring to clarity, a judicial determination should clearly disclose determinative subsidiary factors. One important issue in this case was whether to rely on the 2015 industry forecast as evidence of the actual costs that occurred. While increased compliance costs could have been imposed on electric generators, had the CPP become effective, it is important to underscore that, so far, the CPP's GHG targets have been met through market forces alone.<sup>66</sup> This point indicates that there would not have been any additional costs from the regulation beyond those occurring in the free market baseline.<sup>67</sup> Judge Walker did not disclose why he relied on the industry forecast instead of the actual costs in his separate opinion.<sup>68</sup>

Another important consideration involves calculating "baseline" retail electricity rates, especially in light of planned plant decommissioning<sup>69</sup> and foreseeable transition costs to renewable generation.<sup>70</sup> Accurate electricity retail

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American economy"). The effect is that the relevancy of the \$200 billion wholesale figure is left entirely to speculation, with the inference perhaps being that this rise in wholesale prices will translate to equivalent rises in consumer electricity rates throughout the country, thus creating economy-wide implications, as opposed to just impacting a relatively few coal plant owners.

65. *ALA*, 985 F.3d at 1000 (Walker, J., concurring).

66. See GOFFMAN, *supra* note 37.

67. *Id.*

68. *ALA*, 985 F.3d at 1000 (Walker, J., concurring).

69. Although it is difficult to accurately forecast a "baseline" retail electricity rate over long periods of time, such as 15 years in the CPP case, it is already standard for companies to plan for the decommission and technological improvement of older facilities. See, e.g., CPP, *supra* note 6, at 64927 tbl.17 (calculating retail electricity costs through 2030 increasing by 1 percent as a result of the CPP rule under a rate-based illustrative model or no increase under a mass-based model). Since generation facilities have planned lifetimes, companies already have schedules to decommission older facilities and invest capital to convert them to more efficient generation types. See, e.g., Mike Highlett, *Xcel Wants to Build \$575M Solar Plant in Becker*, STAR TRIB. (Apr. 13, 2021) (reporting on Xcel Energy's plans to build 460-megawatt solar plant in Minnesota, part of its plan to replace generation lost by three coal fired generators scheduled for early retirement). In addition, states have existing "just and reasonable" requirements for rate approval to protect customers against unaffordable retail rates. See, e.g., Cal. Pub. Utils. Comm'n, *Electric Costs*, <https://www.cpuc.ca.gov/industries-and-topics/electrical-energy/electric-costs> (listing utility regulatory cost proceedings in California). States also have protection programs to subsidize low-income customers so they would not end up paying increased rates. See, e.g., Cal. Pub. Utils. Comm'n, *California Alternate Rates for Energy (CARE)*, <https://www.cpuc.ca.gov/consumer-support/financial-assistance-savings-and-discounts/california-alternate-rates-for-energy> (providing terms of a California utility rate assistance program).

70. Transition costs to renewable generation must be considered in any baseline electricity rate projection. In addition, state renewable portfolio standards (RPSs) may already mandate a clean energy transition equivalent to, or exceeding, the CPP's decarbonization goals. See, e.g., Cal. Energy Comm'n, *Clean Energy and Pollution Reduction Act – SB 350*, <https://www.energy.ca.gov/rules-and-regulations/energy-suppliers-reporting/clean-energy-and-pollution-reduction-act-sb-350> (last visited Aug. 28, 2022) (requiring renewable energy procurement of 50 percent by 2030). In these situations, transition costs to renewable generation should be included in the baseline electricity rate projection. It is

rate forecasting is certainly sophisticated due to several regulatory, market, and political variables.<sup>71</sup> As Judge Walker’s opinion indicates, providing a bottom-line figure for electricity costs fails to provide the necessary context for the data because this tack lacks consideration of important factors such as the treatment of actual costs or discussion of baseline determinations.

As this analysis of the nation’s electricity market suggests, even fairly traditional economics questions can be daunting. While a judge may choose to amass all the relevant agency, industry, academic, and nonprofit guidance on the subject, complex specialized questions like economic forecasting ultimately require the exercise of significant discretion. Although specialized economists working in government agencies have the requisite training to forecast complex economic impacts, most federal judges do not.<sup>72</sup>

### 3. *Because Regulatory Benefits Need Not Be Considered, the Major Questions Doctrine Is Analytically Deficient*

Although meaningful judicial analysis of regulations requires a full accounting of costs and benefits,<sup>73</sup> the major questions doctrine does not require

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also hard to predict which states will adopt RPSs and consumer affordability programs in the coming years, and when. Perhaps as the catastrophic impacts of the climate crisis coupled with Congress’s inability to pass climate legislation put political pressure on state leaders to act, states will make greater use of RPSs as well as subsidies to maintain affordable consumer prices or to assist utilities transitioning from fossil fuels to renewables. Suffice it to say, many variables are at play.

71. It is plausible that a significant amount of increased costs could be absorbed by the companies as part of “business as usual” without increasing end user rates. It is also possible that states and utility regulatory bodies may intervene and protect consumers and renewable generators. Even though some connection between wholesale and retail electricity markets certainly exists, determining the exact level of correspondence is challenging. *See, e.g.*, *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 776 (2016) (holding FERC’s order to compensate retail demand response aggregation permissible under the agency’s wholesale electricity market jurisdiction, despite the “fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other”). Perhaps this great uncertainty is what encouraged the industry analysts to focus on wholesale prices, making the unsupported inference that those prices will be passed on to retail consumers. *NAT’L MINING ASS’N*, *supra* note 48, at 4. Although it is unsupported, industry’s framing certainly makes for a stronger “economic” argument – that instead of just impacting the profits of a few coal plant owners, retail consumers across the country would be paying significantly more each month for electricity.

72. *See, e.g.*, *Elec. Power Supply Ass’n*, 136 S.Ct. at 782–84 (upholding FERC demand response rule against arbitrary and capricious challenge because of great deference paid to agency expertise in “technical area like electricity rate design,” and because judicial review does not regulate electricity rates, but is limited to determining whether an agency “engaged in reasoned decision making—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice”).

73. This analysis is formidable, as illustrated by the CPP, where the EPA conceded the agency’s limited ability to project difficult-to-quantify climate-related benefits. *CPP*, *supra* note 6, at 64,927–28. In fact, the agency underestimated many additional benefits, such as the reduction of non-carbon dioxide GHGs like methane, because it was not able to accurately calculate them at the time of the rulemaking. *See id.* at 64,928; *id.* at 64,935–36 (describing additional unquantified benefits, including those involving: ocean acidification, “tipping points in natural or managed ecosystems,” climate benefits from reducing non-carbon dioxide GHGs including nitrous oxide and methane, co-benefits from reduced exposure to SO<sub>2</sub>, NO<sub>x</sub>, mercury, ecosystem effects, and visibility impairment).

judges to consider the benefits, even if they are monetary.<sup>74</sup> The doctrine bluntly asks only whether significant economic costs are *imposed*, not whether benefits *offset* them.<sup>75</sup> In *Brown & Williamson*, for example, it was enough for the Court to find that tobacco was a significant U.S. economic and political force, and thus a major question, regardless of whether the value of lost cigarette sales under the Food and Drug Administration's rule would be offset by the millions of fewer people seeking hospitalization for cancer and respiratory illness.<sup>76</sup> Thus, the Court did not find the benefits of offsetting tobacco's negative health impacts through regulation significant enough to overcome the major question. With the CPP, by comparison, a meaningful cost-benefit balancing is even more challenging:<sup>77</sup> costs are imposed on industry and potentially translate into higher prices for electricity ratepayers; health and welfare benefits accrue to the public at large, but especially to communities living near coal and natural gas plants;<sup>78</sup> and GHG reductions mitigate the global climate crisis.<sup>79</sup> Under a major

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74. In addition, as Judge Walker observes when considering the broad contours of the major questions framework, no set of factors would really be useful for providing judicial assistance as to how a judge should determine whether an issue is a major question. ALA. 985 F.3d 914, 1002 (D.C. Cir. 2021) (Walker, J., concurring) (“No cocktail of factors informing the major-questions doctrine can obscure its ultimate inquiry: Does the rule implicate ‘a decision[ ] of vast economic and political significance?’”).

75. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1934 (2017) (observing the asymmetrical nature of the major questions doctrine itself, on a macro level pertaining only to regulatory expansions and not deregulatory actions). The doctrine's ideological framework, with its bare scrutinizing of the imposition of regulatory restrictions, runs the risk of minimizing the potential value of less high-profile long-term efficiencies. For example, control equipment for natural gas facilities to capture fugitive methane emissions, a potent GHG, may have moderate upfront costs. However, industry is voluntarily adopting these controls both to tout its environmental progress as well as to capture and utilize a valuable wasted commodity.

76. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *see also id.* at 160 (suggesting that major questions analysis should not consider balancing the costs with the benefits of an agency regulation, “no matter how “important, conspicuous, and controversial the issue”).

77. When a reader digs into the actual CPP final rule, as opposed to the fact sheet summarizing its top-line findings for the general public, the inquiry becomes more nuanced. The rule itself runs more than 300 pages and contains more than 1,000 footnotes. *See* CPP, *supra* note 6. The EPA's Regulatory Impacts Analysis for the CPP is an additional 343 pages. *See* EPA, EPA-452/R-15-003, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE (Oct. 23, 2015), [https://www.epa.gov/sites/default/files/2020-07/documents/utilities\\_ria\\_final-clean-power-plan-existing-units\\_2015-08.pdf](https://www.epa.gov/sites/default/files/2020-07/documents/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf). By comparison, the EPA fact sheet is nine pages. *See* EPA, *supra* note 54.

78. *Power Plants and Neighboring Communities*, EPA, <https://www.epa.gov/airmarkets/power-plants-and-neighboring-communities> (last updated May 12, 2022) (detailing disproportionate adverse environmental and health impacts to low-income and minority communities living near fossil fuel power plants).

79. To add to the complexity, economists do not use uniform frameworks to weigh the value of alternative solutions. Welfare economists, for example, would be supportive of the CPP's promotion of more energy efficient forms of energy generation, thus minimizing production energy losses and increasing market efficiency by internalizing unaccounted social costs such as pollution and negative climate externalities into the costs of production. *See* EISEN ET AL., *supra* note 63, at 1023–24 (describing technical conversion losses, energy lost in the process of converting resources into electricity, as exceeding 50 percent for total U.S. energy generation and delivery, offering substantial opportunities for technological innovations to improve system efficiency, such as with renewables, natural gas cogeneration, or the combination of technologies in hybrid renewable plants); *Id.* at 1024 (rating cogeneration, for example, as 50-70 percent more efficient than existing generation); *Id.* at 1022–23



questions analysis, though, a judge need not consider these more complex full-picture national market and community scale impacts. Thus, the major questions doctrine is deeply problematic because it merely requires consideration of costs, regardless of the benefits.

Judge Walker's opinion illustrates another shortcoming of the major questions doctrine: economic analysis under the doctrine need not meaningfully consider unquantified benefits, such as those from improved health.<sup>80</sup> While it is difficult to calculate the actual realized benefits from mitigating the climate crisis, the benefits are certainly not only economic. Economics and politics are the only criteria for major questions, though. For example, the very next bullet point of the EPA fact sheet Judge Walker referenced for sums of money describes the CPP's health implications.<sup>81</sup> Yet, guided by the major question doctrine, as illustrated by Judge Walker's opinion, judges need not consider unquantified benefits, such as the avoidance of detrimental health outcomes.<sup>82</sup> Indeed, Judge Walker ignored the CPP's positive health implications.

To analyze EPA's compliance with the statutory directive of protecting human health and welfare, a judge should value these benefits independently of their economic worth.<sup>83</sup> The EPA found that, as a result of the CPP, each year there would be 3,600 fewer premature deaths, 1,700 fewer heart attacks, 90,000 fewer asthma attacks, and 300,000 more days where people can go to work and attend school.<sup>84</sup> These statistics indeed have economic implications with debatable monetary values. But a regulation under a statutory directive with the express purpose of ensuring human health and welfare should also seriously account for these benefits themselves, apart from any monetary valuation.<sup>85</sup> EPA's figures on children and adults able to go to school and work because they are not at home sick from pollution are crucial evidence to demonstrate EPA's compliance with the statutory directive, as is the evidence of the thousands of lives spared from heart attacks and death. A purely economic valuation simply fails to meaningfully assess the agency's compliance with the statute.

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(discussing economic efficiency as a decision or allocation of resources maximizing social net benefits as determined through a cost-benefit balancing, taking "the difference between the total benefits (including environmental benefits) and total costs").

80. *ALA*, 985 F.3d at 1001 (Walker, J., concurring).

81. *See EPA*, *supra* note 54, at 3.

82. The climate crisis is a perfect candidate for major questions because its impacts are difficult to quantify. Although Judge Walker emphasizes the seriousness of climate impacts, as well as the difficulty of translating them into dollar figures, his opinion's cursory characterization of these nonmonetary risks in a laundry list, almost satirizing the grave nature of these serious concerns, reinforces their second-class status. *ALA*, 985 F.3d 914, 1001 (D.C. Cir. 2021) (Walker, J., concurring) ("According to the rule's advocates, victory over climate change will lower ocean levels; preserve glaciers; reduce asthma; make hearts healthier; slow tropical diseases; abate hurricanes; temper wildfires; reduce droughts; stop many floods; rescue whole ecosystems; and save from extinction up to 'half the species on earth.'").

83. Clean Air Act, 42 U.S.C. § 7401(b)(1).

84. *EPA*, *supra* note 54, at 3.

85. 42 U.S.C. § 7401(b)(1). Even though other areas of the law, such as torts, compensate individuals for health and welfare harms by providing compensation after the harm occurs, the CAA directs the EPA to proactively protect against these harms.

This failure of economic valuation is especially apparent in light of the uneven distribution of the harms from air pollution. A more meaningful analysis would take into account the fact that these health impacts are not spread evenly across the U.S. population, but are most debilitating for communities of color living closest to fossil fuel plants.<sup>86</sup> Black and Indigenous communities, people of color, and the poor suffer disparate health effects from coal plant emissions, which contain mercury, lead, sulfur dioxide, and nitrogen oxide.<sup>87</sup> Analysis exclusively relying on costs, however, fails to capture these important distributional effects.

Parties seeking to challenge the validity of agency analysis should be required to at least reach both sides of the agency findings by weighing the benefits, including the unquantified ones. “Cost-benefit” analysis without attention to “benefits” is not a meaningful tool to judge rulemakings in the context of \$21 trillion economies,<sup>88</sup> especially when the benefits accruing from human health and welfare protections are the express emphasis of a statute.<sup>89</sup> Despite Judge Walker’s substantial failure to fairly consider the costs *and* benefits of the CPP, his one-sided analysis is fully consistent with the Court’s flawed major questions paradigm. It is precisely because human health and quality of life matter, correcting historical racial and class harms matters, and hence, the full picture matters—in the climate crisis and in every regulation—that the major questions doctrine is fundamentally unsound and should be renounced.

4. *Valuable Evidence of Economic Costs May Be Minimized or Excluded, Thus Reinforcing the Imprecision and Discretion of Major Questions Analysis*

A judge establishing that a regulation has a high economic cost under major questions analysis may selectively omit important evidence. An example is Judge Walker’s failure to mention that the CPP would have imposed zero regulatory costs to date.<sup>90</sup> The D.C. Circuit’s decision occurred six years after the CPP rulemaking.<sup>91</sup> It so happens that major changes occurred in the energy sector during the 2010s. A shale gas boom from hydraulic fracturing led to cheap and plentiful domestic natural gas supplies.<sup>92</sup> This supply of natural gas, in turn,

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86. See EPA, *supra* note 78.

87. Brett Israel, *Coal Plants Smother Communities of Color*, SCI. AM. (Nov. 16, 2012) (reporting on NAACP study finding 39 percent of residents living near coal plants were people of color).

88. GDP (Current US\$) – United States, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US> (last visited Aug. 28, 2022) (estimating \$20.937 trillion as 2020 GDP).

89. Clean Air Act, 42 U.S.C. § 7401(b)(1) (stating that the purpose of the CAA is to protect human “health and welfare”).

90. See ALA, 985 F.3d 914, 1000–01 (D.C. Cir. 2021) (Walker, J., concurring).

91. See CPP, *supra* note 6; ALA, 985 F.3d at 998 (Walker, J., concurring).

92. See, e.g., EISEN ET AL., *supra* note 63, at 798 (discussing recent trend of utilities switching from coal to gas generation and concern that this may sacrifice investment in renewables).

accelerated the process of coal plant closure, as the use of natural gas and cheaper renewables for electricity generation increased.<sup>93</sup> As a result, the power sector realized the CPP's GHG reductions completely by market forces alone, with zero regulatory costs.<sup>94</sup> This makes the "too costly" argument an especially myopic perspective.<sup>95</sup> Judge Walker never reconciled this important fact—that the CPP would have imposed zero costs to date—to counterbalance his concern over the "unfathomable" costs of the regulation.<sup>96</sup> This illustrates how the major questions doctrine does not privilege a full accounting of relevant data, even apparently data of the *actual* economic costs that would have occurred due to the regulation computed by the Trump administration.<sup>97</sup> For major questions, a judge need only cite estimates, however faulty, that establish a significant *possible* cost, even if we know, as in this case (rather uniquely), with the benefit of 20-20 hindsight that additional costs authoritatively *did not* occur. In other words, the major questions doctrine privileges the search for a large sum, even if it is divorced from reality, to bar agency action.

In sum, Judge Walker's analysis of the economic implications of the CPP relies on several problematic premises: Judge Walker (1) adopts the industry-funded estimate of costs while failing to give the regulating agency's actual estimates or reasoning on the CPP's affordability;<sup>98</sup> (2) fails to contextualize the

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93. See, e.g., *id.* at 968 (2020) ("Virtually all new capacity being added to the grid is powered by renewables or natural gas, and coal plants are increasingly facing retirement."); *id.* at 969 (describing the large increase in customer adoption of distributed energy resources like rooftop solar, with 2.3 GW of new solar installed in the second quarter of 2018 alone). Compare *id.* at 802 (citing U.S. ENERGY INFO. ADMIN. (EIA), LEVELIZED COST AND LEVELIZED AVOIDED COST OF NEW GENERATION RESOURCES IN THE ANNUAL ENERGY OUTLOOK 2018 6 (2018), [https://www.eia.gov/outlooks/archive/aeo18/pdf/electricity\\_generation.pdf](https://www.eia.gov/outlooks/archive/aeo18/pdf/electricity_generation.pdf) (estimating levelized cost of electricity (LCOE) entering service in 2022, the cost of building and operating electric generation per megawatt hour, from solar photovoltaic at \$63.20 compared with \$130.10 for coal with 30 percent carbon capture and storage)), with EIA, LEVELIZED COST AND LEVELIZED AVOIDED COST OF NEW GENERATION RESOURCES IN THE ANNUAL ENERGY OUTLOOK 2021 8 (2021), [https://www.eia.gov/outlooks/archive/aeo21/pdf/electricity\\_generation.pdf](https://www.eia.gov/outlooks/archive/aeo21/pdf/electricity_generation.pdf) (estimating LCOE entering service in 2026 from solar photovoltaic with battery storage at \$47.67 and \$72.78 for ultra-supercritical coal).

94. In 2019, the Trump EPA found that the CPP would have achieved no greater emission reductions or imposed any greater costs on operators compared to business as usual. EPA, EPA-452/R-19-003, REGULATORY IMPACT ANALYSIS FOR THE REPEAL OF THE CLEAN POWER PLAN AND THE EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS 2-35 (June 2019), [https://www.epa.gov/sites/default/files/2019-06/documents/utilities\\_ria\\_final\\_cpp\\_repeal\\_and\\_ace\\_2019-06.pdf](https://www.epa.gov/sites/default/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf).

95. See, e.g., Brief in Opposition of Non-Governmental Organization and Trade Association Respondents at 10, *West Virginia v. EPA* (Aug. 5, 2021) (Nos. 20-1530, 20-1531, 20-1778, 20-1780), 2021 WL 3501073 ("A never-implemented regulation that would have imposed *no* costs and reduced *no* emissions is not a proper vehicle for this Court to expound upon a doctrine that, according to Petitioners, is reserved for regulations that impose *extraordinary* costs and have *transformational* impacts on society.") (emphasis in original).

96. ALA, 985 F.3d 914, 1000 (D.C. Cir. 2021) (Walker, J., concurring).

97. See EPA, *supra* note 94, at 2-35 (finding "no significant difference in scenario with CPP implementation and one without" with regard to emissions and compliance costs).

98. See, e.g., CPP, *supra* note 6, at 64,666 (describing the opportunity for states to address electric rate affordability through the CPP's flexible framework, allowing for demand-side energy efficiency, as well as multi-state and mass-based trading approaches).

larger economic meaning of the industry's wholesale electricity cost projections or consider future trends within the electricity market; (3) emphasizes the enormous scope of climate change and the difficulty of quantifying the benefits from its regulation while deemphasizing EPA's good-faith efforts to do that with frameworks such as the Social Cost of Carbon; and (4) fails to acknowledge that concerns over possible large costs were, at least six years into the rule, completely wrong.

These observations show how the economic prong to major questions determinations has the potential to be at least arbitrary and, at most, entirely divorced from reality. Judges may easily privilege certain costs over others to reach a desired outcome. In addition, the faults with the economic prong are probably more acute than those with the political prong. This is because "economics" takes on an air of authority that "politics" lacks. Most Americans do not have sophisticated knowledge of economics and will not be able to critically interrogate judges' choices in assessing costs. This lack of understanding adds to the opaqueness of judicial decision making, contributing to a lack of respect for the integrity of the judiciary. But the most problematic aspect of the economic prong is that it requires judges to take on a role they are not trained to do. Economists are suited to making economic justifications, not judges. Placing that kind of discretion into the judicial job description and prioritizing it as a primary doctrinal element—dispositive of whether important regulations can occur—risks extremely arbitrary results.

*C. Analysis of Political Significance Element in Judge Walker's Opinion  
Raises Concerns Over Separation of Powers and Judicial Bias*

In *ALA*, Judge Walker discussed the political process, one of the two focal points of major questions review, as largely synonymous with congressional legislating, effectively deemphasizing the role that citizen opinion and other indicators of political significance play in our democratic system.<sup>99</sup> Judge Walker first considered the important role of constitutional protections, including bicameralism and presentment, in making legislating more difficult and, consequently, protecting the interests of unpopular political minorities.<sup>100</sup> Judge Walker next distinguished section 111(d) from the "clearest" CAA provisions.<sup>101</sup> To the Judge, this statutory clarity reflected Members of Congress reaching a "political consensus," thus producing a statutory provision sufficiently protective of these small ideological groups.<sup>102</sup> Accordingly, Judge Walker's analysis of the political significance of the issue asked only whether

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99. See *ALA*, 985 F.3d at 997 (Walker, J., concurring) ("Major regulations and reforms either reflect a broad political consensus, or they do not become law.").

100. *Id.*

101. *Id.* ("In its clearest provisions, the Clean Air Act evinces a political consensus. For example, according to *Massachusetts v. EPA*, carbon dioxide is clearly a pollutant, and the Act's § 202 unambiguously directs EPA to curb pollution from new cars.").

102. *Id.*

the provision at issue is already part of an enacted legislative plan and whether that provision is sufficiently clear.<sup>103</sup> In other words, this concept of political significance adds nothing new to the major questions analysis. The doctrine already asks whether the statute is sufficiently clear as a threshold question.<sup>104</sup> Thus, determining if an agency properly enacted a statute and assessing whether the text is clear is redundant. In this sense, this type of political analysis is of little utility.

Judge Walker also documented Congress's failed attempts to pass climate legislation, pointing out that the political process of passing legislation worked properly and emphasizing that "small states have outsized influence in the Senate" by intentional design.<sup>105</sup> Judge Walker's concern for the interests of "small states and unpopular political minorities" is also illustrated through his analysis of the "political faction" who litigated against the CPP and the "new faction" challenging the ACE Rule.<sup>106</sup>

Yet, deciding that the interests of "small states" outweigh the interests of the other states makes a political judgment that the major questions doctrine, on its face, seeks to avoid.<sup>107</sup> To establish the existence of a political issue, a judge must exercise their political judgments instead of leaving them to Congress.<sup>108</sup> A determination of political significance is laden with subsidiary value judgments interwoven with economic concerns. For instance, a judge must decide how market distortions play into the argument that any increase in electricity prices justifies opposition to a future clean power plant rule. Such a rule would have less impact on states that have already taken action to limit GHG emissions, such as by enacting renewable portfolio standards, while raising rates for states without such laws. To decide whether the political opposition of the small states is legitimate, a judge must first decide whether the argument is based on a market distortion from the provision of inefficient artificial subsidies for fossil fuel generation. Thus, "political" analysis, such as Judge Walker's concern for the interests of small states here, is problematic and misleading because it inevitably chooses one side as the winner by deciding and incorporating embedded political arguments along the way.

A judicial preference for political minorities that routinely bars agency action also raises line-drawing questions with important implications for separation of powers. When Congress successfully passes legislation, certain

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103. *Id.* at 997–99.

104. *See supra* Part I.

105. *ALA*, 985 F.3d at 997–98 (noting that the Electoral College is designed to "impede fleeting factions from ganging up on small states and unpopular political minorities").

106. *Id.* at 999 (noting that the faction challenging the CPP "included about twenty-four states" against a "political faction of about eighteen states" defending the rule; and that the faction challenging the ACE Rule "looked a lot like the faction that defended" the CPP).

107. *See, e.g., UARG*, 573 U.S. 302, 324 (2014) (describing the major questions doctrine without reference to the interests of small states, but rather that the Court expects "*Congress* to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'") (emphasis added).

108. *See id.*

minority ideological views will inevitably not be accepted. Yet, Judge Walker appeared to advocate for the extension of this preference for protecting unpopular political minorities beyond just the debating and approval of legislation to effectively prohibit implementation of *enacted* legislation when it is contrary to minority interests.<sup>109</sup>

Judge Walker's position raises concerns about the inherently partisan nature of the political inquiry and the lengths courts should go to uphold minority interests against the majority's views. As this case illustrates, if a court may cut off agency implementation of a statutory directive in the name of protecting minority interests, congressional legislation becomes superfluous to the court's unique views on the protection of minority groups. If such judicial protection of minority interests routinely extends outside the process of legislating, with its own inherent minority protections, to also bar agency implementation altogether, the judiciary will have transferred great power from the executive branch in contravention of the separation of powers.

Although Judge Walker's analysis captures the existence of a controversy both in Congress and the courts, the analysis is unacceptably inexact. Does the number of senators from small states or state attorneys general who litigate against the CPP accurately capture the "significance" of the political issue? Now that Congress is reaching a majority consensus that global warming exists, does this mean that climate change is no longer a controversy rising to a significant political issue?<sup>110</sup> Or, does the continued existence of climate deniers, albeit a minority, make it a live controversy?<sup>111</sup> Does congressional consensus on the existence of climate change allow agencies to devise regulations incorporating climate protections? Answers to such questions are elusive in major questions political analysis. Judge Walker's inquiry largely reinforced the role of Congress as gatekeeper, and thus only reaffirmed the more basic question of whether the legislation became law.<sup>112</sup> The inquiry devalued the role of the executive branch and disregarded a wider conception of the politics of the issue outside Congress and the courts.<sup>113</sup>

Heightened attention on the small factions inhibiting climate legislation obfuscates the growing support for climate legislation in the general public.<sup>114</sup> For example, in a recent Associated Press poll, 59 percent of Americans responded that climate change is a "very or extremely important" issue, while 55

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109. *ALA*, 985 F.3d at 997–99 (Walker, J., concurring).

110. See Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, *CTR. FOR AM. PROGRESS* (Mar. 30, 2021), <https://www.americanprogress.org/article/climate-deniers-117th-congress> (finding that 109 representatives and 30 senators, or 25 percent of the House and 30 percent of the Senate, deny the existence of climate change).

111. See *id.*

112. *ALA*, 985 F.3d at 997 (Walker, J., concurring).

113. See, e.g., *id.* at 998 (documenting the EPA's "unprecedented outreach and public engagement," including the "4.3 million public comments" the agency considered in promulgating the CPP).

114. *Id.* at 997–98 ("In general, Senators from small states blocked legislation they viewed as adverse to their voters.").

percent want Congress to pass a law requiring more electricity from clean energy instead of fossil fuels.<sup>115</sup> By this measure, more than a simple majority of Americans agree that there is no political controversy regarding climate change. If majority opinions were dispositive, however, it would undermine the role of Congress to protect the views of “unpopular political minorities.”<sup>116</sup> This tension between public support and congressional action, balancing the interests of the majority versus the minority, illustrates another way the political aspect of major questions is frustratingly inexact.

Further, an exclusive focus on Congress and the courts devalues the role of the Executive, who is a democratically elected public official, just like members of Congress. If politics are part of the equation for major questions, courts should grant some weight to the President’s ability to formulate policy in response to the interests of the American electorate. This again stresses the tension between the major questions doctrine and broader congressional grants of authority. Even if Congress explicitly delegates general authority to an executive agency to decide important issues under a broad statutory framework, such as the CAA, the major questions doctrine fundamentally undervalues the roles in this intended relationship. Both the economic and political significance prongs are frustratingly imprecise. As a result, a judge wishing to deemphasize the important role of the executive branch in our tripartite separation of powers may overemphasize the other branches.

Finally, turning to legislative history to clarify political significance poses problems. For instance, it is unclear whether courts look to original or current legislative debates. Congressional discussions surrounding climate change would be very different now than during the most recent CAA amendments in 1990.<sup>117</sup> A textualist reading may require deference to the 1990 legislative debates, which occurred when global warming was more controversial in the popular zeitgeist and scientific consensus was not as strong.<sup>118</sup> Importantly, these debates also occurred before the recent intensification of climate-caused catastrophic weather events and substantial changes in the economics of clean energy.<sup>119</sup> If legislation is meant to change with time to meet important new societal challenges, courts should look to 2022 politics instead of debates thirty years ago to answer significant questions.

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115. Ellen Knickmeyer et al., *Majority in US Concerned About Climate AP-NORC/EPIC Poll*, A.P. NEWS (Oct. 26, 2021), <https://apnews.com/article/climate-joe-biden-science-environment-and-nature-only-on-ap-1e48e3315d2e0b618ccaa4a8d466e057>.

116. *ALA*, 985 F.3d at 997 (Walker, J., concurring).

117. *See id.* at 953–54 (majority opinion) (describing the CAA 1990 amendments and legislative history surrounding changes to BSER from the original 1970 enactment and 1977 amendments).

118. *See* Julia Rosen, *The Science of Climate Change Explained: Facts, Evidence and Proof*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/article/climate-change-global-warming-faq.html#link-429d8fc> (comparing the approximately two-thirds of atmospheric scientists accepting human-caused global warming in 1991 with the 90 percent accepting it today).

119. *Id.* (summarizing findings that climate change is increasing the frequency and intensity of extreme weather events, including heat waves, drought, wildfire, and flooding).

In summary, Judge Walker's conception of the political dimension of the major questions doctrine leaves several questions about when the doctrine applies. First, it is unclear whether political polling, legislative history, congressional voting, or some combination thereof may demonstrate the existence of a "significant political issue." Second, it is unclear whether Congress's voting record would need to be roughly even or, say, a 30-70 percent split. Finally, the doctrine does not advise on how recent congressional support for the reality of climate change interacts with Congress's broad delegations to EPA to control power plant emissions under the CAA. Neither does the doctrine speak to the democratically elected President's power to set national policy. A thorough vetting of these questions is unsatisfying because it leads to no greater clarity in defining the scope of political significance. Just as the economic inquiry lacks any limiting principles, the political analysis is also untethered and is thus equally subject to judicial bias.

### III. CRITIQUE OF *ALA* PETITIONS FOR CERTIORARI: IMPRECISE AND HYPERBOLIC ARGUMENTS RAISE CONCERNS OVER THE INTEGRITY OF JUDICIAL DECISION MAKING UNDER THE MAJOR QUESTIONS DOCTRINE

#### *A. Petitioners' Arguments Framing the Major Question as a Hypothetical Future Rule Impacting All Sectors Demonstrate the Tendency for Major Questions Analysis to be Susceptible to Exaggeration*

Litigants' petitions for Supreme Court review in *ALA* demonstrate how the major questions doctrine encourages exaggeration to the detriment of the integrity of judicial decision making. Petitioners argue that EPA's GHG rulemaking authority poses a major question because it will disrupt the energy sector and every other sector of the national economy.<sup>120</sup> If the case challenged

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120. Three petitions and Kentucky's amicus brief emphasize the major question broadly as encompassing potential EPA regulation in all sectors, not just power generation. Petition for Writ of Certiorari at 18, *N. Am. Coal Corp. v. EPA*, 142 S. Ct. 417 (2021) (No. 20-1531) (warning that EPA "could (and will) issue similarly broad regulations again, not only for power plants, but for potentially *any* industry") (emphasis in original) [hereinafter Petition for *N. Am. Coal*]; Petition for a Writ of Certiorari at 36, *North Dakota v. EPA*, No. 20-1780 (2021), 2021 WL 2593326 (positing that the EPA is planning to regulate "all other existing sources," "beyond just the generation sector," under section 111(d)) [hereinafter Petition for *N. Dakota*]; Petition for Writ of Certiorari at 2, *West Virginia v. EPA*, No. 20-1530, 2021 WL 9439135 ("EPA to dictate huge shifts in most sectors of the economy") [hereinafter Petition for *W. Virginia*]; Brief of Amicus Curiae Commonwealth of Kentucky in Support of Petitioners, *West Virginia v. EPA*, at 2, No. 20-1530 (2021), 2021 WL 2239637 (remarking that decision below grants EPA "unfettered authority to address climate change"). These petitioners explicitly divorce the major questions doctrine from any existing regulatory scaffolding; they instead warn that the agency may regulate in the future under section 111(d) in several different source categories. *North American Coal* explains that every building emitting GHGs could potentially fall under a regulated stationary source category, including residential homes and commercial facilities. Petition for *N. Am. Coal*, at 18. *West Virginia's* question presented refers to EPA's power to potentially "issue significant rules," including those to "unilaterally decarbonize[ ] virtually any sector of the economy." Petition for *W. Virginia*, at i, 2-3, 15 (No. 20-1530) (maintaining that the "power to regulate factories, hospitals, hotels, and even homes would have tremendous costs and consequences for all Americans"). Petitioner claims that GHG



an actual regulation impacting regulated sources, petitioners' arguments regarding energy sector impacts would be logical under a major questions analysis.<sup>121</sup> After all, the regulation of electricity generating power plants falls within the energy sector.<sup>122</sup> But, petitioners expand the scope of the regulatory threat as one reaching all sectors.<sup>123</sup> Petitioners exaggerate the different types of stationary sources the agency may endeavor to regulate, seeking to convince the justices that the hypothetical rule or rules are "major" because they could function, either individually or in concert, to effectively regulate most fixed sources of air pollution.<sup>124</sup> In this way, petitioners artificially expand the reach of the agency's rulemaking authority beyond those facilities EPA has regulated to demonstrate the existence of a major issue.<sup>125</sup>

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reductions will be required in other sectors to meet Biden's 50–52 percent commitment by 2030. *Id.* at 15 (relying on EPA GHG Inventory to show that other sectors emit two-thirds of the GHGs that must be reduced to meet Biden's nationally determined contribution by 2030).

121. For example, Westmoreland Mining Holdings, a petitioner challenging the D.C. Circuit's decision, quotes Judge Walker in its argument that the major questions doctrine bars agency action since a GHG rulemaking under section 111(d) of the CAA would restructure the entire energy industry. Petition for Writ of Certiorari at i, 18–19, 20, *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1778 (2021), 2021 WL 2580741 (quoting *ALA*, 985 F.3d at 996) (Walker, J., concurring) [hereinafter *Petition for Westmoreland*]. The other three petitioners also frame the major question as deriving from EPA's power to make large changes to the power sector. *See* *Petition for N. Am. Coal*, *supra* note 120, at 33; *Petition for W. Virginia*, *supra* note 120, at 29; *Petition for N. Dakota*, *supra* note 120, at 28. The Supreme Court limited its grant of certiorari to the major questions issue in the *Westmoreland* petition, denying review of an additional question on whether § 112 regulation of a source category prohibits § 111(d) regulation, the issue Judge Walker found dispositive. *See ALA*, 985 F.3d at 1004. This suggests that the Court is especially interested in deciding the major questions issue.

122. *See* *CPP*, *supra* note 6, at 64,661.

123. *Westmoreland* suggests this as well, but only in passing. *Petition for Westmoreland*, *supra* note 121, at 21, 37 (claiming CPP "just the tip of the iceberg" of Biden administration's climate goals).

124. North Dakota, a petitioner challenging the D.C. Circuit's decision, for example, identifies several other source categories besides coal power plants listed in EPA's Greenhouse Gas Inventory that it maintains EPA may regulate: "industrial oil operations; petroleum systems; oil and gas wells; iron, cement, and petrochemical production; and many residential existing sources." *Petition for N. Dakota*, *supra* note 120, at 36 (citing EPA, *Greenhouse Gas Emissions Inventory*, <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks> (last updated Apr. 14, 2022)). EPA submits its yearly Greenhouse Gas Inventory to the U.N. in accordance with the Framework Convention on Climate Change. *See* EPA, *Greenhouse Gas Emissions Inventory*, <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks> (last updated Apr. 14, 2022). EPA's Greenhouse Gas Inventory is purely a documentation of existing GHG emissions, as opposed to a legal framework setting compulsory GHG limits, such as a final agency rule. *Id.* Nevertheless, North Dakota cites the report to suggest that EPA may regulate GHGs in other areas besides coal plants, and that these regulations would have a sweeping effect. *West Virginia*, another petitioner challenging the D.C. Circuit's decision, also relies on the GHG Inventory, in addition to other GHG reduction studies, to persuade the Court that EPA's potential GHG rulemaking authority is too vast. *Petition for W. Virginia*, *supra* note 120, at 14–16 (emphasizing that EPA would have power to control emissions from areas "beyond the industries . . . that use fossil fuels for energy[. . .]" such as "'fugitive' emissions from oil and gas development," and "aspects of iron, steel, cement, and petrochemical production").

125. *West Virginia*, for example, attempts to demonstrate the significance of EPA's potential authority by citing several sources. *See, e.g.,* *Petition for W. Virginia*, *supra* note 120, at 15–16 (citing JEFF DEASON ET AL., *ELECTRIFICATION OF BUILDINGS AND INDUSTRY IN THE UNITED STATES* 14 (Lawrence Berkeley Nat'l Lab. 2018) (looking to a building electrification study for the proposition that

Petitioners demonstrate how the doctrine's analytical framework incentivizes litigants to exaggerate the scope of the impacts for rhetorical effect.

*B. Petitioners' Invention of Conjectural Rules Represents an Unconstrained Application of the Doctrine That Would Threaten Judicial Integrity If Approved*

If accepted by the Court, petitioners' arguments could threaten the integrity of judicial review. Petitioners rely on multiple levels of hyperbole in seeking to expand the application of the major questions doctrine to reach hypothetical future agency rulemaking.<sup>126</sup> Arguably, an ideologically conservative justice who is already predisposed to believing that the administrative state is ballooning out of control may be easily convinced that an administrative agency has the potential to create significant new rules.<sup>127</sup> Nevertheless, petitioners employ several levels of hyperbole to drive home the point. The idea of calling for judicial intervention just because an agency could make a new rule is a first level of hyperbole unsuitable for judicial review.<sup>128</sup> Inventing numerous examples of what that rule might regulate is another level of hyperbole. Finally, hypothesizing how an agency may choose to regulate is yet another level of abstraction removed from reality. Judicial acceptance of the multiple levels of hyperbole involved in petitioners' major questions arguments would certainly call into question the integrity of the judicial process.

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EPA has the power to regulate GHGs from manufacturing plants); DANIEL STEINBERG ET AL., NAT'L RENEWABLE ENERGY LAB., ELECTRIFICATION & DECARBONIZATION 7 (2017) (citing an NREL report to show EPA's authority over homes and small businesses); Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,375 (proposed July 30, 2008) (citing EPA's 2008 advanced notice of proposed rulemaking seeking comment on possible GHG regulation under the CAA). The 2008 proposed rulemaking includes a clear statement from EPA explaining the important considerations involved with GHG regulation as well as the need for further study. *See* 73 Fed. Reg. at 44,354. However, contrary to West Virginia's suggestion, these sources do not support the proposition that EPA is now regulating, or even planning to regulate "over 2,000 large buildings," "millions of homes and small businesses," and "nearly every manufacturing plant." *Id.*

126. *See, e.g.*, Brief of Amicus Curiae U.S. Senators Sheldon Whitehouse, Richard Blumenthal, Bernie Sanders, and Elizabeth Warren in Support of Respondents at 2, *West Virginia v. EPA*, No. 20-1530 (2021), 2021 WL 6693202 ("These cases present a legal oddity: petitioners are challenging a regulation that does not exist.") [hereinafter Brief for U.S. Senators].

127. *See* *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (remarking on the Court's existing judicial deference doctrines permitting "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design"); *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020), *cert. denied* (Thomas, J., dissenting) (explaining that *Chevron* deference to agency interpretations "gives federal agencies unconstitutional power" because it either impermissibly grants them "the judicial power" or "legislative power," and "precludes judges from exercising" judgment over statutory ambiguities).

128. *See, e.g.*, Brief for U.S. Senators, *supra* note 126, at 2 (discussing Article III case or controversy requirement and positing that the "judiciary was not intended to settle future potential, or hypothetical disagreements").

1. *Judicial Acceptance of Petitioners' Arguments Would Upset Separation of Powers and Traditional Judicial Oversight*

Petitioners' rhetorical strategy of exaggerating potential regulatory impacts from not-yet-promulgated rules shows how major questions arguments may be divorced from legitimate judicial review of agency rules, which first requires that an agency promulgates a rule.<sup>129</sup> Challengers' ask the Court to treat nonfinal agency actions and outside reports as persuasive authority.<sup>130</sup> This approach flouts traditional standards of judicial review.<sup>131</sup> Thus, the Court's endorsement of petitioners' arguments would further erode judicial integrity.

The petitions suggest a broader reading of the major questions doctrine than any reading yet endorsed by the Court, raising concerns about the appropriateness of such a large consolidation of power to the judiciary.<sup>132</sup> Under petitioners' reading, just the distant threat of the issuance of a major regulation is enough for the Court to preemptively restrict the agency's permitted interpretations.<sup>133</sup> Rather than adjudicate the merits of an individual case or controversy, this broad take on the major questions doctrine would allow the Court to issue an advisory opinion to deter any suspect potential regulation, even if it may be very unlikely to emerge through the process of notice-and-comment

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129. See Administrative Procedure Act, 5 U.S.C. § 704.

130. See sources cited *supra* note 125. None of these documents represents a final agency action susceptible to judicial review under the APA. See Administrative Procedure Act, 5 U.S.C. § 704. The advance notice of proposed rulemaking comes closest. Yet, in the notice, EPA explicitly describes that its purpose is to gather public comments on "how to respond" to *Massachusetts v. EPA*, stating upfront that the information the notice provides on climate change is meant to "advance public debate" and inform the government, rather than represent a "policy decision by the EPA." 73 Fed. Reg. at 44,354. In fact, EPA followed through on its GHG information-gathering trajectory. In 2009, it made a public endangerment finding for GHGs. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,495, 66,496 (Dec. 15, 2009). However, West Virginia did not cite this twelve-year-old final agency rule to support its argument. See Petition for W. Virginia, *supra* note 120, at 15–16. This is probably because the public endangerment finding is only the predicate step to allow the EPA Administrator to regulate GHGs under the CAA through future rulemakings. See, e.g., Clean Air Act, 42 U.S.C. § 7521 (setting forth requirement that the EPA Administrator set automotive air pollution standards following the Administrator's finding that any pollutant from new motor vehicles causes or contributes to "air pollution which may reasonably be anticipated to endanger public health or welfare"). EPA reaffirmed its 2009 GHG endangerment finding for the power plant context in 2015. See Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015). In other words, if West Virginia were limited to traditional administrative review based on the official record, it would come up short.

131. Administrative Procedure Act, 5 U.S.C. § 704 (requiring administrative agency actions be final to be eligible for judicial review).

132. Compare, e.g., Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) (determining that OSHA's COVID-19 vaccine or test interim final rule for large private employers was barred as a major question), with discussion *supra* note 124 (positing major questions of merely hypothetical agency regulations).

133. See, e.g., discussion *supra* note 124 (describing North Dakota's claims of hypothetical agency regulation).

rulemaking.<sup>134</sup> Needless to say, this view would call into question the independence of the executive and legislative branches under separation of powers. In consolidating unprecedented power into the judicial branch alone, it would also upend our democratic system.<sup>135</sup>

Traditionally, the elected executive and legislative branches are given the first bite at regulation and policy formation.<sup>136</sup> Subsequently, the judiciary reviews statutes and regulations to check for compliance with federal law.<sup>137</sup> The major questions doctrine disrupts that constitutionally prescribed turn-taking.

In challenging Congress's ability to delegate the implementation of comprehensive statutory frameworks, the litigants further show how the major questions doctrine works to upset the separation of powers. Petitioners suggest that EPA retains a significant power merely based on the comprehensive nature of the CAA's coverage.<sup>138</sup> Yet, petitioners forget that the entire purpose of the CAA is to regulate air pollution, including that from stationary sources.<sup>139</sup> Thus, implicit in petitioners' critique of EPA's hypothetical rulemaking is a critique of the CAA itself, and by extension, congressional legislative intent.

The parties are really challenging the idea of a comprehensive regulatory framework designed to regulate all air pollutants.<sup>140</sup> Should the Court enable a more active major questions doctrine in its judicial review, conservative litigants will be able to challenge any number of comprehensive legislative schemes. Thus, the efficacy of a great deal of existing legislation will be called into

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134. U.S. CONST. art. III, § 2 (providing the case or controversy requirement for federal court judicial review so as to avoid speculative advisory opinions). *See also* *Hayburn's Case*, 2 U.S. 409 (1792).

135. The Court's abstention doctrines offer an interesting point of comparison. Under the *Rooker-Feldman* doctrine, federal courts will generally abstain from reviewing state court decisions altogether. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983). Under *Pullman* abstention, the Court will abstain from hearing a challenge to an unclear state constitutional provision if a state court could provide clarification to resolve the federal constitutional issue. *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). On the other hand, under the major questions doctrine, where Congress promulgates a legislative provision that the Court deems to be unclear, the Court will bar the executive agency from any interpretation. This suggests a far greater respect for the sovereignty of states than the pronouncements of Congress or the interpretations of the executive branch. The independence of these entities is of course also constitutionally protected, but that protection falls under separation of powers instead of federalism and state sovereignty.

136. *See* discussion *infra* in Conclusion (discussing traditional judicial review of executive agency decisions).

137. *Id.*

138. *See, e.g.*, Petition for W. Virginia, *supra* note 120, at 28 (arguing that EPA has major power because it can "dictate how any industrial or commercial sector operates, or to decide whether heating systems for millions of homes and thousands of hospitals and factories must be retrofitted"); *Id.* at 17 ("EPA could commandeer almost any greenhouse-gas emitting building, factory, or house through almost any mechanism.").

139. Clean Air Act, 42 U.S.C. § 7401(b)(1) (declaring CAA purpose to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population"); *Id.* § 7408(a)(1)(B) (defining scope to include emissions from "numerous or diverse mobile or stationary sources").

140. *See, e.g.*, discussion *supra* note 138 (illustrating petitioners' opposition to comprehensive air pollution regulation).

question.<sup>141</sup> An expansion of the major questions doctrine would thus grant the judiciary enormous power while severely diminishing Congress's ability to legislate, violating separation of powers.

Petitioners' exaggeration of the potential impacts of illusory rules shows how major questions arguments may disrupt legitimate judicial review and the separation of powers.<sup>142</sup>

## 2. *Challengers' Hyperbolic Arguments on Novel Demand Response Approaches Demonstrate the Potential Dangers of an Expansive Major Questions Doctrine*

Petitioners' arguments concerning hypothetical rulemaking under section 111(d) requiring homeowners to adopt demand response mechanisms demonstrate the dangers of the major questions doctrine.<sup>143</sup> Several petitioners warn of EPA potentially employing new ways of controlling energy sector pollution, such as with demand response mechanisms.<sup>144</sup> North American Coal, a petitioner challenging the D.C. Circuit decision, argues that EPA may require homeowners to keep thermostats higher in summer months, install solar panels or purchase emissions credits, compost, and "retire" older homes altogether so as to transition to newer and more efficient homes.<sup>145</sup> Its strategy in depicting a burdensome regulatory state is to warn the Court that EPA could go too far in future regulations.<sup>146</sup> In addition, West Virginia suggests that EPA's future decision making could force oil and gas reliant states to reduce power availability to customers.<sup>147</sup> Petitioners develop these hypotheticals to argue that EPA has unfettered discretion to implement any regulatory solution it wants.<sup>148</sup> These

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141. See, e.g., Social Security Act, 42 U.S.C. § 301 (establishing a comprehensive federal system of benefits for support in old age); Telecommunications Act of 1996, 47 U.S.C. § 151 (overhauling the Communications Act of 1934 and reasserting the primacy of federal regulation of U.S. communication markets); Federal Food, Drug, and Cosmetic Act, 29 U.S.C. § 301 (providing FDA authority over safety of U.S. food, drugs, and cosmetics).

142. See Administrative Procedure Act, 5 U.S.C. § 704.

143. See Petition for W. Virginia, *supra* note 120, at 16; Petition for N. Am. Coal, *supra* note 120, at 20; Petition for Westmoreland, *supra* note 121, at 18.

144. See sources cited *supra* note 143.

145. Petition for N. Am. Coal, *supra* note 120, at 20 (analogizing also between energy sector wide generation shifting in the CPP to the residential housing context, illustrated with a hypothetical mandate requiring homeowners to transition to newer homes).

146. *Id.* at 19 ("If the agency is not limited to source-level and source-achievable systems, the next Clean Power Plan could be the 'Green New Deal'—without [the] need for a single vote in Congress.").

147. Petition for W. Virginia, *supra* note 120, at 16 ("There is now no obstacle to calculating emission guidelines that presume reducing electricity availability to customers in States that depend on coal and natural gas."). Although a reader could make inferences from the language to read in a critique of renewable energy intermittency, or perhaps energy efficiency standards, West Virginia's "presumption" of an electricity reduction is vague and unsupported.

148. This is not accurate, since the court in *ALA v. EPA* merely holds that EPA need not be limited to on-site controls and does not speak to EPA's potential authority to require demand response or distributed generation. *ALA*, 985 F.3d 914, 995 (D.C. Cir. 2021). North American Coal raises cap-and-trade as an additional novel mechanism EPA could potentially utilize, despite the agency's use of this approach in the past. Petition for N. Am. Coal, *supra* note 120, at 19. See also *id.* at 945–46 (discussing

arguments demonstrate how major questions analysis may be so divorced from reality that it serves no legitimate analytical purpose.

Judicial acceptance of petitioners' arguments would also usurp agency interpretive discretion, since agencies could no longer craft novel approaches if the Court preemptively cuts off agency power before it has regulated. Petitioners argue that the novelty of EPA's possible air pollution solutions shows that the agency has significant power.<sup>149</sup> Yet, agencies could often be accused of contemplating new ways of dealing with complex regulatory problems in promulgating new rules. Agency actions based on new statutory interpretations are susceptible to judicial scrutiny, since courts may review new agency interpretations under traditional administrative review.<sup>150</sup> In addition, the Court has upheld the ability of an agency to change course with a new administration, respond to a newly arising problem, or revise an ineffective regulation.<sup>151</sup> However, petitioners seek to obtain a Supreme Court decision that would only require an agency to *contemplate* a new approach, and obliquely at that.<sup>152</sup> This contemplation trigger would upset the ability of agency technical experts, such as staff scientists and economists, to design more effective solutions to challenging problems. Moreover, if the novelty of a regulation is dispositive of legality, agencies' toolkits will be severely constrained. This is yet another way that judicial acceptance of petitioners' major questions arguments would upset traditional judicial review and agency rulemaking.

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prior cap-and-trade program for mercury emissions from coal plants during George W. Bush administration as well as Clinton-era nitrogen oxide municipal solid waste emissions-trading program under § 111(d)). Westmoreland goes further, suggesting that any new agency approach to regulating GHGs, or any regulatory approach where EPA is allowed to "set its own scope of authority," would be impermissible for upsetting industry reliance interests. Petition for Westmoreland, *supra* note 121, at 37 (positing that if EPA was allowed to set a regulatory approach based on its policy preferences, it would yield "a perpetually shifting target for defining compliance"). Finally, carbon offsets also figure into petitioners' critique of potential new approaches. West Virginia questions whether offsite tree planting to offset carbon emissions from coal plants would be effective as a BSER. Petition for W. Virginia, *supra* note 120, at 17.

149. Petitioners believe that a novel regulatory approach, by itself, is at least suspect, and at most, is dispositive of an illegal agency action. *See, e.g.*, Petition for Westmoreland, *supra* note 121, at 37. *See also* discussion *infra* pp. 57–59 (considering new agency interpretation as a major questions factor); *supra* discussion in note 148; Petition for W. Virginia, *supra* note 120, at 14 ("Questions surrounding new and almost limitless agency powers like these are as important as they come.").

150. Under Congress's framework for reviewing administrative agency actions, a judicial review mechanism exists to deal with illegal agency actions. *See* Administrative Procedure Act, 5 U.S.C. § 706(2). Therefore, courts can still invalidate novel approaches that violate a statutory grant of authority.

151. *See* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (holding that no heightened arbitrary and capricious standard is necessary where agencies reverse or change, "undoing or revising" prior policies); *see also* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring) (finding the existence of a new President as generally an adequate reason for changing agency policy so long as the action is otherwise permissible under the APA).

152. *See, e.g.*, Petition for W. Virginia, *supra* note 120, at 15 (citing President Biden's commitment to reduce GHGs by 50–52 percent by 2030); *id.* at 16 (declaring that EPA's "next rule might not stop with 'supply-side activities'").

*C. Petitioners' Major Questions Arguments Illustrate the Doctrine's Imprecision*

The petitions illustrate how difficult it can be to associate individual arguments with particular major questions doctrine elements because arguments may not fit neatly into economic or political categories. For example, the loss of coal jobs or higher electricity prices may map onto both the economic and political prongs. While the economic prong is, in general, a more natural fit for many of the arguments in *ALA*, petitioners suggest another catchall category. As discussed in the next section, a pervasive theme in the major questions analysis here is simply whether the agency has significant power, irrespective of whether it is economic or political. The petitions suggest that, rather than discussing how particular arguments map onto each element of the doctrine, establishing a major question merely requires a showing that the agency would have significant power to regulate in a subject area. This new interpretation goes beyond the typical case, where a litigant must show that an actual regulation exceeds the agency's statutorily authorized power. Adopting this approach would thus render an already imprecise doctrine even more inexact.

Several reasons may explain why petitioners rarely explicitly describe how their arguments satisfy the individual major questions prongs. First, petitioners may believe, possibly correctly, that the doctrine does not require that level of precision. Under this approach, if an agency generally has a significant power, it is a major question, even if petitioners merely point to the economic and political significance in a cursory manner. Second, petitioners may believe that it helps them strategically to be noncommittal in assigning evidence within the framework. For example, if petitioners set the general tone, a judge may always accomplish a more specific mapping to their liking. Third, and similarly, petitioners may be genuinely uncertain of the requirements for satisfying the Court's doctrine. In this way, petitioners may simply punt the question to the Court to sort it out. Regardless of the reason, the clumsiness of petitioners' arguments reflects the imprecision of the doctrine itself.

*1. In Arguing that EPA Generally Has Great Power to Regulate GHGs, Petitioners Illustrate Several Concerns About Major Questions Arguments Eroding the Integrity of Judicial Determinations*

After describing the many stationary source categories that EPA could regulate, petitioners make the case that EPA generally has great power to regulate GHGs, even if it has not acted yet.<sup>153</sup> Challengers' major questions arguments

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153. See, e.g., Petition for W. Virginia, *supra* note 120, at 17 ("If this is not transformative power, it is only because (so far) EPA has stayed its own hand."); *Id.* at 14 ("[T]he decision below gives EPA more policy-making power than ever before placed in an agency's hands . . . Questions surrounding new and almost limitless agency powers like these are as important as they come."). Petitioners also employed *UARG*, a 2014 case where petitioners successfully challenged the EPA's decision-making by arguing that the major questions doctrine barred agency action in order to establish that *ALA* involves a comparatively

concerning EPA's generally large power to regulate GHGs raise several concerns and threaten the integrity of judicial decisions. In marshaling the major questions doctrine to their deregulatory ends, challengers depend on arguments that threaten the integrity of judicial decisions. First, petitioners rely on nonlegal and nonadministrative source materials in arguing that the major questions doctrine should apply to block EPA's generally large power to regulate GHGs.<sup>154</sup> Second, petitioners advocate for using the number of public comments received to determine whether a question is "major."<sup>155</sup> Third, petitioners overemphasize the "major" costs of the proposed regulation, thereby minimizing and degrading traditional consideration of the specificity of the statutory grant of authority to the responsible agency—in this case, EPA.<sup>156</sup> Finally, petitioners tie their arguments to administrative actions that are not justiciable under binding Article III case law.<sup>157</sup>

Petitioners' reliance on popular nonlegal sources to substantiate the major question here is concerning because these sources do not reflect normative types of evidence in legal administrative challenges. Those legally challenging administrative actions normally base their arguments on the official administrative record.<sup>158</sup> In a rulemaking context, challengers critique the official rule and the agency's actions in promulgating the rule.<sup>159</sup> By contrast, in building the major questions case here, petitioners and Judge Walker cite a good deal of evidence outside the administrative record.<sup>160</sup> This includes an Al Gore newspaper opinion piece describing the catastrophic, "civilization ending" stakes of mishandling the climate crisis.<sup>161</sup> Petitioners and Judge Walker also reference

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greater major question than in that case. *See, e.g.*, Petition for N. Am. Coal, *supra* note 120, at 31 (finding EPA's power, as illustrated with the CPP, "even more 'vast' than in *UARG*, with even *greater* 'economic and political significance,' yet is based on statutory text even *less* capable of bearing it") (emphasis in original) (citations omitted) (quoting *UARG*, 573 U.S. 302, 323–24 (2014)). Similarly, although North American Coal's language is extremely broad in arguing that EPA's power in *ALA* is "even more vast" than in *UARG*, its comparison to precedent at least grounds the distinction in some footing, unlike so many of the arguments. *See* discussion *supra* note 120.

154. *See* discussion *infra* notes 160–161.

155. *See* discussion *infra* note 163.

156. *See* discussion *infra* notes 166–170.

157. *See* discussion *infra* notes 176–178.

158. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (explaining that validity of agency action depends on the "contemporaneous explanation of the agency decision" and whether the agency's finding is "sustainable on the administrative record made," not based on procedures the court may find "'best' or most likely to further some vague, undefined public good").

159. *See, e.g., id.* at 528–29 (discussing controversy stemming from rulemaking procedures).

160. *See, e.g.*, Petition for N. Am. Coal, *supra* note 120, at 17, 20 (citing news articles and NGO websites). *Compare* Petition for Westmoreland, *supra* note 121, at 20, 22 (citing an NBC News broadcast reporting on President Obama's remarks on the CPP, the President's comments in a Scientific American magazine article, and the CPP White House Fact Sheet) with *ALA*, 985 F.3d 914, 1000 (D.C. Cir. 2021) (Walker, J., dissenting) (citing same White House Fact Sheet and NBC broadcast, as well as NGO websites).

161. *Compare* Petition for N. Am. Coal, *supra* note 120, at 19 (citing Al Gore, *The Climate Crisis Is the Battle of Our Time, and We Can Win*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/>



nongovernmental organization websites and news reports.<sup>162</sup> Petitioners' lack of creativity in amassing new source material to support a major question finding suggests that meeting the major questions threshold does not require a great deal of outside research. But perhaps more importantly, several of these source materials are from popular sources, rather than academic or peer-reviewed sources. And far from being official rules or legal precedents, these sources do not carry the same authoritative weight as legal authority. It is concerning how such materials may usurp the traditional role of official legal-regulatory evidence in the major questions context.

Although public comments on a proposed regulation may appear useful to gauge the general level of public engagement on an issue, comments are an imprecise indicator of whether an issue is "major." North American Coal, for example, references the large number of public comments EPA received as part of its CPP rulemaking to illustrate the vastness of EPA's power.<sup>163</sup> While agency rulemakings often receive many comments, this feature is not necessarily indicative of EPA's major power, especially if numerous comments are duplicative, fake, or manipulated.<sup>164</sup> By contrast, public comments, by their nature, represent a successful public process grounding the regulation in community consensus.<sup>165</sup> Public comments are, thus, not necessarily a meaningful indicator of whether a question is "major," and may in fact serve to justify the regulation.

Petitioners overemphasize the "major" costs of the proposed regulation, thereby deemphasizing traditional consideration of the specificity of the statutory grant of authority to the responsible agency. Kentucky, as amicus curiae for petitioners, argues that EPA's power is too great, even if the Administrator considers the limiting criteria under section 111(d).<sup>166</sup> Kentucky first generally asserts that EPA's regulatory power is major by citing its high costs.<sup>167</sup> Next, it alludes to the statutory limitations under 111(d) to maintain that even considering the statutory factors, EPA may not promulgate an acceptable GHG regulation under the section.<sup>168</sup> In so doing, Kentucky brushes aside the argument that the statute encourages reasoned agency decision making because Congress provided

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2019/09/20/opinion/al-gore-climate-change.html) with *ALA*, 985 F.3d at 1001 n.43 (Walker, J., dissenting).

162. See sources *supra* note 160.

163. Petition for N. Am. Coal, *supra* note 120, at 31 (noting 4.3 million public comments on CPP).

164. Danielle A. Schulkin, *Improving the Management of Public Comments in a Digital Age*, REG. REV. (Nov. 8, 2021), [www.theregreview.org/2021/11/08/management-of-public-comments](http://www.theregreview.org/2021/11/08/management-of-public-comments).

165. Regulations.gov, *Factsheet Regulatory Process* at 3, [https://www.nrcs.usda.gov/wps/PA\\_NRCSCConsumption/download?cid=nrcseprd1448884&ext=pdf](https://www.nrcs.usda.gov/wps/PA_NRCSCConsumption/download?cid=nrcseprd1448884&ext=pdf) (stating that public comments aid the agency in gauging the "level of acceptance or resistance" of a proposed rule in impacted communities).

166. Brief for Amicus Curiae Commonwealth of Kentucky, *supra* note 120, at 6 (maintaining that EPA may not "sidestep" a regulation barred by major questions doctrine "by conducting an analysis of costs, nonair impacts, and energy requirements").

167. *Id.*

168. *Id.* at 6–7.

specific factors.<sup>169</sup> In effect, Kentucky argues that once a party finds a regulation to be major because of its high costs, the regulation cannot be supported as a proper delegation of power from Congress, even by a statute that limits agency discretion with specifically enumerated factors, including cost.<sup>170</sup> This misguided approach would divert the Court's inquiry away from assessing whether an agency action is reasonable in light of Congress's limited grant of authority to the agency. Instead, the approach would find agencies' future actions improper, notwithstanding a discretion-limiting statutory framework.<sup>171</sup> Therefore, an expanded major questions doctrine risks diluting the significance of Congress's statutory limitations on the agency.

Finally, the petitions illustrate how the major questions doctrine incentivizes litigants to seek review of conjectural issues that are not justiciable under Article III judicial standards.<sup>172</sup> For example, Westmoreland warns that the CPP "is just the tip of the iceberg."<sup>173</sup> In making this argument, Westmoreland relies on the early and expansive language of President Biden's Tackling the Climate Crisis executive order, which outlines an all-of-government approach to address the climate crisis.<sup>174</sup> However, the executive order does not represent any binding final agency action that could be ripe for challenge under the APA.<sup>175</sup> In fact, the Biden administration has not proposed, let alone finalized, any rulemaking on power plants.<sup>176</sup> The use of aspirational executive orders to establish the predicate required for judicial review would have broad implications for the ability of future administrations to coordinate and effectively

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169. *Id.*

170. *Id.* at 6. Kentucky uses the "major" costs to reverse engineer an argument as to the ambiguity of the statutory language because it disagrees with EPA's balancing of costs and benefits. *Id.* ("The EPA justified these costs and job losses with the 'important benefits' . . . EPA's cost-benefit analysis for the CPP demonstrates the vast significance of the issue."). This is all despite the fact that the statute itself requires the administrator to consider costs, arguably the most important factor to litigants challenging agency rulemaking. This type of grievance, over the agency's cost-benefit balancing, would normally be settled under the Court's deferential framework of judicial review for arbitrary and capricious agency rulemaking. *See* discussion *infra* note 222 (discussing *Chevron* deference).

171. *See infra* text accompanying note 227 (providing support for this approach).

172. *See, e.g.,* *Poe v. Ullman*, 367 U.S. 497, 504 (1961) (discussing the judicially created doctrines of standing, ripeness, and mootness as meant to limit judicial power, endorsing the "primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action").

173. *See* Petition for Westmoreland, *supra* note 121, at 21 (quoting Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021) (providing the Biden administration's goal of reducing "climate pollution in every sector of the economy").

174. *Id.*

175. Administrative Procedure Act, 5 U.S.C. § 704.

176. *See* GOFFMAN, *supra* note 37 (providing EPA's understanding that states need not submit plans to comply with either the CPP nor ACE rules because the D.C. Circuit decision did not leave either rule in place, and for the practical reasons that the submission deadlines have passed and "emission reduction goals that the CPP set for 2030 have already been achieved" due to electricity industry changes).

implement the policy agendas voters elected them to pursue.<sup>177</sup> Perhaps even more troubling, however, is how the Court's validation of the major questions doctrine, in this case, would erode longstanding judicial doctrines that ensure the "case or controversy" required for Article III judicial review.<sup>178</sup> Given that no justiciable issue exists in this case, the Court's grant of certiorari further illustrates the dangers the major questions doctrine poses to traditional judicial norms.

2. *Petitioners Largely Emulate Judge Walker's Blunt Approach in Establishing Economic Significance by Failing to Consider Important Public Benefits*

Petitioners in *ALA v. EPA* largely repeat Judge Walker's arguments in the D.C. Circuit as to the economic costs of the CPP, while neglecting to evaluate regulatory benefits.<sup>179</sup> North American Coal claims that the CPP "would have engendered billions (or even hundreds of billions) in compliance costs and price

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177. While executive orders commonly coordinate executive agencies by setting an administration's aspirational policy agenda, it is quite a stretch to claim that the unrealized fruits of such policy statements can be reviewed preemptively before any concrete agency actions have emerged.

178. See U.S. CONST. art. III, § 2; Brief for U.S. Senators, *supra* note 126, at 6–7 (discussing the lack of case or controversy and justiciability for the case at hand). As a result, the Court will need to dispose of the obvious mootness problem. Perhaps the Court will accept Westmoreland's suggestion that the administration's conduct evidences a controversy subject to repetition but evading review. Although Westmoreland does not explicitly reach the mootness issue, its language hints at this exception to the mootness doctrine. See Petition for Westmoreland, *supra* note 121, at 20 ("The Petition Presents Recurring Issues of Vast Importance that Require Prompt Resolution by This Court."). A voluntary cessation argument could be made as well, although that poses challenges because the CPP's reimposition at this time would have no effect.

179. See, e.g., Petition for N. Am. Coal, *supra* note 120, at 31 (citing National Mining Association Economic Analysis relied on by Judge Walker); Petition for N. Dakota, *supra* note 120, at 28 (citing Judge Walker's characterization of industry analysis with \$214 billion and \$64 billion figures); *id.* (quoting Judge Walker on the CPP as "one of the most consequential" rules ever, requiring industry CO2 reduction of 32 percent, or emissions from 166 million cars); Petition for Westmoreland, *supra* note 121, at 21 (citing wholesale electricity estimates from the industry-funded National Mining Association analysis). West Virginia argues that EPA's forthcoming rule threatens "two-thirds of the nation's total electricity-generation capacity." Petition for W. Virginia, *supra* note 120, at 14. To support its claim, West Virginia cites to a 2021 Energy Information Administration report showing that coal and natural gas make up two-thirds of our national energy mix. *Id.* (citing EIA, ELECTRIC POWER ANNUAL 2019 tbl.4.3 (Feb. 2021)). The petitioner argues that the agency's regulation will shutter power plants, and as a result, shut down coal mines and natural gas development. *Id.* For West Virginia's argument to logically flow, EPA would need to promulgate a rule targeting both coal and natural gas to such an extent as to require the closure of power plants, mines, and natural gas production. This kind of rule is probably very unlikely. See, e.g., Ben Lefebvre et al., *Biden's Pro-Car, Pro-Gasoline Moves Leave Green Allies Fuming*, POLITICO (Aug. 15, 2021), <https://www.politico.com/news/2021/08/15/biden-climate-fossil-fuels-504464> (reporting on the Biden administration's calling on OPEC and Russia to increase oil production, deciding not to block pipelines, and approving drilling on leased federal lands); Emma Newburger, *Biden Administration Proposes Oil and Gas Drilling Reform But Stops Short of Ban*, CNBC (Nov. 26, 2021), <https://www.cnbc.com/2021/11/26/biden-recommends-reforms-to-oil-and-gas-drilling-stops-short-of-ban.html> (reporting on the Biden administration's decision to continue leasing oil and gas on public lands). Even so, when attacking a hypothetical rule, a litigant may highlight sweeping consequences, even if such consequences are extremely unlikely.

hikes, as well as tens of thousands of lost jobs.”<sup>180</sup> In keeping with Judge Walker’s general approach, Westmoreland relies on EPA’s Regulatory Impact Analysis to establish the CPP’s estimated costs, but does not refer to its significant benefits.<sup>181</sup> Thus, petitioners do not add significant new economic arguments and instead emulate those of Judge Walker.

Some petitioners compare the economic costs in *ALA* with those of other major questions cases—an approach Judge Walker did not employ.<sup>182</sup> Yet, petitioners nevertheless compare precedents in a very imprecise manner.<sup>183</sup> Although attempts to ground economic arguments in case law offers the theoretical benefit of greater decisional predictability, as petitioners demonstrate,

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180. See Petition for N. Am. Coal, *supra* note 120, at 16 (citing NERA ECON. CONSULTING, POTENTIAL ENERGY IMPACTS OF THE EPA PROPOSED CLEAN POWER PLAN 21 (Oct. 2014), [http://www.globalwarming.org/wp-content/uploads/2014/10/NERA\\_ACCCE-CPP-ReportFinal-Oct-16-20141.pdf](http://www.globalwarming.org/wp-content/uploads/2014/10/NERA_ACCCE-CPP-ReportFinal-Oct-16-20141.pdf) (providing industry-commissioned analysis of CPP)); *id.* at 31 (citing EPA, *Regulatory Impact Analysis*, *supra* note 77, at 3-22).

181. Compare Petition for Westmoreland, *supra* note 121, at 21 (citing EPA, *Regulatory Impact Analysis*, *supra* note 77, at 6-25 (describing closure of coal plants, decreased coal production, and decreased jobs in coal and natural gas industries)), with EPA, *Regulatory Impact Analysis*, *supra* note 77, at ES-22, tbl.ES-9, (providing “Monetized Benefits, Compliance Costs, and Net Benefits Under the Rate-Based Illustrative Plan Approach,” listing, for example, climate benefits of \$20 billion and air quality health co-benefits of \$14 to \$34 billion in 2030 at a 3 percent discount rate, as well as compliance costs of \$8.4 billion at a 5 percent discount rate). See also discussion *supra* Part II.B.3, at 20–24 (considering omission of benefits in Judge Walker’s major questions analysis). This evidence underscores the concern that judges may apply the major questions doctrine in a manner that overly fixates on costs. Whereas the EPA must demonstrate the reasonableness of the rule by balancing its costs with other statutorily enumerated factors, a party challenging a rule as barred as a major question may simply summarize the costs without considering whether they are justified by greater benefits. See Clean Air Act, 42 U.S.C. § 7411(a)(1) (requiring EPA consideration of three enumerated factors: cost, “any nonair quality health and environmental impact and energy requirements”). In rules protecting the nation’s health and welfare, such as those promulgated under the authority of the CAA, agencies are tasked with conducting a serious analysis of the impacts of the regulatory action. See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (defining the hard look review standard as requiring the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made”). With so many Congressional delegations meant to protect similar public interests, it is difficult to imagine how administrative agencies could craft meaningful regulatory solutions, by their nature seeking to achieve public benefits, if those very benefits count for nothing in the judicial calculation. See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C. § 651(b) (stating purpose to provide for “safe and healthful working conditions and to preserve our human resources”); Resource Conservation and Recovery Act, 42 U.S.C. § 6902(a) (providing purpose to protect human health, the environment, “and to conserve valuable material and energy resources”); National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30101 (stating purpose to “reduce traffic accidents and deaths and injuries” from such accidents).

182. *ALA*, 985 F.3d 914, 1000–01 (D.C. Cir. 2021) (Walker, J., dissenting) (discussion of economic major questions element).

183. For example, West Virginia and North Dakota compare the costs at stake in *ALA* with those of previous major questions decisions. West Virginia looks at the big picture, noting that while *King v. Burwell* involved “only” billions of dollars, the CPP involved hundreds of billions of dollars. Petition for W. Virginia, *supra* note 120, at 28 (citing *King v. Burwell*, 576 U.S. 473, 486 (2015)). North Dakota compares the number of sources with permits and administrative costs to the figures in *UARG*. Petition for N. Dakota, *supra* note 120, at 31 (finding the number of sources required to permit increasing from 15,000 to 6.1 million, administrative costs rising to \$21 billion, and permitting costs to \$147 billion).

the comparison of costs in completely different contexts and with great imprecision reveals the limited value of this tool in practice.

Thus, petitioners' economic analysis is largely similar in approach to Judge Walker's in the level of abstraction and in its avoidance of any discussion of benefits.

3. *Petitioners Fail to Raise Concrete Arguments to Demonstrate the Political Significance of the Issue, Calling into Question the Utility of This Element*

Petitioners fail to explicitly address political significance.<sup>184</sup> The following sections discuss the limited utility of this element by commenting on Westmoreland and Kentucky's arguments in particular.

a. *Political Significance Discussion in Westmoreland's Petition Has Little Analytical Value, Yet Undermines the Executive's Communication of Important Policy Goals*

Westmoreland demonstrates how the political element inquiry may hamstring administrations' attempts to communicate important policy goals to the American people. If policy statements, such as the broad language of the Biden climate executive order cited by Westmoreland, may aid challengers in satisfying the political significance prong of the major questions doctrine, cautious administrations would be wise not to disclose such goals.<sup>185</sup> This would likely incentivize more opaque processes for promulgating rules—a trend that runs counter to ideal democratic governance.

Westmoreland's oblique references to the political significance element show how the element is analytically unhelpful. Westmoreland does not explicitly contend that the case presents a politically significant issue. Instead, Westmoreland argues that because the energy policy may uniquely disadvantage its business—coalfired energy—the major questions doctrine is inevitably triggered.<sup>186</sup> Additionally, Westmoreland merely telegraphs ominous warnings rather than attempting to establish the political controversy of climate change, or perhaps with greater effort, the political dynamics of the U.S. wholesale energy

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184. For example, North American Coal addressed the politics of the issue obliquely by presenting failed climate change legislative attempts as background elsewhere in its petition. Petition for N. Am. Coal, *supra* note 120, at 21. In addition, its petition also mentions Congress's incentive to pass difficult questions to the executive agencies, further illustrating its skepticism towards agency statutory interpretations. *Id.* (citing *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting)). Although it does not clearly analyze the element, and while not a petitioner, Kentucky comes closest to illustrating the political significance element. Brief for Amicus Curiae Commonwealth of Kentucky, *supra* note 120, at 12–13.

185. Petition for Westmoreland, *supra* note 121, at 21 (citing *Tackling the Climate Crisis at Home and Abroad*, Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Jan. 27, 2021)).

186. Petition for Westmoreland, *supra* note 121, at 21–22 (“The consequences of setting a national energy policy designed to destroy a particular industry (coalfired energy) are no less momentous than the economic ramifications.”).

market.<sup>187</sup> The petitioner faults EPA's yet-to-be-enacted rule because it subordinates "energy diversity, consumer protection, reliability, and other policies in current state dispatch law."<sup>188</sup> It is difficult to assess these considerations as political issues, however, because Westmoreland does not explain the connection between its general policy preferences and the major questions political element.<sup>189</sup> Thus, Westmoreland's treatment of the political significance element illustrates its limited analytic utility.

Judicial acceptance of major questions arguments that take presidential communications as evidence of political significance also risks hamstringing administrations.<sup>190</sup> Presidential communications have been important mechanisms for Americans to stay informed and ensure executive accountability.<sup>191</sup> Along these lines, presidential statements influence Americans' perceptions of an administration, and, in turn, the administration's political favorability as measured in periodic polling.<sup>192</sup> This active two-way communication has been an essential check to prevent executive overreach that is out of line with the prevailing views of the American public.<sup>193</sup> Once the Court admits preemptive review based on presidential policy statements, however, Americans' oversight function, effectuated through the "fourth estate" role of the

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187. *Id.*

188. *Id.* at 22.

189. Based on the petition, the reader would have no frame of reference to understand why lower-carbon solutions would pose power reliability issues, let alone be issues of great political significance. *Id.* For example, the petition does not mention renewable intermittency, nor how it is currently overcome by supplementing the grid with stable generation sources to cover peak demand, such as hydropower, or other types of renewables to boost energy portfolio resilience. See Amory B. Lovins & M. V. Ramana, *Three Myths About Renewable Energy and the Grid, Debunked*, YALE ENV'T 360 (Dec. 9, 2021), <https://e360.yale.edu/features/three-myths-about-renewable-energy-and-the-grid-debunked>. Likewise, we have no citations to any research showing higher retail electricity prices for lower-GHG emitting power options, which are now more affordable than coal-generated electricity. *Levelized Cost of Energy and Levelized Cost of Storage 2019*, LAZARD (Nov. 7, 2019), <https://www.lazard.com/perspective/lcoe2019>. And, assuming Westmoreland's hypothetical Biden regulation is envisioned to be a proposal along the lines of the CPP, or in the alternative, anything else the Biden EPA could promulgate under the CAA's cooperative federalism approach, the states ultimately set the terms for the mechanisms achieving the GHG targets. See ALA, 985 F.3d 914, 949 (D.C. Cir. 2021) (explaining the cooperative federalism structure governing § 111(d)); GOFFMAN, *supra* note 37 (describing EPA's understanding that the D.C. Circuit decision leaves neither the ACE Rule nor the CPP in place, "and thus no CAA section 111(d) regulation[ ] in place with respect to greenhouse gas (GHG) emissions from electric generating units"). This allows states the flexibility to accommodate other dispatch policies in their implementation plans.

190. Westmoreland cites to presidential statements in a variety of informal contexts. See sources *supra* note 160 and accompanying text.

191. See, e.g., *The Fireside Chats*, HISTORY.COM (Apr. 23, 2010), <https://www.history.com/topics/great-depression/fireside-chats> (describing how President Roosevelt's chats reassured Americans during the 1930s depression, boosting public confidence "and Roosevelt's approval rates").

192. *Id.*

193. See, e.g., Kate Harris & Michael Gonchar, *Analyzing the Relationship Between the Press and the President A Lesson Plan*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/learning/lesson-plans/analyzing-the-relationship-between-the-press-and-the-president-a-lesson-plan.html> (reporting on presidential communication with Americans, including through news conferences, where presidents use "journalists as a conduit of information" to the American people).

press, breaks down.<sup>194</sup> In this way, judicial reliance on presidential statements of policy to substantiate the major “political” dynamics of an issue has the perverse incentive of increasing the opacity of executive policy formation, reducing the openness of democracy, and stifling the citizen’s oversight role.

According to Westmoreland’s petition, parties that seek to challenge agency action by invoking the major questions doctrine may effectively do so merely by implying, without substantiation, that issues have an aura of significance.<sup>195</sup> Such a tenuously established legal element has very little analytic value and, if accepted, may serve to deter presidential statements communicating future policy priorities.

b. Kentucky Only Obliquely Alludes to Political Significance in the Context of Another Legal Issue

Kentucky, amicus curiae supporting petitioners, provides another example of the lack of persuasive argumentation on the political significance element in *ALA*. Kentucky obliquely references political significance in its argument on another legal issue, even though it too fails to substantiate the element in its major questions analysis.<sup>196</sup>

In the context of a disproportionate impacts argument, Kentucky argues that EPA’s regulatory power would disproportionately impact certain coal-producing states.<sup>197</sup> For the state, this is further evidence of why Congress, “rather than the EPA [ ] should consider issues relating to climate change and the power sector.”<sup>198</sup> Kentucky’s analysis of political significance themes illustrates how the major questions doctrine encourages parties to merely state unsupported opinions rather than provide concrete evidence.

Kentucky also argues that the political process is absent in executive agency rulemaking.<sup>199</sup> Amicus’ position, however, fails to address the important

194. See, e.g., MATTHEW GENTZKOW ET AL., *The Rise of the Fourth Estate How Newspapers Became Informative and Why it Mattered*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA’S ECONOMIC HISTORY* 188 (Edward L. Glaeser & Claudia Goldin eds., 2006) (describing the importance of the free press to democracy). The President’s disclosure of policy goals initiates a feedback loop with the American people gauged through polling. The looming threat of judicial advisory opinions chills policy adjustments. This in turn degrades the quality of the feedback loop.

195. Although Westmoreland presents failed climate legislation to substantiate the ambiguity of section 111(d), it does not raise this evidence to demonstrate the political significance of the issue. See Petition for Westmoreland, *supra* note 121, at 36–37. Thus, Westmoreland shows its comprehension of the traditional legal tools available to establish textual ambiguity. *Id.* (arguing that § 111(d) is ambiguous by exhausting the traditional tools of statutory interpretation, including Congress’s failure to communicate a precise intent). However, when it comes to arguing for political significance, perhaps because there are no “traditional tools,” Westmoreland completes no analysis.

196. Brief for Amicus Curiae Commonwealth of Kentucky, *supra* note 120, at 9–12.

197. *Id.* at 12–16.

198. *Id.* at 15–16. Kentucky’s statements are unpersuasive because they are broad opinions that are insufficiently compelling to substantiate a complete prohibition on agency regulation.

199. *Id.* at 16 (remarking that policy decisions should be left to Congress as opposed to “administrative agencies . . . unaccountable to the electorate”).

political consequences of the democratic election of the president, the ultimate leader of executive agency activities.<sup>200</sup> Kentucky's imprecise claims show how the major questions doctrine invites litigants to weigh in on the appropriate level of political representativeness of the various branches. While arguments over the right amount of power are certainly relevant to the separation of powers, that doctrine is an independent ground already available to litigants. Adding an additional "political" checkbox for the major questions doctrine is thus unnecessary, imprecise, and of limited analytical value.

The near-complete lack of analysis of the political dimension of the major questions doctrine in these petitions calls into question the nature and utility of this requirement. It appears that if litigants can establish the major question without arguing the issue's political importance, the political dimension is either determined solely at the judge's discretion or is not an essential element of the doctrine. Either way, this undermines one of only two possible routes under the Court's doctrine to imposing much-needed guardrails.

*D. Although Petitioners Acknowledge Doctrinal Ambiguity and Hint at Potential Guideposts, Imposing Additional Factors onto the Major Questions Doctrine Will Not Effectively Limit Judicial Discretion*

*1. Litigants Such as Petitioners Will Continue to Build Imprecise Major Questions Arguments Until the Court Retires the Doctrine*

Although litigants directly concede that ambiguity pervades the major questions doctrine and call on the Court to settle the confusion, they must still rely on the flawed doctrine as it is the current law. West Virginia, for example, directly confronts the confusion surrounding the major questions doctrine, calling on the Court to resolve whether the doctrine "exists, what principles animate it, and how clearly Congress must speak to satisfy it."<sup>201</sup> West Virginia demonstrates this confusion by providing examples of inconsistencies in the doctrine's application in four circuits.<sup>202</sup> The concerns West Virginia raises include: the inconsistent approaches of different circuits applying the doctrine to a particular subject matter;<sup>203</sup> the interaction between major questions and other doctrines like nondelegation; the uncertain status of the doctrine; and the avoidance of the doctrine due to the difficulties judges face when applying it.<sup>204</sup> Similarly, Westmoreland concedes that "[t]here may be some cases where the question of the minor versus major nature of a rule is reasonably disputable."<sup>205</sup> Its petition advocates for the Court to devise "guidance" to settle circuit

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200. *Id.*

201. Petition for W. Virginia, *supra* note 120, at 19.

202. *Id.* at 18.

203. *Id.* (finding inconsistency, for example, on whether telecommunications issues implicate the doctrine).

204. *Id.*

205. Petition for Westmoreland, *supra* note 121, at 35.



disagreement on the doctrine's scope.<sup>206</sup> Although litigants acknowledge the doctrine's significant ambiguity and call on the Court to clarify it, as petitioners' arguments illustrate, litigants will continue to craft imprecise major questions arguments until the Court decides to retire the doctrine.

2. *While Possible Additional Factors Would Seem to Limit Judicial Discretion, In Practice, Such Factors Would Not Be Meaningful Constraints*

Although the Court could offer helpful guidance or impose additional limiting factors to the major questions doctrine, these devices would not effectively limit judicial discretion in practice. The lack of any specific analysis from petitioners on the political significance element highlights the inherent “I know it when I see it” nature of this doctrine.<sup>207</sup> Conversely to petitioners' arguments, expanding the major questions doctrine under such circumstances, even with guidance or factors, will not lead to greater regulatory certainty.<sup>208</sup> Instead, continued use of the doctrine will produce inconsistent judgments subject to the varying whims of individual judges.

The following analysis considers the limited value of petitioners' proposals for adding two additional factors to the Court's major questions framework. First, petitioners suggest that a new agency interpretation should be a factor counseling against agency rulemaking. Second, petitioners call on the Court to consider the adequacy of agency expertise.

a. *Adding a New Agency Interpretation Factor Would Merely Reinforce the Existing Major Questions Doctrine Without Adding Any Meaningful Limitation*

It would not be especially useful to add to the major questions analysis a “new agency interpretations” factor, as petitioners suggest,<sup>209</sup> because a new

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206. *Id.* at 22–23 (citing confusion in several circuits regarding scope and frequency of major questions issues).

207. See discussion *supra* pp. 51–56 (regarding lack of political element analysis in petitions).

208. See *Petition for Westmoreland*, *supra* note 121, at 23–24 (calling for the Court to intervene to correct the “regulatory uncertainty” for industry and states); *Petition for W. Virginia*, *supra* note 120, at 19.

209. Petitioners here emphasized the newness of using section 111(d) for controlling power plant GHGs. See *Petition for N. Am. Coal*, *supra* note 120, at 32 (calling § 111(d) “virtually unused for five decades”); *Petition for W. Va.*, *supra* note 120, at 28 (remarking on the CPP as a power not exercised before). North Dakota, for example, placed special emphasis on this consideration in its argument that the imposition of the CPP as a changed regulatory mechanism was an “overthrow” of the provision’s “longstanding structure and design.” *Petition for N. Dakota*, *supra* note 120, at 31 (quoting *UARG*, 573 U.S. 302, 321 (2014)). North Dakota would thus hold that a new use for a now-unused statutory provision, a transfer to a new application, or potentially, the use of a new regulatory technique, would be barred. Although this approach finds some support in the Court’s precedent, if taken to an extreme, it would have the negative effect of cutting off agencies’ ability to make rules using currently unused statutory provisions. See *UARG*, 573 U.S. at 321; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Again, it is notable how the major questions doctrine and potential factors implicitly favor

agency interpretation, by its nature, is already the type of rule susceptible to a major questions challenge.<sup>210</sup> A rule, and hence the legal interpretation it was based on, would presumably be insulated from challenge under the major questions doctrine if the promulgated rule survived the gauntlet of judicial review and was allowed to stand the test of time.<sup>211</sup> It follows that a new statutory interpretation by its nature makes an agency especially vulnerable to major questions attacks. To add to this vulnerability, litigants may frame a rule as “new” in many ways: if it imposes greater regulatory costs, covers a wider scope, or has other subtle variations in the method of regulation.<sup>212</sup> Thus, a reviewing court may still have great discretion in determining whether a rule is “new.”

Adding new agency interpretation as a factor in the major questions analysis, though, would not add any meaningful limitation in practice beyond the Court’s current framework.<sup>213</sup> In addition, explicitly adding this factor would have the negative effect of constraining agencies’ ability to employ statutory provisions, such as section 111(d), to accomplish beneficial purposes.

b. Lack of Agency Expertise Also Fails to Serve a Meaningful Discretion-Limiting Function Because the Factor May Be Established with Artful Yet Arbitrary Framing of the Issue

Lack of agency expertise is also of limited value since artful framing allows litigants to craft arbitrary arguments to satisfy this factor. Petitioners in *ALA* argued that a misalignment between the regulated subject matter and agency knowledge added to the major questions nature of the issue. Specifically, petitioners found that EPA should not regulate under a framework like the CPP since the agency has the expertise to regulate air pollution, not the electrical grid.<sup>214</sup>

Petitioners derive support from the Court’s precedents for the proposition that issues may be especially barred by the major questions doctrine by involving

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restricting regulation and narrowing the role of regulatory agencies, rather than seeking a counterbalance in the benefits gained from changing regulatory frameworks.

210. That a rule is a new interpretation is effectively already a part of the nature of a major questions challenge. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156, 160 (2000) (invalidating new agency interpretation regulating tobacco where FDA’s previous position was that it lacked authority to regulate tobacco).

211. This would not be the case, however, under an expanded major questions doctrine, where existing agency regulations would also be on the judicial chopping block.

212. *See supra* text accompanying note 209.

213. The petitioners vary on how a new agency interpretation fits within a major questions argument, with North Dakota at one extreme maintaining that it is dispositive of invalid agency action and other petitions considering it as a factor contributing to the larger invalid agency interpretation. *See* Petition for N. Dakota, *supra* note 120, at 31; Petition for N. Am. Coal, *supra* note 120, at 32; Petition for W. Virginia, *supra* note 120, at 28.

214. *See, e.g.*, Petition for N. Dakota, *supra* note 120, at 28 (arguing that the CPP’s generation shifting approach inappropriately transferred EPA’s regulatory authority from air pollution to the electrical grid).

novel subjects outside agency experience.<sup>215</sup> Defining what is inside and outside agency experience, however, involves much discretion. In this case, petitioners' framing of the issue as impacting the energy sector is arbitrary and simplistic. Petitioners could have instead emphasized the connection between limiting power plant GHG emissions and achieving the CAA's purposes: reducing air pollution while improving health and wellbeing.<sup>216</sup> Such artful framing illustrates how this factor still allows for great discretion in establishing major questions. As such, agency expertise also does not add a meaningful limitation to improve the integrity of major questions determinations.

*E. Summary of Critique of Major Questions Doctrine in ALA Certiorari Petitions*

Petitioners' imprecise and hyperbolic arguments demonstrate the significant risks to judicial integrity posed by the Court's continued reliance on the major questions doctrine. As discussed above, petitioners' arguments are especially imprecise because this case does not deal with a regulation, but rather with EPA's stated intention to regulate the area in the future.<sup>217</sup> Petitioners believe that the mere proposition of an agency's potential rulemaking, not a final rule or administrative record, may raise a major question sufficient to bar regulation in that area. This interpretation of the major questions doctrine raises doubts about the objectivity of the judicial process, the validity of judicial interpretations, and the limited judicial role.

Petitioners' analyses demonstrate the incredible vagueness that the doctrine promotes. Petitioners generally do not even reference, let alone substantially engage with, political significance, which is one of only two required major questions doctrine elements. As one petitioner concedes, the major questions doctrine is not the kind of test that supports clear judicial determinations that lower courts can apply consistently going forward.<sup>218</sup> The framework invites the "I know it when I see it" quality that cannot be overcome with factors or further clarification, inviting, and perhaps requiring, judicial intemperance.

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215. See Petition for N. Am. Coal, *supra* note 120, at 32 (citing *King v. Burwell*, 576 U.S. 473, 474 (2015)). In *King v. Burwell*, the Court found it "especially unlikely" for Congress to have intended an implicit delegation to the IRS because it had no prior experience with health insurance policy. *Burwell*, 576 U.S. at 486. West Virginia, citing *Gonzales v. Oregon*, similarly argued that it would be an "unusual" type of authority for the agency, which lacks expertise to consider the energy sector's economic, infrastructure, and reliability issues. Petition for W. Virginia, *supra* note 120, at 28 (citing *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)). In *Gonzales*, the Court held that Congress could not have delegated to the Attorney General the power to make policy on physician-assisted suicide due to the importance of the issue as well as the "broad and unusual" nature of the authority. *Gonzales*, 546 U.S. at 267.

216. See Clean Air Act, 42 U.S.C. § 7401(b)(1).

217. *Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection Agency Before the S. Comm. on Env't & Pub. Works*, 117th Cong. 42–43 (2021) (stating intention to undertake new power plant GHG rulemaking on a "clean slate").

218. Petition for W. Virginia, *supra* note 120, at 18–19.

By its definition, major questions review invites judicial bias because it effectively asks a judge to decide whether they view the issue as important. Strangely, upon this determination, agency authority is extinguished rather than granted greater deference. The doctrine may thus serve as a convenient proxy for judges who favor blocking executive agency intervention in a particular subject matter.<sup>219</sup> Major questions doctrine in this context runs the great risk of empowering judicial bias while suppressing the executive and legislative branches in contravention of the separation of powers.

Petitioners illustrated here, relieved of their normal duty to connect their critique to an administrative record, that the heart of their argument—the “something” that is “major”—is not really the agency’s rule. Unburdened by an administrative record, petitioners may strategically focus on undermining agency power itself.<sup>220</sup>

If the major questions doctrine is divorced from the reality of concrete rulemaking, it will cast doubt on the integrity of judicial decision making. Approving the doctrine for purely advisory use would only further empower the judiciary to express its ideological impulses toward a diminished administrative state without even a minimum of filtration through the administrative record.<sup>221</sup>

#### CONCLUSION

As this Note has shown, the Court’s major questions doctrine is deeply flawed and should be renounced. There are several reasons for this conclusion: the doctrine lacks analytical rigor; it aggrandizes the judiciary at the expense of constitutionally mandated separation of powers principles; it is unnecessary, since existing mechanisms provide more than adequate judicial review of administrative actions; and the doctrine compromises the legitimacy of judicial decision making.

First, the doctrine lacks analytical rigor. Major questions doctrine deviates from traditional judicial methods of analysis, such as statutory construction and

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219. Curiously, this design advantages only those seeking to constrain governmental authority. For example, a judge with an ideological interest in expanding agencies’ authority cannot utilize the doctrine to realize her goal. See Heinzerling, *supra* note 75.

220. For a compelling argument describing the history of dark money-funded attacks on executive agency regulation, see Brief for U.S. Senators, *supra* note 126, at 13–20.

221. See *supra* text and sources accompanying note 127. Given the highly irregular context of the Supreme Court’s granting of certiorari where no rule currently limits, or for that matter, ever limited the regulated industry in this setting, it is impossible to avoid commenting on the optics. See Brief of Non-Governmental Organization, *supra* note 95, at 10. For those concerned with the judicial integrity of the bench, it is startling to witness the Court’s appearing to bend over backwards to grant such irregular review precluding power plant GHG regulation not once, but twice. See *U.S. Supreme Court Unexpectedly Stays Clean Power Plan*, NAT’L L. REV. (Feb. 11, 2016), <https://www.natlawreview.com/article/us-supreme-court-unexpectedly-stays-clean-power-plan>; Bob Sussman, *The Supreme Court’s Clean Power Plan Missteps*, BROOKINGS INST. (Feb. 12, 2016), <https://www.brookings.edu/blog/planetpolicy/2016/02/12/the-supreme-courts-clean-power-plan-missteps/> (“For the Supreme Court to intervene after the lower court had denied a stay and without waiting for it to examine the legality of the CPP is unprecedented, yet its brief order provides no rationale for this extraordinary step.”).

common law stare decisis. Instead of probing statutes to search for congressional intent through a deep analysis of statutory meaning, the judicial exercise of determining whether a regulation is “major” is untethered from the statute. In addition, the Court’s doctrine is divorced from traditional administrative law judicial review. Traditional review assesses the administrative record for the agency’s justifications, factfinding, consideration of public comments, consideration of alternatives, and consideration of any statutorily enumerated factors.<sup>222</sup> Major questions analysis shifts the focus from the reasonableness of the agency’s statutory interpretation to the Court’s prerogatives. Although this aspect of the doctrine serves judicial efficiency by allowing judges to summarily decide issues without the traditional constraints of administrative review, it runs the risk of undermining reliance interests and the predictability of judicial outcomes. Failure to limit review to the evidence presented in the administrative record allows judges to expand the aperture of allowable materials, greatly increasing discretion, and thus, the potential for judicial bias. This variety of judicial review can potentially upset the reliance interests of stakeholders of all types and inject great uncertainty into the regulatory environment.

Second, the major questions doctrine aggrandizes the judiciary, encroaching on the powers of the executive and legislative branches in violation of the Constitution’s separation of powers. Judge Walker’s dissent and the petitions for certiorari offer examples for parties independently determining the meaning of a statutory provision, overriding agency interpretation and congressional intent. Major questions doctrine devalues agency justifications for the regulation. It also sidelines congressional intent, as derived from the traditional tools of statutory construction, such as plain language, statutory structure, and legislative history.<sup>223</sup>

The aggrandizement of judicial power will likely lead to negative outcomes for the other constitutional branches. Executive agency ossification is likely to increase as agencies question what regulations the Court will invalidate under the major questions doctrine. Consequently, agencies may regulate and enforce existing rules in fewer subject areas, reducing important protections for individual citizens and regulated actors. In addition, the doctrine looms over congressional legislation, paradoxically creating a disincentive for an already glacial legislative body to pass laws on important issues. An obstructed Congress cannot pass clarifying laws that would respond to and potentially ameliorate the concerns that animate the major questions doctrine. As a result, the Court’s doctrine creates perverse incentives for blocking legislative attempts to clarify the law, further emboldening anti-regulatory ideologies. Many statutory

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222. See, e.g., Administrative Procedure Act, 5 U.S.C. § 706(2) (providing the basis for arbitrary and capricious judicial review); *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing the standard for hard look review of agency decisions under the arbitrary and capricious framework); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984) (recognizing deference for reasonable agency interpretations of ambiguous statutory language).

223. See *infra* note 227 and accompanying text (discussing statutory tools of construction).

frameworks like the CAA are subject to potential judicial invalidation where they do not specify the precise terms of the regulatory plan. In these ways, the Court's expanded power under the major questions doctrine has a chilling effect on the entire legislative-regulatory apparatus, violating the separation of powers.

Third, other existing judicial review mechanisms provide for more than adequate judicial oversight of administrative actions, ensuring proper congressional delegation, maintenance of the separation of powers, and balancing of public benefits with impacts to the regulated community.<sup>224</sup> Courts have a robust arsenal of tools to review agency actions. Courts must follow the procedural rules Congress provided in the Administrative Procedure Act.<sup>225</sup> In addition, courts have created judicial standards to interpret the Administrative Procedure Act provisions, ensure reasoned decision making, and guarantee constitutional delegations of interpretive power to the agency.<sup>226</sup> Courts may also use the traditional tools of statutory construction<sup>227</sup> to decide whether

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224. See, e.g., *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part) (opining that the Court's application of the "beefed-up" APA § 706 arbitrary and capricious standard of judicial review increases the APA requirements to such an extent that it may be itself arbitrary and capricious, transforming rulemaking from a "simple and speedy practice" into a "laborious, seemingly never-ending process," curtailing agencies' ability to "rapidly and effectively" respond to new issues).

225. See Administrative Procedure Act, 5 U.S.C. § 553 (providing procedural requirements for informal rulemaking, including notice periods, publication in the Federal Register, opportunity for public to comment on proposed and final rules, and the requirement that an agency provide a "concise and general statement" of basis and purpose of the rule); *Id.* at § 706(2) (providing the basis for arbitrary and capricious judicial review).

226. See, e.g., *State Farm*, 463 U.S. at 43 (providing standard for hard look review under arbitrary and capricious framework); *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1105, 1107 (4th Cir. 1985) (requiring agency to reopen comment period and reconsider comments if final rule departs in substantial way from proposed rule); *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (requiring agency to respond to significant issues raised in public comments); *Chevron*, 467 U.S. at 844, 865 (recognizing deference for reasonable agency interpretations of ambiguous statutory language).

227. Traditional tools of statutory construction include plain meaning, statutory context and structure, legislative history, legislative purpose, and canons of construction, such as clear statement rules. See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594–600 (2004) (using tools of construction including plain language, legislative purpose, and legislative history to find no statutory ambiguity under *Chevron* step one). It could be argued that the major questions doctrine is simply a flavor of the Court's clear statement rules, such as the "no elephants through mouseholes" canon, and that the Court could achieve the same goal through these tools in the absence of the major questions doctrine. That is not necessarily true. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 244–45 (2006) (describing various ways of understanding the relationship between the major questions doctrine and *Chevron*, including thinking of the major question doctrine as a type of nondelegation canon that effectively overrides *Chevron* analysis altogether); see also *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (finding *Chevron* analysis inapplicable because the statutory interpretation at issue posed a major question that precluded finding an implicit delegation to the agency to "fill in the statutory gaps"). Tools of statutory construction in the administrative law context are typically used in the service of another discretion-limiting framework, for example, the Court's *Chevron* doctrine. Operating under the *Chevron* doctrine, the Court could employ a clear statement rule as a factor with other tools in a larger analysis to determine whether to defer to an agency. Under major questions, on the other hand, the clear statement tool is potentially the only tool the Court uses. Thus, major questions doctrine places much greater weight on a

agency interpretations are reasonable in light of Congress's statutory intent.<sup>228</sup> These mechanisms provide more than adequate judicial oversight.

Finally, the major questions doctrine compromises the integrity of judicial decision making by explicitly furthering a naked conservative deregulatory ideology.<sup>229</sup> The major questions doctrine reinforces the public perception of the judiciary as a politicized entity. As the above analyses show, courts are granted wide discretion to endorse extra-record evidence to build a case for a major question. With that discretion comes the opportunity for greater bias to infiltrate judicial decision making. Public perception of the legitimacy of judicial review is undermined when inappropriate ideological considerations enter the calculus, such as judicial worldviews concerning the proper roles of administrative agencies, the acceptable amount of regulation, and the relative value of individual freedoms or free market economics to governmental intervention. The major questions doctrine thus risks intensifying public scrutiny of the judiciary's objectivity and the legitimacy of judicial review.

Our constitutional democracy recognizes the central importance of Congress's authority to make laws. Congress, which is closer to the people, is in a more appropriate position to balance ideological interests concerning governmental intervention in free-market economies and impacts to individual liberties.<sup>230</sup> Congress's laws, which affect both regulated entities and provide important benefits to citizens at large, are the fruits of a crucible of dialogue and compromise. A judiciary delegating to itself the enormous discretion to supplant Congress's statutory intent with its own preferred interpretation<sup>231</sup> risks placing countless legal protections for the American people at risk of nullification. As such, it is critical that the Court reconsider the continued use of the major questions doctrine.

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particular individual tool without counterbalancing it with other considerations, like analysis of statutory purpose, structure, and language.

228. While I do not advocate for its revival, the Court could also assess whether the delegation of power is permitted by reviving its nondelegation doctrine. *See* *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

229. *See* Heinzerling, *supra* note 75.

230. *See, e.g., Indus. Union Dep't, A.F.L.-C.I.O. v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J. concurring) (“[I]mportant choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”).

231. This approach is illustrated in the case at hand by the lack of consideration petitioners pay to Congress's expressly provided purpose, requiring the agency to protect the public health and welfare. *Clean Air Act*, 42 U.S.C. § 7401(b)(1).

**We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**

