The Effects of Recent Supreme Court Rulings on the Authority of Administrative Agencies to Regulate the Workplace

Presented by:

Allan Dinkoff, Associate General Counsel, Amgen Inc.

Eric S. Dreiband, Jones Day

David S. Fortney, Fortney & Scott, LLC

The American Employment Law Council

30th Annual Conference

The Ritz-Carlton Dove Mountain
Marana, Arizona

October 19-22, 2022

Table of Contents

I. Introduction **1**

II. Historical Background on the Major Questions and Non-Delegation Doctrines **3**

A. Major Questions Doctrine 3

B. Non-Delegation Doctrine 3

III. The Ascendance of the Major Questions and Non-Delegation Doctrines **5**

A. Major Questions Doctrine: West Virginia v. EPA and NFIB v. OSHA 5

B. Non-Delegation Doctrine: *Gundy v. U.S.* and Lower Court Adoption 9

IV. Application of Major Questions and Non-Delegation to Regulatory Schemes Affecting the Workplace **11**

A. Executive Order 11246 - Equal Employment Opportunity 11

B. Age Discrimination in Employment Act (ADEA) 12

C. Fair Labor Standard Act (FLSA) 13

D. Title VII of the Civil Rights Act of 1964 15

V. Conclusions and Final Thoughts **16**

APPENDIX 18

The Effects of Recent Supreme Court Rulings on the Authority of Administrative Agencies to Regulate the Workplace

Presented by:[1] Allan Dinkoff, Eric S. Dreiband, and David S. Fortney

The experienced labor and employment practitioners who are members of the AELC regularly counsel their clients on a broad range of administrative agency actions and regulations. The U.S. Supreme Court in the past term and the lower courts have issued significant decisions emphasizing that the Major Questions and Non-Delegation Doctrines can be used successfully to challenge many far reaching actions and rulemakings by the agencies. These rulings appear to be the beginning of a strong judicial trend in which the courts are willing to cut back on broad agency actions, and to revisit fundamental questions regarding the breadth of executive branch agencies' authority. This trend is particularly significant for labor and employment lawyers because of the widespread, and commonly accepted, actions by the agencies governing the workplace that rely on regulations and sub-regulatory actions to impose compliance obligations.

The three Justices appointed to the Supreme Court[2] by President Trump resulted in a realigned court, with a six-justice conservative majority. The newly appointed justices have changed the Roberts Court's approach on many issues. Last year's Supreme Court term (October 2021 through June 2022) was notable for several reasons, but among the most significant developments was the Court's embrace of the Major Questions Doctrine in *West Virginia v. EPA*[3] and *National Federation of Independent Business v. OSHA*.[4] The Supreme Court's new approach to agency authority is gaining traction in the lower courts, particularly in more conservative federal circuits. This is leading courts to question the legitimacy of regulations long seen as grounded on firm legal footing.

I. Introduction

Both the Major Questions and the Non-Delegation Doctrine are part of the canon of doctrines interpreting agency rulemaking authority. Both doctrines are skeptical of agency rulemaking, asking first whether the agency has a Congressional mandate to issue the rule in the first place, and then, even if there is such a mandate, whether Congress can delegate the rulemaking to the executive branch consistent with the Constitution's separation of powers. Historically, the Major Questions Doctrine was seldom used by the Supreme Court, which has overwhelmingly favored doctrines granting agencies broad deference in rulemaking and the Court's recent adoption

---

[1] The views expressed in this paper are the personal views of the authors, and the paper is not presented on behalf of any clients or other interests represented by the authors. We also want to acknowledge and thank Savanna Shuntich, Esq. at FortneyScott, for her significant assistance in preparing these materials.

[2] Justice Amy Coney Barrett replaced Justice Ginsberg in 2020, Justice Brett Kavanaugh replaced Justice Kennedy in 2018, and Justice Neil Gorsuch replaced Justice Scalia in 2017. During President Trump's term, 234 Article III judgeship nominees were confirmed by the United States Senate, including the three associate justices of the Supreme Court, 54 judges for the United States courts of appeals, and 174 judges for the United States district courts.

[3] *West Virginia v. EPA.*, 142 S. Ct. 2587 (2022).

[4] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) (*per curiam*).

of Major Questions Doctrine represents a significant paradigm shift.[5] Similarly, the Non-Delegation Doctrine has seen little use and has practically been a dead letter since the end of the New Deal. The doctrine was once employed by the Court to invalidate regulations but was weakened over time and has not been the basis for overturning a regulation since 1935.[6] The Non-Delegation Doctrine is newly relevant due to its popularity with Justice Gorsuch and other conservative jurists.

Below we discuss the history and current application of both doctrines. With an understanding of the current legal landscape regarding Major Questions and Non-Delegation in place, we then apply the doctrines to regulatory schemes issued pursuant to major employment statutes, to provide examples of the way the wider acceptance of these doctrines may affect the employment law landscape.

Ultimately the ascendence of both doctrines means two things for employers: (1) in some cases agency authority to issue regulations and/or sub-regulatory guidance related to labor and employment will be accorded far more legal scrutiny than any time since the 1930s; and (2) employers seeking to challenge agency actions should consider seriously whether to assert Major Questions and Non-Delegation Doctrine arguments in both agency proceedings and in judicial challenges. Avoiding the approach may leave a major tool unused in the toolbox.

Finally, as part of our introductory remarks, we also note that this paper does not delve into what the rise of the Major Questions/Non-Delegation Doctrines and the conservative super majority will mean for the other interpretive doctrines – often referred to as agency deference doctrines – that more commonly have been used to challenge agency action: *Chevron*, *Auer*, and *Skidmore*[7] and that most AELC members are familiar with. For example, *West Virginia v. EPA* has already prompted a debate over whether Major Questions will spell the end of *Chevron*.[8] In our view, the deference doctrines can be accommodated, and applied as "Step 2" in an analysis of

---

[5] *See* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019, 2029, 2031 (2018) ("The major questions doctrine is a departure from the general rule that courts will give some degree of weight or deference to agency interpretations of the statutes they are charged with administering . . . . This flexible regime of deference was crucial to many of the canonical cases of judicial statutory interpretation during and after the New Deal . . . .").

[6] *See* Alex Forman, *A Call to Restore Limitations on Unbridled Congressional Delegations: American Trucking Ass'ns v. EPA*, 34 Ind. L. Rev. 1477, 1480 (2001) ("In its purest form the nondelegation doctrine prohibits Congress from delegating any of its lawmaking power to any other entity. Originally, the doctrine served as the primary restraint on the growth of federal regulatory authority, but as the government grew, many recognized that the doctrine required a measure of relaxation."); Kathryn A. Watts, *Rulemaking As Legislating*, 103 Geo. L.J. 1003, 1012 (2015) ("[I]n 1935 in *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*, the Court--for the first and last times ever--invalidated provisions of a federal statute on nondelegation grounds.").

[7] The Supreme Court recently considered and modified the so-called *Auer* doctrine. *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). For more about the various agency-deference doctrines the Supreme Court has used to decide the EEOC's regulatory authority, please see Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin*, 32 ABA Journal of Labor & Employment Law 93, 95 (2017) (Explaining that there are "tiers of deference [that] courts afford agency statutory interpretation. Courts typically apply one of three standards which originated from three cases: (1) *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (2) *Auer v. Robbins*, and (3) *Skidmore v. Swift & Co.*").

[8] *See e.g.,* Dan Wolff & Eryn Howington, *Justices' EPA Ruling Didn't Move the Needle on Chevron Doctrine*, Law 360 (August 9, 2022) https://www.law360.com/articles/1519300/justices-epa-ruling-didn-t-move-needle-on-chevron-doctrine.

agency action. Under this framework, Step 1 determines whether the challenged agency action passes muster under the Major Questions and Non-Delegation Doctrines, as applicable. Then, if necessary, as Step 2 agency action can be evaluated under the agency deference doctrines. Consistent with our suggested analytical framework, under these evolving constructs many courts are not even reaching the deference question if the challenged agency action is improper under either the Major Questions or Non-Delegation Doctrines.[9]

II. Historical Background on the Major Questions and Non-Delegation Doctrines

A. Major Questions Doctrine

The Major Questions Doctrine requires that Congress "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[10] The doctrine is attributed to *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, a case from 2000, where the Supreme Court found that Congress did not grant the Food and Drug Administration (FDA) authority to regulate tobacco products under the Federal Food, Drug, and Cosmetic Act (FDCA), through the general grant of authority to regulate drugs and devices.[11]

Under the Major Questions Doctrine, for a regulation to be within the agency's remit, the "administrative agenc[y] must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance."[12] As Justice Scalia famously wrote in *Whitman v. American Trucking Assns.*, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[13] Thus regulations on questions of vast political and economic significance that are not based on clear congressional authorization are *ultra vires*.

B. Non-Delegation Doctrine

The Non-Delegation Doctrine is a much older doctrine, dating back to the 1825 case *Wayman v. Southard*.[14] Essentially, "[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[15] Though the Supreme Court first articulated the concept in *Wayman*, the Non-Delegation Doctrine was not used to strike down

---

[9] *See e.g., Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (*infra* at fn. 26).
[10] *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[11] *See* 529 U.S. at 133, 147 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency . . . . Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter.").
[12] *West Virginia v. EPA*, 142 S. Ct. at 2616 (2022) (Gorsuch, J., concurring) (internal quotations omitted).
[13] 531 U.S. 457, 468 (2001).
[14] 23 U.S. 1 (1825). *See* Kathryn A. Watts, *Rulemaking As Legislating*, 103 Geo. L.J. at 1011 ("The central premise of the nondelegation doctrine--that Congress may not delegate its Article I legislative powers--was first articulated clearly by the Supreme Court in *Wayman v. Southard*, a Marshall Court opinion decided in 1825.").
[15] *Gundy v. U.S.*, 139 S. Ct. 2116, 2121 (2019).

administrative actions until 1935, in *Panama Refining Co. v. Ryan* ("*Panama Refining*")[16] and *A.L.A. Schechter Poultry Corp. v. U.S.* ("*Schechter Poultry*"),[17] two cases stemming from the establishment of numerous federal programs and federal agencies to administer the programs created by the New Deal.[18]

Panama Refining concerned Executive Order 6199, issued by President Roosevelt pursuant to section 9(c) of the National Industrial Recovery Act ("NIRA").[19] Executive Order 6199 allowed the president to prohibit the transportation of petroleum across state lines when the amount of petroleum produced by the refiner was in excess of state restrictions. The Court found the NIRA's delegation of authority to the President under Section 9(c) was too broad to pass constitutional muster. It held "that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits . . . . Congress has declared no policy, has established no standard, has laid down no rule."[20]

In *Schechter Poultry* the Supreme Court held that the NIRA unconstitutionally delegated lawmaking authority to the president by allowing the president to set codes of fair competition for various industries.[21]

These rulings represent the high-water mark of the Non-Delegation Doctrine because although the Non-Delegation Doctrine appears in cases in the latter part of the 20th century and in the 21st century[22], the Supreme Court has not used it to invalidate a regulation since *Schechter Poultry* and *Panama Refining*.[23] As currently applied, the doctrine sets what would appear to be a low threshold for satisfying constitutional muster – the statute must supply "an intelligible

---

[16] *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).
[17] *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).
[18] *See Gundy v. U.S.*, 139 S. Ct. at 2137 ("Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations. Twice the Court responded by striking down statutes for violating the separation of powers.") (Gorsuch, J., dissenting).
[19] *See* 293 U.S. 388 (1935).
[20] *Id.* at 430.
[21] *See* 295 U.S. 495, 541-542 (1935) ("In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.").
[22] *See* C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 Geo. Mason L. Rev. 619, 623 (2015) ("But that is not to say that the nondelegation doctrine ceased to play any further role whatsoever in the courts [since 1935]--to the contrary, the Supreme Court has applied the doctrine repeatedly as a canon of construction, interpreting statutes narrowly when necessary to avoid outright violations of the intelligible principle doctrine.").
[23] *See* Dan Walters, *Experience in State Courts Tells Us What to Expect When We're Expecting*, 71 Emory Law Journal 417, 419, fn. 6 (2022) (Writing that other than *Schechter Poultry* and *Panama Refining* "the federal nondelegation doctrine has never been invoked to invalidate any federal statute delegating power to an agency, and it was, until quite recently, described as 'dead'" and referring to it as a "zombie doctrine.").

principle to guide the delegee's use of discretion."[24] The standard historically has allowed regulations to survive based on only the barest of congressional guidance.[25]

III. The Ascendance of the Major Questions and Non-Delegation Doctrines

A. Major Questions Doctrine: West Virginia v. EPA and NFIB v. OSHA

To the surprise of many, in *National Federation of Independent Business v. OSHA ("NFIB v. OSHA")* and *West Virginia v. EPA* the Supreme Court used the Major Questions Doctrine to invalidate two agency actions this past term.[26]

NFIB v. OSHA involved the U.S. Department of Labor's application of the Occupational Safety and Health Act (OSH Act) to the COVID-19 crisis. On November 5, 2021, the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) addressing COVID-19, requiring vaccination or mandatory testing for employees of large employers (those with 100 or more employees).[27] OSHA acted pursuant to its authority under section 655(c)(1) of the OSH Act, which authorizes the Secretary of Labor to issue emergency temporary standards if the Secretary determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger."[28] As OSHA articulated in its ETS notice,[29] the regulations were consistent with its obligation under section 2(b) of the OSH Act to "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[30]

---

[24] *Gundy v. U.S.*, 139 S. Ct. at 2123 (2019).

[25] *See* Kathryn A. Watts, *Rulemaking As Legislating*, 103 Geo. L.J. at 1016 (2015) ("Although the intelligible principle requirement conceivably could have evolved over time into a stringent requirement with teeth, the reality is that the Court has taken an extremely lenient view of what constitutes an intelligible principle. Rather than stressing the necessity of serious standards to guide agencies and to constrain their delegated discretion, the Court seems to look only at whether there is a complete lack of an intelligible principle.").

[26] In the interest of completeness, there is one additional case from the most recent Supreme Court term that was decided (in part) under the Major Questions Doctrine. In *Alabama Association of Realtors v. HHS*, a case on the Supreme Court's emergency docket, the Court used the Major Questions Doctrine as one of its bases for vacating the Centers for Disease Control and Prevention's (CDC) national eviction moratorium. *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021). In that case, the lower court had vacated the moratorium but stayed its order pending appeal. *Id.* at 2486. The plaintiffs asked the Supreme Court to vacate that stay. When the Court applied the standard for a stay, whether or not the party is likely to succeed on the merits, it found no such likelihood because, *inter alia,* "[e]ven if the text [of the Public Health Service Act] were ambiguous, the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. at 324).

[27] *See* 86 Fed. Reg. 61402 (2021).

[28] 29 U.S C. § 655(c)(1).

[29] *See* 86 Fed. Reg. 61,402, 61,404 (Nov. 5, 2021).

[30] 29 U.S.C. § 651(b).

In response, there were judicial challenges by states and private entities challenging OSHA's ETS, and seeking to stay the implementation of the ETS.[31] The litigation was consolidated before the Sixth Circuit Court of Appeals, and the Supreme Court granted *certiorari* to decide two of the cases.

In the resulting January 13, 2022, *per curiam* opinion, the six so-called "conservative" justices (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, Kavanaugh and Barrett) granted a nationwide stay of the ETS based on the Major Questions Doctrine, with the three so-called "liberal" justices (Justices Breyer, Sotomayor and Kagan)[32] dissenting. Specifically, the Court held that the Department of Labor lacked the authority to impose a vaccine/covid-testing mandate under the OSH Act because the OSH Act allows the Secretary of Labor "to set workplace safety standards, not broad public health measures" and Congress had not explicitly authorized the Department of Labor to exceed that mandate.[33] The opinion declared that "[p]ermitting OSHA to regulate the hazards of daily life - simply because most Americans have jobs and face those same risks while on the clock - would significantly expand OSHA's regulatory authority without clear congressional authorization" and that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[34]

Although the *per curiam* opinion was based on the Major Questions Doctrine, the opinion never mentions the doctrine by name. Instead, the only reference to Major Questions comes in Justice Gorsuch's concurrence, which discusses both the Major Questions and Non-Delegation Doctrines at length.[35]

Six months later, in *West Virginia v. EPA*, the Supreme Court relied explicitly on the Major Questions Doctrine to invalidate an EPA regulation along the same ideological lines.[36] At issue was the legality of the Clean Power Plan, a regulatory scheme created by the EPA under section

[31] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. at 663-664.
[32] Justice Stephen Breyer retired in June 2022, and was replaced by Justice Ketanji Brown Jackson who currently is generally aligned with the liberal justices.
[33] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. at 665. Because this case concerned a nationwide stay of the ETS, technically it was not a ruling on the merits because, as discussed in fn. 26, to grant a stay the court must decide whether the plaintiff is likely to prevail on the underlying claim. Thus, the Court held "Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate." *Id.* at 664-665.
[34] *Id.*(internal citations and quotations omitted).
[35] *See id.* at 668-669 (Gorsuch, J., concurring) ("Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress. In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine . . . . Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.") (internal citations omitted).
[36] 142 S. Ct. 2587 at 2609-2610 ("As for the major questions doctrine 'label' . . . it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. . . . Under our precedents, **this is a major questions case."**) (internal citations and quotations omitted) (emphasis added).

111(d) of the Clean Air Act.[37] The EPA regulations set emissions standard on states that were so onerous that it would force the closure of coal plants to meet emissions targets (what the EPA called "generation shifting"). Previously 111(d) had been employed to require cleaner production methods, not to shift energy production from one medium to another.[38]

The majority opinion authored by Chief Justice Roberts found that there was no clear congressional mandate from the EPA authorizing the EPA's generation shifting approach and that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[39]

Justice Gorsuch filed a notable concurrence, which can be read as an attempt to formalize the Major Questions Doctrine by listing factors for courts to use in determining whether a given controversy qualifies as a "major question." For example, courts should consider applying the Major Questions Doctrine when the agency is attempting to regulate something typically left to the states or "when an agency claims the power to resolve a matter of great 'political significance . . . .'"[40] The dissent, authored by Justice Kagan, accused the majority of using Major Questions as a "get-out-of-text-free-card[]," asserting that the statute gave a broad grant of authority to the EPA which allows for "generation shifting" as a system of emission reduction.[41]

One of the more remarkable aspects of *West Virginia v. EPA* may be that the Court took the case at all. By the time the Supreme Court granted *certiorari* the Clean Power Plan was no longer in effect. In a 2019 filing before the D.C. Circuit in this same matter, the EPA asked the appeals court to stay the case because it planned to issue new regulations to replace the Clean Power Plan and would not be enforcing the Clean Power Plan in the interim.[42] Knowing this, the Supreme Court still granted *certiorari*, twisting itself into knots to find that enough of a case and

[37] *See id.* at 2602-2604. *And see* 42 U.S.C. § 7411 (Section 111d of the Clean Air Act) ("**(d) Standards of performance for existing sources; remaining useful life of source (1)** The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies. **(2)** The Administrator shall have the same authority-- **(A)** to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and **(B)** to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan. In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.") (emphasis in the original).

[38] *See id.* at 2610.

[39] *Id.* at 2616.

[40] *Id.* at 2620-2621 (Quoting *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. at 665) (Gorsuch, J., concurring).

[41] *Id.* at 2641 (Kagan, J., dissenting).

[42] *See id.* at 2606.

controversy existed for the plaintiffs to have standing.[43] *West Virginia v. EPA* shows an eagerness on the part of the Court to push the Major Questions Doctrine, even in situations where procedurally the case is less than ideal and traditional notions of judicial restraint would counsel otherwise.

The congressional response to the Court's ruling in *West Virginia v. EPA* is worth noting. Congress amended the Clean Air Act through the Inflation Reduction Act of 2022 ("IRA") to create new programs to reduce greenhouse gas emissions and to explicitly classify greenhouse gases as pollutants.[44] Though there is some debate over whether the IRA effectively addresses the issue identified in *West Virginia v. EPA*[45], the congressional response is a reminder that a Supreme Court ruling striking down a regulation under Major Questions does not preclude Congress from undertaking remedial action as it sees fit (provided, of course, that Congress does not violate the Non-Delegation Doctrine, discussed in the next section below).

A number of lower courts have embraced the Major Questions Doctrine. In October 2021 the states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia filed a lawsuit in the United States District Court for the Southern District of Georgia seeking to overturn the federal contractor COVID-19 vaccine mandate.[46] The plaintiffs filed for a preliminary injunction, arguing that the mandate, created by Executive Order 14042, was outside of the President's authority under the Federal Property and Administrative Services Act ("FPASA" or the "Procurement Act").

The Judge assigned to the case, the Honorable R. Stan Baker, granted a nationwide preliminary injunction of the contractor mandate, relying on the Major Questions Doctrine in part to find that the President had exceeded his authority. Finding that the mandate was an issue of "vast economic and political significance," Judge Baker instituted the injunction because there was no clear authorization under FPASA to regulate public health.[47] In August of 2022 the Eleventh Circuit narrowed the scope of the preliminary injunction but affirmed the underlying holding that "[a]gencies' bare authority to set contract specifications and terms [under the Procurement Act] is not enough to show that when Congress passed the Procurement Act it contemplated the general

---

[43] The Court found that the parties had standing because there was no guarantee that the EPA would not change its mind and decide to enforce the Clean Power Plan. *Id.* at 2607 ("Here the Government nowhere suggests that if this litigation is resolved in its favor it will not reimpose emissions limits predicated on generation shifting; indeed, it vigorously defends the legality of such an approach.") (internal quotations omitted).

[44] *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, Title VI – Committee on Environment and Public Works, Subtitle A – Air Pollution (2022). *See* Lisa Friedman, *Democrats Designed the Climate Law to Be a Game Changer. Here's How.*, N.Y. Times, August 22, 2022, https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html.

[45] Specifically, the IRA does not authorize the EPA to require generation shifting technology. *See* Kate Aronoff, *No, the Inflation Reduction Act Did Not "Overturn" West Virginia v. EPA*, The New Republic, August 24, 2022, https://newrepublic.com/article/167520/inflation-reduction-act-overturn-west-virginia-epa.

[46] *See Georgia v. Biden*, No. 1:21-cv-00163 (S.D. Ga. filed Oct. 29, 2021).

[47] *See Georgia, v. Biden*, No. 1:21-cv-00163, at *19-20 (S.D. Ga. Dec. 7, 2021).

power to mandate vaccination."[48] The Eleventh Circuit Opinion cites to the growing body of Major Questions cases – including *West Virginia v. EPA* and *NFIB v. OSHA*.[49]

B. Non-Delegation Doctrine: *Gundy v. U.S.* and Lower Court Adoption

The current Supreme Court has not yet relied on the Non-Delegation Doctrine to strike down a regulation, but there are signs that the Court has a serious interest in doing so. In 2019 the Court decided *Gundy v. U.S*.[50] *Gundy* challenged the delegation of authority to the U.S. Attorney General under the Sex Offender Registration and Notification Act ("SORNA").[51] SORNA gives the Attorney General the authority to impose registration requirements on sex offenders convicted before its enactment.[52] Gundy was convicted of failing to register as prescribed by the Attorney General, and he appealed the conviction. Writing for the plurality, Justice Kagan found the "delegation easily passes constitutional muster" under the longstanding intelligible principles test.[53]

Justice Gorsuch wrote a dissent joined by Chief Justice Roberts and Justice Thomas calling for the Court to re-examine its interpretation of the Non-Delegation Doctrine and abandon "intelligible principles" in place of a new (and more onerous) test. He opined that "[t]he Constitution promises . . . only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens."[54] Gorsuch opined that the intelligible principles test as applied "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[55] Under the revised standard, Justice Gorsuch would permit delegation only in three circumstances. First, Congress would be permitted to delegate to the president in circumstances involving authority already possessed by the Executive Branch (termed "non-legislative responsibilities"), such as the authority to regulate foreign affairs.[56] Second, "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on

---

[48] *See Georgia v. President of the United States*, No. 21-14269, at *30 (11th Cir. Aug. 26, 2022).

[49] *See id.* at 17 ("Our analysis is also informed by a well- established principle of statutory interpretation: we 'expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.' *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotations omitted). That doctrine has been applied in 'all corners of the ad-ministrative state,' and this case presents no exception. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). As the Supreme Court has emphasized, requiring widespread Covid-19 vaccination is 'no everyday exercise of federal power.' *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (quotation omitted). Including a Covid- 19 vaccination requirement in every contract and solicitation, across broad procurement categories, requires 'clear congressional authorization.' *West Virginia*, 142 S. Ct. at 2609.").

[50] *See* 139 S. Ct. 2116 (2019).

[51] *Id.*

[52] *See* 34 U.S.C. § 20913 ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders ….").

[53] 139 S. Ct. at 2121.

[54] *Id.* at 2131 (Gorsuch, J., dissenting).

[55] *Id.* at 2139 (Gorsuch, J., dissenting).

[56] *Id.* at 2137 (Gorsuch, J., dissenting).

executive fact-finding."[57] By way of example Justice Gorsuch cites to *Miller v. Mayor of New York*, where Congress had instructed the Secretary of War to build the Brooklyn Bridge if it was found the new bridge would not interfere with marine navigation.[58] Finally, Congress may delegate to the executive if it "set[s] forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[59]

Justice Alito wrote a separate concurrence that "[i]f a majority of this Court were willing to reconsider the approach [to the Non-Delegation Doctrine] we have taken for the past 84 years, I would support that effort."[60] At the time Justice Barrett was not on the Court and Justice Kavanaugh took no part in the opinion. If *Gundy* were decided today the holding might come out differently with participation by Justices Kavanaugh and Barrett, particularly after Justice Kavanaugh's statement in a denial of a *certiorari* petition in 2019 that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[61]

The Non-Delegation Doctrine is getting traction at the trial and circuit court level in employment and labor matters. For example, in *Kentucky v. Biden*, U.S. District Court Judge Gregory Van Tatenhove issued a preliminary injunction enjoining the federal contractor COVID-19 vaccine mandate in Kentucky, Ohio, and Tennessee in late 2021.[62] Judge Van Tatenhove ruled, *inter alia*, that in issuing Executive Order 14042 (requiring vaccination) under FPASA, President Biden likely violated the Non-Delegation Doctrine.[63] The matter is currently on appeal to the Sixth Circuit, where oral arguments took place on July 21, 2022.[64]

Another example are the cases filed in Arizona and Texas against the Department of Labor, seeking to overturn Executive Order 14026 ("EO 14026"), which requires employees of federal contractors to be paid a $15 minimum wage.[65] These lawsuits also challenge the delegation of the President's authority under FPASA, arguing that if the Procurement Act is so sweeping as to permit the executive branch to set the minimum wage, then it is unconstitutional under the Non-Delegation Doctrine. Litigation in those matters is ongoing. Separately, a lawsuit was filed in the United States District Court for the District of Colorado also alleging, *inter alia*, that the EO 14026 violated the Non-Delegation Doctrine.[66] The plaintiffs failed in their bid to get the District Court to issue a preliminary injunction and the denial of that motion is currently on appeal to the Tenth Circuit, where oral argument took place on September 28, 2022.[67]

---

[57] *Id*. at 2136 (Gorsuch, J., dissenting).
[58] *See id.* at 2136-2137 (Gorsuch, J., dissenting) (citing *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883)).
[59] *Id.* at 2136 (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 426, (1944)).
[60] *Id.* at 2131 (Alito, J., concurring).
[61] *Paul v. United States*, 140 S. Ct. 342 (2019).
[62] 571 F. Supp. 3d 715 (E.D. Ky. 2021).
[63] *See id.* at 724-725.
[64] *See* Kentucky v. Biden, No. 21-6147 (6th Cir.).
[65] *See Arizona v. Walsh*, Case No. 2:22-cv-213, at *24-25 (D. Ariz., filed Feb. 9, 2022); *Texas v. Biden*, Case No. 6:22-cv-00004, at *26-27 (S.D. Tex., filed Feb. 10, 2022).
[66] *See Bradford v. U.S. Dept. of Labor*, No. 1:21-cv-03283 (D. Col. filed Dec. 7, 2021).
[67] *See Bradford v. U.S. Dept. of Labor*, No. 22-1023 (10th Cir. filed Jan. 28, 2022).

IV. Application of Major Questions and Non-Delegation to Regulatory Schemes Affecting the Workplace

Below we analyze how the greater acceptance of the Major Questions and Non-Delegation Doctrines may affect landmark federal employment statutes and their accompanying regulatory schemes, as well as Executive Order 11246. We do not seek to detail every possible legal challenge that could be brought under these doctrines. Instead using our "crystal ball" we provide some examples of how to identify which regulations and sub-regulatory guidance the current Supreme Court may view as unauthorized expansions of agency power.

Some regulations are more vulnerable than others, and regulations may be vulnerable for entirely different reasons. For example, if an agency is provided no authority by statute to issue substantive regulations and yet begins issuing regulations under the statute all the same, the Supreme Court may decide that those regulations are invalid under the Major Questions Doctrine because Congress never clearly assigned that authority to the agency. In other circumstances, the agency may have statutory authority to issue substantive regulations, but the grant of authority may be too broad to survive a Non-Delegation Doctrine challenge. Unsurprisingly, determining whether a given regulatory scheme is vulnerable under either doctrine requires a fact specific analysis and close reading of the statutory language authorizing the regulatory scheme.

Below we discuss the following federal labor and employment statutes and an Executive Order: (1) Executive Order 11246; (2) the Age Discrimination in Employment Act; (3) the Fair Labor Standards Act of 1938; and (3) Title VII of the Civil Rights Act of 1974.

A. Executive Order 11246 - Equal Employment Opportunity

Executive Order 11246 ("EO 11246") was signed by President Johnson in 1965 and is enforced by the Office of Federal Contract Compliance Programs ("OFCCP"). [68] It prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, and national origin by federal contractors. It also imposes affirmative action obligations, including requiring federal contractors with contracts for $50,000 or more and 50 or more employees to prepare Affirmative Action Programs.[69] The articulated basis for EO 11246 and accompanying regulatory scheme is FPASA[70], which gives the President the authority to create regulations to promote economy and efficiency in the procurement system.[71]

Yet no express authorization exists under the FPASA to require non-discrimination or to institute affirmative action requirements for federal contractors. This makes EO 11246 and its accompanying compliance obligations susceptible to a challenge under Major Questions, and it is not inconceivable that OFCCP could be stripped of all its authority under 11246 by this Court. The Court is already on record expressing doubt over the legitimacy of EO 11246 in a 1979 case called *Chrysler Corp. v. Brown* (*"Chrysler"*).[72] In one of the footnotes, the Court stated that "Executive

---

[68] *See* Exec. Order No. 11246 (1965), https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended.
[69] *See* 41 C.F.R. § 60-2.1(b).
[70] *See* 40 U.S.C. § 101, *et seq.*
[71] *See* 40 U.S.C. § 121(a) (Giving the President the authority to "prescribe policies and directives that the President considers necessary to carry out this subtitle.").
[72] *See* 441 U.S. 281, fn. 1 (1979).

Order No. 11246 . . . prohibits discrimination . . . in federal employment or by Government contractors. Under § 202 of this Executive Order, most Government contracts must contain a provision whereby the contractor agrees not to discriminate in such a fashion and to take affirmative action to ensure equal employment opportunity."[73] The majority opinion then casts doubt on the validity of OFCCP regulations observing "[t]he origins of the congressional authority for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and courts."[74]

There is reason to believe a challenge to EO 11246 is forthcoming. In the Eleventh Circuit's opinion upholding the preliminary injunction of the federal contractor vaccine mandate based on the Major Questions Doctrine, the appeals court went out of its way to call the legitimacy of EO 11246 into question.[75] Discussing the *Chrysler* case, the Eleventh Circuit stated "[t]he Supreme Court [in *Chrysler*] ultimately did not decide whether any statute authorized . . . [EO 11246], but suggested that the Procurement Act alone was not enough to carry the day . . . *Chrysler* thus points to interpreting the Act as a limited grant of authority, empowering the President to carry out the Act's specific provisions—but not more."[76]

Just like EO 11246, the federal contractor vaccine mandate is based on executive authority under FPASA. Yet, the discussion of whether EO 11246 is authorized by FPASA is superfluous to the Eleventh Circuit's Opinion on whether FPASA authorizes a separate executive order on a completely different topic (vaccine mandates). This portion of the Eleventh Circuit's opinion is best read as an invitation for a test case challenging the validity EO 11246 under Major Questions Doctrine. Judging by the current ideological makeup of the Supreme Court, that challenge may be successful.[77]

B. Age Discrimination in Employment Act (ADEA)

EO 11246 and the ADEA draw an interesting contrast. While is it difficult to locate the regulatory authorization for EO 11246's affirmative action obligations, the grant of regulatory authority to the Equal Employment Opportunity Commission to engage in rulemaking under the ADEA is substantial. The Commission "may issue such rules and regulations as it may consider necessary or appropriate for carrying out [the ADEA] . . . , and may establish such reasonable

[73] *Id.* (quoting Exec. Order No. 11246).
[74] *Id.* at 304.
[75] *See Georgia v. Biden*, No. 21-14269, at *14-17 (11th Cir. Aug. 26, 2022).
[76] *Id.* at *15.
[77] If there are successful challenges to affirmative action requirements under EO 11246, for employers that want to continue their affirmative action programs it is important to keep in mind a defense may be available under Title VII Section 713(b) which provides a "good faith" reliance defense similar to the FLSA's Portal Act defense. *See* 42 U.S.C. § 2000e-12(b). The EEOC issued affirmative action regulations that it claims will provide good faith reliance defenses to any challenge to voluntary affirmative action employer practices. To satisfy the defense, an employer must "plead[] and prove[]" that the employer implemented a voluntary affirmative action program "in good faith, in conformity with, and in reliance on" the EEOC's regulations. *Id.* *See also* 29 C.F.R. §§ 1608.1(d), 1608.2, 1608.5(b), 1608.6(b), 1608.7(b), 1608.10(b). *See also* 29 C.F.R. § 1601.93 (defining "'written interpretation or opinion of the Commission' within the meaning of section 713 of title VII").

exemptions to and from any or all provisions of [the ADEA] . . . as it may find necessary and proper in the public interest."[78]

A regulation issued pursuant to that grant could easily be susceptible to a Non-Delegation Doctrine challenge because the grant of rulemaking authority is about as broad as one could imagine, giving the EEOC little in the way of limiting principles to guide its work. It is possible the EEOC acting entirely within the grant could create an exception so large that it swallows the rule. For example, the EEOC could issue a regulation exempting 40–55 year olds from the ADEA's protections. This would run directly counter to Congress's intentions while also being a lawful exercise of agency authority.

This example may sound improbable, but it is based in past events. On March 24, 2008, the Supreme Court denied *certiorari* in *AARP v. EEOC*, an appeal from the United States Court of Appeals for the Third Circuit, stemming from a regulatory exemption about retiree health care benefits issued by the EEOC pursuant to its authority under the ADEA.[79] In denying the appeal, the Court was leaving in place the Third Circuit's ruling that "the EEOC has the power to issue a regulation exempting from the prohibitions of the ADEA employer-sponsored benefits plans that coordinate retiree health benefits with eligibility for Medicare or state-sponsored health benefits programs."[80] Without the regulation, employers would not be permitted to reduce healthcare benefits for workers also receiving Medicare money without risking age discrimination prohibited by the ADEA.[81]

The Third Circuit applied *Chevron* and found that the EEOC was granted the explicit the authority under the ADEA to issue a regulation exempting (in part) employer-sponsored health plans from the ADEA's non-discrimination requirements. Today a court might take a different view and instead strike down the regulation on Non-Delegation grounds as an unconstitutional delegation of legislative authority to the executive branch.

C. Fair Labor Standard Act (FLSA)

The Wage and Hour Division (WHD) of the Department of Labor (DOL) enforces the requirements of the FLSA, as amended. DOL has broad authority to issues regulations under the Act regarding payment of wages, pay recordkeeping, and child labor.[82]

The FLSA specifically authorizes rulemaking by the Secretary of Labor to address many specific statutory requirements, including exemptions from minimum wage and overtime for executive, administrative, and professional employees (the "white collar" exemptions), maximum hours, record keeping, homework, child labor, as well as employment under special certificates

---

[78] *See* 29 U.S.C. § 628.
[79] *See* 552 U.S. 1279, 128 S.Ct.1733 (2008).
[80] *Am. Ass'n of Retired Persons v. E.E.O.C.*, 489 F.3d 558, 563 (3d Cir. 2007).
[81] *Id.* at 564-565.
[82] A separate program during the AELC meeting and the accompanying paper provide detailed updates on the wage and hour developments, including the latest developments by the Wage and Hour Division at DOL.

for students, learners, apprentices, and others.[83] To the extent that regulations under the FLSA do not comport with the specific statutory authorization, then there may be a basis for challenging the regulations under the Major Questions doctrine.

A federal district court decision *Nevada v. U.S. Dep't of Labor* illustrates the application of the rationale under the Major Questions Doctrine to invalidate a FLSA regulation. In 2016, DOL published a controversial final rule updating the salary level for overtime exemption from $455 per week to $913 per week. The Department made no changes to the standard duties test. That rulemaking was challenged in court, and the U.S. District Court for the Eastern District of Texas enjoined DOL from implementing and enforcing the rule and granted summary judgment against the Department, invalidating the 2016 final rule because it "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties."[84]

The district court reasoned that Congress intended the exemptions to be defined by the duties associated with a bona fide executive, administrative, and professional capacity. DOL therefore is authorized to use a minimum salary level as a defining characteristic of employees who, in good faith, perform actual executive, administrative, or professional capacity duties. However, DOL is not authorized to impose a minimum salary level that effectively eliminates the duties test established by Congress.

In reaching its decision, the Court reasoned that:

> [T]he Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1). See *Michigan v. EPA*, 135 S. Ct. 2699, 2707–08 (2015) ("Chevron allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not."). Nor does the Department have the authority to categorically exclude those who perform "bona fide executive, administrative, or professional capacity" duties based on salary level alone. In fact, the Department admits, "[T]he Secretary does not have the authority under the FLSA to adopt a 'salary only' test for exemption." 81 Fed. 32,446[85]

Because the 2016 rule made the overtime status largely dependent on a minimum salary that would exclude millions of previously exempt employees who perform exempt duties, the court held that the rule did not carry out Congress's unambiguous intent. Additionally, the court found that the 2016 regulation did not qualify for *Chevron* deference and was unlawful.

The decision in *Nevada v. U.S. Dep't of Labor* is particularly useful for illustrating how challenges based on the FLSA's specific rulemaking provisions can be mounted based on the Major Questions Doctrine.

---

[83] A listing of the FLSA statutory provisions that authorize rulemaking are included as Appendix A, and are codified at 29 U.S.C. Sections 206(a)(2), 207(e), (g) and (k), 211(c) and (d), 212(d), 213(a), (b), (c), and (e), and 214(a), (b), (c) and (d).

[84] *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017).

[85] *Id.* at 805-806.

D. Title VII of the Civil Rights Act of 1964

The Equal Employment Opportunity Commission (EEOC) has no authority to issue substantive rulemaking under Title VII; it is confined to issuing procedural regulations.[86] Despite having no authority to issue substantive regulations, the EEOC has issued substantive interpretive regulations and a significant number of guidance documents. To give some examples, the Commission issued Guidelines on Discrimination Because of Sex[87], Guidelines on Discrimination Because of Religion,[88] Uniform Guidelines on Employee Selection Procedures[89], Enforcement Guidance on Pregnancy Discrimination and Related Issues[90] and Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors, to name just a handful.[91]

In the past, the Supreme Court has afforded deference to EEOC interpretive rules and guidance, though on an uneven basis.[92] For example, in *Crawford v. Metropolitan Government of Nashville*, the Court adopted the EEOC's interpretation on whether information disclosed during an internal investigation (rather than pursuant to a complaint) constitutes protected activity.[93] The Court agreed with the interpretation in the EEOC Compliance Manual that "'[w]hen an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication' virtually always 'constitutes the employee's opposition to the activity.'"[94] Despite such examples, it is difficult to envision the current Court affording any weight to substantive interpretive regulations or guidance from the EEOC, which is explicitly authorized to issue only procedural regulations and unauthorized to interpret Title VII's substantive prohibitions. To do so would be anathema to the Major Questions Doctrine.

An October 1, 2022, Opinion and Order from the United States District Court for the Northern District of Texas is illustrative of how the current Court might treat substantive EEOC regulations and sub-regulatory guidance. In *State of Texas v. EEOC*[95], Texas challenged the

---

[86] *See* 42 U.S.C. § 2000e-12 ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter."); *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, U.S. Equal Employment Opportunity Commission, (May 5, 2016) https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource#:~:text=Regulations%20issued%20by%20EEOC%20without,EEOC's%20positions%20to%20be%20persuasive ("Under Title VII of the Civil Rights Act, EEOC's authority to issue legislative regulations is limited to procedural, record keeping, and reporting matters.").

[87] *See* 29 C.F.R. §§ 1604.1-1604.11.

[88] *See* 29 C.F.R. §§ 1605.1-1605.3.

[89] *See* 29 CFR §§ 1607.1-1607.13.

[90] *See* U.S. Equal Employment Opportunity Commission (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues.

[91] *See* U.S. Equal Employment Opportunity Commission (June 18, 1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors.

[92] *See* Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin*, 32 ABA Journal of Labor & Employment Law at 98 (2017) ("In recent years, the Court's deference to this array of EEOC guidance has varied.").

[93] *See Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 273 (2009).

[94] *Id.* at 276 (quoting from 2 EEOC Compliance Manual §§ 8–II–B(1), (2), p. 614:0003 (Mar. 2003), as quoted in the United States' amicus brief for the matter.).

[95] *State of Texas v. EEOC*, No. 2:21-cv-00194 (N.D. Tex. Oct. 1, 2022).

legality of a technical assistance document issued by EEOC Chair Burrows in the wake of *Bostock v. Clayton County.*[96] The technical assistance document, entitled Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity, interpreted Title VII and explained "what the Bostock decision means for LGBTQ+ workers (and all covered workers) and for employers across the country."[97] The guidance asked and answered questions such as "[m]ay a covered employer require a transgender employee to dress in accordance with the employee's sex assigned at birth?" and "[d]oes an employer have the right to have separate, sex-segregated bathrooms, locker rooms, or showers for men and women?"[98]

The district court held that the guidance was actually a substantive legislative regulation because it went "beyond informing the public and expressing the agencies' views as to *Bostock's* effect in interpreting Title VII" by changing "the text of the statute it professed to interpret." [99] Rather than providing guidance, the technical assistance document left "no room for EEOC staff not to issue referrals to the Attorney General when an employer implements the condemned practice[s]."[100] The Court found that the EEOC had no authority to promulgate the technical assistance document because the Commission is confined to issuing procedural rules.[101] Following that logic, the Commission also violated APA requirements by issuing substantive legislative rules without following notice and comment.[102] The EEOC's failure to vote on the guidance also was found to violate the agency's procedural requirements.[103] The court vacated the guidance and declared it unlawful.[104] While the Major Questions doctrine was not mentioned by the court, the Opinion and Order effectively follows the doctrine and its rationale, and the court's reasoning would invalidate any regulation or sub-regulatory guidance under Title VII that qualifies as a "substantive rule."

V. Conclusions and Final Thoughts

The Major Questions and Non-Delegation Doctrines will continue to be relied on by the Supreme Court and the lower courts to set aside many actions and rulemakings by the agencies. The workplace agencies widespread reliance on broad regulations and sub-regulatory actions to impose compliance obligations on employers make it highly likely that we will see more challenges under both the Major Questions and Non-Delegation Doctrines. In particular, requirements that are imposed by Executive Orders based on FPASA, *e.g.,* the imposition on

[96] *Bostock v. Clayton County*, 207 L. Ed. 2d 218 (2020) (Extending the protections of Title VII to gay and transgendered individuals).
[97] U.S. Equal Employment Opportunity Commission (June 15, 2022), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender#_edn6.
[98] *Id.*
[99] *State of Texas v. EEOC*, No. 21-00194, at *20 (internal quotations omitted).
[100] *Id.* at *21 (internal quotations omitted).
[101] *Id.* at *24 ("[T]he June 15 Guidance constitutes a substantive rule. Because the Juen 15 Guidance is a substantive ule, EEOC could not promulgate the June 15 Guidance under the procedural rules of Title VII. The Court finds a procedural violation of Title VII.").
[102] *Id.*
[103] *Id.* at 27.
[104] *Id.* at 32.

Federal contractors of additional obligations, including the $15 minimum wage, COVID-19 vaccinations, and non-discrimination and affirmative action obligations, could be particularly susceptible to these challenges. If the nondiscrimination and affirmative action obligations imposed on federal contractors go beyond even Title VII, they are on even thinner ice.

To fully advise and represent clients' interests, counsel for employers should ensure that the Major Questions and Non-Delegation Doctrines are fully considered in both counseling and defending clients facing agencies' regulatory and enforcement obligations.

APPENDIX

REGULATORY AUTHORIZATION UNDER THE FLSA

29 U.S.C.A. § 206(a)(2): Minimum Wage - Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees.

- "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: . . . . if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator [of the Wage and Hour Division], or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;"

29 U.S.C.A. § 207(e): Maximum hours – "Regular rate" defined.

- "As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include . . . . Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator [of Wage and Hour]) paid to performers, including announcers, on radio and television programs;"

29 U.S.C.A. § 207(g): Maximum hours – employment at piece rates.

- "No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—. . . . 3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;"

29 U.S.C.A. § 207(k): Maximum hours - Employment by public agency engaged in fire protection or law enforcement activities.

- "No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if-- (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975;"

29 U.S.C.A. § 211(c): Collection of data – Records.

- "Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [of Wage and Hour] as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder."

29 U.S.C.A. § 211(d): Collection of data - Homework regulations.

- "The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect."

29 U.S.C.A. § 212(d): Child Labor – Proof of Age

- "In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."

29 U.S.C.A. § 213(a)(1): Exemptions - Minimum wage and maximum hour requirements.

- "The provisions of sections 206 [Minimum Wage] . . .and 207 [Maximum Hours] of this title shall not apply with respect to—

    (1) "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . ."

    (7) "any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 [Employment Under Special Certificates] of this title."

    (15) "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary);"

29 U.S.C.A. § 213(b): Exemptions - Maximum hour requirements.

- (11) "any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title;"
- (14) "any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations;"

29 U.S.C.A. § 213(c): Exemptions – Child labor requirements

- (2)The provisions of section 212 [Child Labor Provisions] of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.
- (5)(B) The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause . . . ."

29 U.S.C.A. § 213(e): Exemptions –Maximum hour requirements and minimum wage employees

- "The provisions of section 207 [Maximum Hours] of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) [Minimum Wage for seamen] of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action."

29 U.S.C.A. § 214(a): Employment under special certificates - Learners, apprentices, messengers

- "The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 206 of this title and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe."

29 U.S.C.A. § 214(b): Employment under special certificates – Students

- (1)(A) "The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206 [Minimum Wage] of this title or not less than $1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments."
- (2) "The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 206(a)(5) [Minimum wage – agricultural workers] of this title or not less than $1.30 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture."
- (3) "The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206 [Minimum Wage] of this title or not less than $1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable."
- (4)(B) "If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed six, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection."
- (4)(D) "To minimize paperwork for, and to encourage, small businesses to employ students under special certificates issued under paragraphs (1) and (2), the Secretary shall, by regulation or order,

prescribe a simplified application form to be used by employers in applying for such a certificate for the employment of not more than six full-time students."

29 U.S.C.A. § 214(c): Employment under special certificates – Handicapped workers

- "The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are . . . "

29 U.S.C.A. § 214(d): Employment under special certificates –Employment by schools

- "The Secretary may by regulation or order provide that sections 206 [Minimum Wage] and 207 [Maximum Hours] of this title shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws."