

TO: Interested Parties  
FROM: Democracy Forward Foundation  
DATE: August 12, 2025  
RE: Doctrinal Developments: Major Questions, Nondelegation, *Corner Post*, *Jarkesy*

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## Introduction

Democracy Forward Foundation has been tracking the major questions doctrine (MQD) since the U.S. Supreme Court invoked it by name in *West Virginia v. Environmental Protection Agency*.<sup>1</sup> This memo summarizes developments in the doctrine over roughly the last year, including in recent cases challenging the Trump-Vance administration’s aggressive assertions of executive power. Specifically, Democracy Forward Foundation closely analyzed the thirty-three cases decided between June 1, 2024 and July 21, 2025 that featured MQD challenges, to capture both a baseline prior to this administration as well as newly emerging trends.

MQD developed through a set of cases that cautions courts to hesitate before upholding agency actions in certain “extraordinary cases.” Though the features of MQD continue to develop, recent Supreme Court jurisprudence suggests that MQD applies when agencies (1) assert “unheralded” power representing a “transformative expansion of [the agency’s] regulatory authority”; (2) enact policies of “vast economic and political significance”; and (3) act without pointing to “clear congressional authorization” to take the action at issue.<sup>2</sup>

Most recently, the Court decided *Biden v. Nebraska*, striking down President Biden’s attempt to forgive student loan debt under the HEROES Act on major questions grounds.<sup>3</sup> *Nebraska* followed the analytical methodology outlined in *West Virginia*, including a finding that past invocations of the relevant statutory provision had been more modest. The Court also found that forgiveness of student loans at an estimated taxpayer cost of \$469 to \$519 billion was of “staggering” economic and political significance.<sup>4</sup>

Though a majority of courts during the period of our review rejected MQD challenges, some courts relied on overly broad or novel constructions of the doctrine to support its application across a variety of settings. For example, courts relied on the size of the regulated industry in question, rather than the impact of the regulation standing alone; emphasized the controversial or hot-button nature of an action, rather than true economic and political

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<sup>1</sup> 597 U.S. 697 (2022). *West Virginia* is commonly cited as the first Supreme Court case to explicitly invoke the doctrine by name, though its development can be traced over several cases since the early 2000s in which the Supreme Court applied heightened judicial scrutiny to certain agency assertions of authority. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>2</sup> *West Virginia*, 597 U.S. at 700 (collecting cases that lay out the components of a major questions inquiry).

<sup>3</sup> 600 U.S. 477 (2023).

<sup>4</sup> *Id.* at 502-03 (citing *Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758, 764 (2021)).

significance; or found an agency action “unheralded,” while discounting examples of prior similar agency action.

In cases brought against the Trump-Vance administration, litigants have also regularly invoked the doctrine to challenge authority claimed by the administration’s far-reaching actions to, among other things, pause congressionally appropriated funds, influence global markets through tariffs, and make systematic changes to election systems. While some of these cases did not result in holdings that squarely applied the doctrine, almost every court to have considered MQD in scrutinizing the administration’s actions has found the doctrine to be implicated.

These are, however, still the early days. It remains to be seen how the major questions doctrine will develop as these cases continue through the courts—particularly considering other related cases and evolving administrative law doctrines, some of which are discussed in brief at the end of this memo.

Democracy Forward Foundation will continue to track these doctrines and update its analyses accordingly.

### **Application of the Major Questions Doctrine to Late Biden-Era Actions**

There were twenty five cases challenging Biden-era regulatory actions decided after June 1, 2024, in which courts addressed the major questions doctrine.<sup>5</sup> In fifteen of these cases, district or appellate courts upheld the regulatory action against an MQD challenge in either a preliminary or merits determination.<sup>6</sup> In the other ten challenges, by contrast, courts invalidated or stayed the challenged action on MQD grounds. The ten regulatory actions at issue in these challenges include, for example, actions by agencies attempting to: provide reasonable accommodations for pregnant workers needing reproductive healthcare;<sup>7</sup> protect the privacy of reproductive healthcare information;<sup>8</sup> establish minimum staffing standards for nursing homes;<sup>9</sup> create programs to help student borrowers minimize their loan debt burdens;<sup>10</sup> and ensure supportive housing for LGBTQ+ children in state foster care systems,<sup>11</sup> among others.<sup>12</sup>

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<sup>5</sup> Many of these cases are ongoing and outcomes may change.

<sup>6</sup> In some cases, the court may have invalidated or stayed the action or rule at issue on other grounds.

<sup>7</sup> *Louisiana v. EEOC*, 705 F. Supp. 3d 643, 659-61 (W.D. La. 2024).

<sup>8</sup> *Purl v. HHS*, 2025 WL 1708137, at \*22-26 (N.D. Tex. June 18, 2025).

<sup>9</sup> *Kansas v. Kennedy*, 2025 WL 1702670, at \*12-16 (N.D. Iowa June 18, 2025).

<sup>10</sup> *Missouri v. Biden*, 112 F.4th 531, 537-38 (8th Cir. 2024).

<sup>11</sup> *Texas v. HHS*, 770 F. Supp. 3d 940, 949-51 (E.D. Tex. 2025).

<sup>12</sup> The other challenged actions include: disclosing the racial and gender composition of corporate governance boards, *see Alliance for Fair Bd. Recruitment v. SEC*, 125 F.4th 159, 180-83 (5th Cir. 2024); requiring broadband providers to adhere to net neutrality principles, *see In re MCP No. 185*, 2024 WL 3650468, at \*3 (6th Cir. Aug. 1, 2024); providing greater protections for retirement investors by imposing fiduciary duties on insurance agents, *see Fed’n of Ams. for Consumer Choice, Inc. v. U.S. Dep’t of Labor*, 742 F. Supp. 3d 677, 697-98 (E.D. Tex. 2024); and prohibiting discrimination on the basis of gender identity under Title IX, *see*

While the Fifth Circuit has cautioned that “the major questions doctrine is not a talisman to be invoked by concerned litigants whenever they are beholden to new administrative requirements,”<sup>13</sup> the decisions in these ten cases show that some courts are willing to strike down agency actions on MQD grounds, without limiting the doctrine to “extraordinary” cases and without applying MQD factors with fidelity.

The resulting court decisions have varied widely in their approach to the MQD factors.<sup>14</sup> For instance, several courts have conceived of the “vast economic and political significance” factor to encompass *any* agency action touching on a topic of national debate. These courts have avoided discussions of costs, which are normally central to this factor of the MQD inquiry.<sup>15</sup> For example, in a case regarding a Department of Health and Human Services (HHS) rule designed to protect LGBTQ+ children in state foster care systems, the district court found the factor satisfied in part because there is “enormous social and political significance associated with transgenderism and gender-identity issues.”<sup>16</sup> Other regulatory actions—including rules to safeguard the privacy of reproductive healthcare information and to protect students from discrimination based on their gender identity—have likewise been labeled as major questions. Courts in those cases similarly failed to explain how the rules could implicate the doctrine when costs associated with the agency’s action were estimated, at the high end, to be roughly one percent of the \$50 billion “trigger” the Supreme Court highlighted in *Nebraska*.<sup>17</sup>

Many of these courts have relied on the size of the industry in question to determine economic significance. For example, in striking down on MQD grounds Nasdaq disclosure rules approved by the Securities and Exchange Commission (SEC), the en banc Fifth Circuit emphasized that “the market cap of companies traded on the Nasdaq exchange exceeds \$25 trillion.”<sup>18</sup> By contrast, when analyzing the impact of agency actions in MQD cases, the Supreme Court has focused on the economic impact of the action itself, not merely whether it

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*Texas v. Cardona*, 743 F. Supp. 3d 824, 878-84 (N.D. Tex. 2024), and *Oklahoma v. Cardona*, 743 F. Supp. 3d 1314, 1326 (W.D. Okla. 2024).

<sup>13</sup> *Airlines for Am. v. U.S. Dep’t of Transp.*, 127 F.4th 563, 578 (5th Cir. Jan. 28, 2025).

<sup>14</sup> Legal scholars have also noted the inconsistency of major questions analyses in the lower courts. See, e.g., Natasha Brunstein, *Major Questions in Lower Courts*, 75 Admin. L. Rev. 661 (2023); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 Calif. L. Rev. 899 (2024).

<sup>15</sup> Compare, e.g., *Texas v. Cardona*, 743 F. Supp. 3d at 879-80 (ignoring cost as a factor by focusing on the fact that “questions about ... people claiming a particular gender identity inconsistent with their biological sex have prompted significant legislative debate at the state level”), with *Nebraska*, 600 U.S. at 502-03 (highlighting the \$430 billion cost of student loan forgiveness and the \$50 billion cost of the eviction moratorium as touching on “a significant portion of the American economy” (citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

<sup>16</sup> *Texas v. HHS*, 770 F. Supp. 3d at 949-50 (quoting *Texas v. Cardona*, 743 F. Supp. 3d at 879).

<sup>17</sup> *Nebraska*, 600 U.S. at 502-03 (citing *Ala. Ass’n of Realtors*, 594 U.S. at 764).

<sup>18</sup> *Alliance for Fair Bd. Recruitment*, 125 F.4th at 181.

will impact a large industry.<sup>19</sup> These courts are rendering agency action susceptible to an MQD challenge by abstracting out to a sizable enough “market” or “industry,” despite such an approach being untethered to the major questions inquiry as set out by the Supreme Court.

Similarly, in a case challenging the Federal Communications Commission’s (FCC) attempt to reinstate net neutrality for internet providers, the Sixth Circuit invoked the MQD when ordering a stay, despite engaging in no meaningful discussion of the economic impact of the rule. The court instead focused on the ubiquity of internet services in modern life,<sup>20</sup> noting only in passing that the rule may cause “some increase in compliance costs.”<sup>21</sup>

Finally, one court disregarded past agency practice and held that agency action was still “unheralded.” In a challenge to an HHS rule providing enhanced privacy protections for reproductive healthcare information under the Health Insurance Portability and Accountability Act (HIPAA), the district court explicitly recognized that “HIPAA regulations have long protected a certain type of record, psychotherapy notes, at a higher level than routine health information.”<sup>22</sup> Yet the court nonetheless concluded that offering heightened protection to reproductive healthcare information was “unheralded,” because the agency was attempting to “weaponiz[e] HIPAA] to achieve protections for politically favored medical procedures—psychotherapy notes notwithstanding.”<sup>23</sup>

Despite these ten cases where courts agreed with plaintiffs’ MQD arguments, the majority of courts reviewing Biden-era regulatory actions have rejected plaintiffs’ attempts to wield the doctrine. Some examples of why courts rejected MQD arguments include:

- landowners’ challenge to the Fish and Wildlife Service’s rule protecting the lesser prairie-chicken “ultimately brought too little [evidence] in the way of national impact”;<sup>24</sup>

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<sup>19</sup> See *Mayfield v. U.S. Dep’t of Labor*, 117 F.4th 611, 616 n.3 (5th Cir. 2024) (noting that Supreme Court major questions cases have “analyz[ed] the *impact of the rule in question*” (emphasis added)).

<sup>20</sup> *In re MCP No. 185*, 2024 WL 3650468, at \*4 (writing that “broadband services are absolutely essential to modern day life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression,” and concluding on that basis that net neutrality was a major question).

<sup>21</sup> By contrast, in an MQD challenge to the Department of Labor’s strengthening of protections for H-2A visa workers, the court noted that, despite agriculture being a \$1.5 trillion national industry, it is instead “the history and breadth and economic and political significance of the *action at issue*” that may trigger the major questions doctrine. *N.C. Farm Bureau Fed’n, Inc. v. U.S. Dep’t of Labor*, 2025 WL 1296245, at \*9 (E.D.N.C. May 5, 2025) (citation omitted) (emphasis added); see also *U.S. Dep’t of Labor v. Americare Healthcare Servs., LLC*, 762 F. Supp. 3d 666, 687-88 (S.D. Ohio 2025) (highlighting discrepancy between a party’s focus on the fact that the rule impacts a \$66 billion industry and the proper focus on the “economic impact of the [Rule itself, which is] distinguishable from cases implicating the major questions doctrine.”).

<sup>22</sup> *Purl*, 2025 WL 1708137, at \*25-26.

<sup>23</sup> *Id.*

<sup>24</sup> *Kan. Natural Res. Coal. v. U.S. Fish and Wildlife Serv.*, 2025 WL 1367834 (W.D. Tex. Mar. 29, 2025).

- airlines’ challenge to the Department of Transportation’s (DOT) rule requiring airline fees be disclosed prominently on websites did not implicate a “vastly significant economic or political issue”;<sup>25</sup>
- Tennessee’s challenge to HHS’s requirement of reproductive health care counseling and referral for Title X grants likely did not implicate the doctrine because of the “limited scope” of HHS’s authority under Title X;<sup>26</sup>
- dog breeders and associations’ challenge to the Centers for Disease Control’s (CDC) increased standards for dog importations could not meet the MQD elements, particularly “given [the CDC’s] history” of such regulations;<sup>27</sup> and
- tree care company’s challenge to the Federal Trade Commission’s (FTC) non-compete ban failed to distinguish past instances where the FTC had promulgated substantive rules to prevent unfair methods of competition.<sup>28</sup>

### **Application of the Major Questions Doctrine to Trump-Vance Actions**

The Trump-Vance administration has asserted expansive executive authority as a basis for regulatory actions, often through aggressive readings of Article II powers and statutory text. Since the administration began, eight lawsuits have led to court decisions discussing the major questions doctrine. Though many of these cases are still in the initial stages of litigation, they offer an indication of how courts are responding to Trump-era MQD challenges. In short: in all but one case, courts have reviewed Trump-Vance actions and concluded that MQD is implicated.

Cases that challenge the administration’s freezing or cancellation of government funding programs comprise half of the early MQD challenges to this administration’s actions. Several courts in these cases have emphasized the lack of clear statutory text anchoring the agency’s authority. During the early weeks of the administration, plaintiffs invoked the major questions doctrine when the Office of Management and Budget (OMB) attempted to freeze “as much as \$3 trillion dollars” in federal grants and loans.<sup>29</sup> In finding plaintiffs were likely to succeed on the merits of their claim that OMB’s action had exceeded its statutory authority, the district court concluded that the case “easily qualifie[d]” to “trigger heightened judicial scrutiny” under MQD precedents. As the court explained, the broad freeze was “no everyday exercise of federal power”; rather, “[t]he scope of power OMB [sought] to claim is ‘breathhtaking,’ and its ramifications are massive”—without any “clear statutory hook for this broad assertion of power.”<sup>30</sup>

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<sup>25</sup> *Airlines for Am.*, 127 F.4th at 578.

<sup>26</sup> *Tennessee v. Becerra*, 131 F.4th 350, 367-68 (6th Cir. 2025).

<sup>27</sup> *U.S. Sportsmen’s All. Found. v. CDC*, 2025 WL 1068069, at \*7 (W.D. Mich. Feb. 11, 2025).

<sup>28</sup> *ATS Tree Services, LLC v. FTC*, 2024 WL 3511630, at \*18 (E.D. Pa. July 23, 2024).

<sup>29</sup> *Nat’l Council of Nonprofits v. OMB*, 775 F. Supp. 3d 100, 126-27 (D.D.C. Feb. 25, 2025).

<sup>30</sup> *Id.* In a different lawsuit regarding the suspension of foreign aid, the district court stressed in a footnote that the administration did not identify any authority that allowed cancelling the congressionally appropriated funding. The court remarked that defendants would need to show “clear congressional authorization,” because the suspension of billions of dollars of congressionally appropriated aid was “no everyday exercise of federal power.” *AIDS Vaccine Advocacy Coal. v. U.S. Dep’t of State*, 770 F. Supp. 3d 121, 148 n.18 (D.D.C. Mar. 10, 2025).

In a lawsuit challenging federal agencies’ respective pauses on funding appropriated under the Infrastructure Investment and Jobs Act and the Inflation Reduction Act, the district court held that the plaintiffs were likely to succeed on the merits of their claim that the agencies had exceeded their statutory authority.<sup>31</sup> The court reasoned that “summarily t[ying] up a significant subset of the billions of dollars already awarded under those acts” involved “similarly vast questions” to past MQD precedent, without a “clear statutory hook for this broad assertion of power.”<sup>32</sup> In a lawsuit brought against HHS for terminating funding for COVID-19 public health programs, the district court held that the plaintiffs were likely to succeed on the merits of an MQD claim as well.<sup>33</sup> That court found that HHS exceeded its authority in terminating “\$11 billion worth of [public health] funding based on [its determination] that the money is no longer necessary.”<sup>34</sup> It concluded that “background legal conventions, constitutional structure, and common sense” cautioned against the agency having that authority, because Congress presumably intended that programs it appropriated funds for would be carried out.<sup>35</sup>

Outside of funding cases, the administration’s imposition of worldwide tariffs has also drawn MQD challenges. The administration invoked the International Emergency Economic Powers Act (IEEPA) to levy tariffs on multiple countries through IEEPA’s provision authorizing the “regula[tion]” of imports.<sup>36</sup> Litigants in turn have argued that using IEEPA to levy such tariffs is an unheralded power newly found in the statute, and such action is of vast economic and political significance. In one lawsuit in the Court of International Trade, the court explained that the statutory term “regulate ... importation” could not authorize “anything as unbounded as” the worldwide tariffs without running afoul of the major questions doctrine.<sup>37</sup> In another challenge, the district court likewise noted the unheralded nature of the asserted power, given the “lack of historical precedent, coupled with the breadth of authority that the [President] now claims” in implementing tariffs for the first time in the statute’s five-decade history.<sup>38</sup>

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<sup>31</sup> *Woonasquatucket River Watershed Council v. USDA*, 2025 WL 1116157, at \*20-21 (D.R.I. Apr. 15, 2025).

<sup>32</sup> *Id.*

<sup>33</sup> *Colorado v. HHS*, 2025 WL 1426226, at \*13 (D.R.I. May 16, 2025).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (citing *Nebraska*, 600 U.S. at 510-13 (Barrett, J., concurring)).

<sup>36</sup> 50 U.S.C. § 1702.

<sup>37</sup> *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1370 (C.I.T. May 28, 2025) (“[U]nder any construction that would comport with the separation-of-powers underpinnings of the nondelegation and major questions doctrines, [the term “regulate ... importation”] does not authorize anything as unbounded as the Worldwide and Retaliatory Tariffs.”). The court noted that, regardless of its choice of lens—nondelegation, major questions, or simple separation of powers principles—“any interpretation of IEEPA that delegates unlimited tariff authority is unconstitutional.” *Id.* at 1372. Another court, in a similar lawsuit challenging the worldwide tariffs, invoked the major questions doctrine to suggest that there was no clear congressional authorization allowing the President to impose worldwide tariffs. *Learning Res., Inc. v. Trump*, 2025 WL 1525376, at \*8 (D.D.C. May 29, 2025) (“If Congress had intended to delegate to the President the power of taxing ordinary commerce from any country at any rate for virtually any reason, it would have had to say so.” (citing *Nebraska*, 600 U.S. at 505-06)).

<sup>38</sup> *Learning Res.*, 2025 WL 1525376, at \*10.

President Trump’s attempt to unilaterally impose a proof-of-citizenship requirement for mail voter registration forms has also been challenged on MQD grounds. In granting a preliminary injunction, the court invoked the language of the Supreme Court’s *West Virginia* opinion, finding that the President’s executive order amounted to the discovery of an “unheralded power” in a “long-extant statute” that would mark a “transformative expansion” of the President’s power in elections.<sup>39</sup>

There is only one case to date in which a court has rejected applying MQD to a Trump-Vance regulatory action (though the court still invalidated the action on other grounds).<sup>40</sup> The case involved a challenge to a Financial Crimes Enforcement Network (FinCEN) Southwest geographic targeting order, which required money services businesses near the Southwest border to adhere to additional recordkeeping requirements. While ultimately granting a preliminary injunction on other grounds (namely, under *Loper Bright*), the district court rejected the plaintiff’s MQD argument, finding that FinCEN regularly invoked the relevant statutory language to issue targeting orders.<sup>41</sup> The court further found that the order was not a matter of vast economic and political significance, because it was “facially implausible” that compliance costs for a FinCEN recordkeeping order were on par with the scale of economic impacts at issue in prior major questions cases.<sup>42</sup>

Finally, Justice Kavanaugh issued a notable concurrence in *FCC v. Consumers’ Research* (a case that primarily concerned the nondelegation doctrine, discussed in more detail below), in which he lays the groundwork for a possible “national security” exception to MQD.<sup>43</sup> Justice Kavanaugh asserted that the major questions doctrine “does not translate” to the national security and foreign policy contexts due to “the usual understanding that Congress intends to give the President substantial authority and flexibility” in those areas.<sup>44</sup> Democracy Forward will be tracking whether and how this exception develops in future cases.

## Conclusion

The major questions doctrine will continue to evolve as it is applied in new scenarios, particularly as the Trump-Vance administration continues to act in aggressive ways. How appellate courts and the Supreme Court weigh the doctrine’s applicability against these latest actions will answer some of the lingering questions about the doctrine. In Biden-era challenges, will appellate courts correct lower courts that wielded MQD in cases that were not “extraordinary” and should not have met the MQD bar? And in challenges to the Trump-Vance administration, will they cut against the near-universal conclusion of the lower courts that MQD is implicated? With Justice Kavanaugh’s possible foreign affairs exception to MQD as just one

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<sup>39</sup> *League of United Latin Am. Citizens v. Exec. Off. of the President*, 2025 WL 1187730, at \*38 (D.D.C. Apr. 24, 2025) (citing *West Virginia*, 597 U.S. at 724-25).

<sup>40</sup> *Novedades y Servicios, Inc. v. Fin. Crimes Enforcement Network*, 2025 WL 1501936 (S.D. Cal. May 21, 2025).

<sup>41</sup> *Id.* at \*8-9.

<sup>42</sup> *Id.* at \*10.

<sup>43</sup> *FCC v. Consumers’ Research.*, 606 U.S. \_\_\_, 145 S. Ct. 2482, 2515-16 (2025) (Kavanaugh, J., concurring).

<sup>44</sup> *Id.*

example, new decisions may create exceptions or reworkings of the doctrine, or sanction misconstruals of typical MQD factors that ultimately serve to enable aggressive Executive Branch action in some areas yet constrain it in others.

To ensure that pro-democracy advocates are prepared for these developments as they take shape, Democracy Forward Foundation will continue to monitor the development of the major questions doctrine in litigation.

## Developments in the Nondelegation Doctrine, *Corner Post*, and *Jarkesy*

Democracy Forward Foundation is also monitoring the development of the nondelegation doctrine and two Supreme Court decisions in the last year concerning administrative law: *Corner Post v. Board of Governors of the Federal Reserve System*<sup>45</sup> and *SEC v. Jarkesy*.<sup>46</sup> Below are notes on the current states of these doctrines and cases.

### Nondelegation

The nondelegation doctrine is a longstanding canon of statutory interpretation that constrains Congress's ability to delegate its Article I legislative power absent an "intelligible principle" that guides agency decision-making in executing on Congress's will.<sup>47</sup> The major questions doctrine and nondelegation doctrine are related to the extent both are rooted in separation of powers principles, and seek to ensure that executive power is wielded by agencies in a manner consistent with Congress's intent.<sup>48</sup>

Despite speculation that the Supreme Court would revive or otherwise strengthen the nondelegation doctrine in the recently decided *Consumers' Research* case, the Court did not do so. Instead, the majority rejected a nondelegation challenge to the Universal Service Fund administered by the FCC. A concurrence by Justice Kavanaugh (the same concurrence in which he posited a potential national security exception to MQD, discussed above) noted that nondelegation concerns had been somewhat mitigated by the demise of *Chevron* deference in *Loper Bright*,<sup>49</sup> and by the rise of the major questions doctrine.<sup>50</sup> A survey of all 137 federal cases in the last year to raise a nondelegation challenge confirmed that, save for a Fifth Circuit decision concerning the Horseracing Integrity and Safety Act (which was vacated by the Supreme Court in light of the decision in *Consumers' Research*),<sup>51</sup> no court has agreed with a plaintiffs' nondelegation argument.<sup>52</sup>

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<sup>45</sup> 603 U.S. 799 (2024).

<sup>46</sup> 603 U.S. 109 (2024).

<sup>47</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406-09 (1928).

<sup>48</sup> *Nat'l Fed. of Indep. Bus. v. U.S. Dep't of Labor, Occup. Safety and Health Admin.*, 595 U.S. 109, 124-26 (2022) (Gorsuch, J., concurring) ("The major questions doctrine serves a similar function [to the nondelegation doctrine] by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power.").

<sup>49</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

<sup>50</sup> *Consumers' Research*, 145 S. Ct. at 2515-16.

<sup>51</sup> See *Nat'l Horsemen's Benevolent and Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024), vacated, *Hisa, Inc. v. NHBPA*, 2025 WL 1787684 (U.S. 2025).

<sup>52</sup> One additional case, *Alpine Securities Corporation v. Financial Industry Regulatory Authority*, resulted in a narrow ruling that a FINRA-registered broker dealer could not be expelled from FINRA (thus immediately barring the broker-dealer from trading) without pre-expulsion review by the Securities and Exchange Commission overseeing FINRA. The panel stressed that, in this limited context alone, it applied the private nondelegation doctrine. See 121 F.4th 1314 (D.C. Cir. 2024).

Corner Post

The Supreme Court held in *Corner Post v. Board of Governors of the Federal Reserve System* that the six-year statute of limitations for claims under the Administrative Procedure Act (APA) starts when a plaintiff suffers harm from the agency action, not when the regulation becomes final.<sup>53</sup> Through this expansive interpretation of the statute of limitations, *Corner Post* opened the door for anyone newly injured by an agency action to bring an APA challenge, even against long-settled agency orders or rules that have been in place for decades. As of August 7, 2025, *Corner Post* has only led to one APA challenge to a regulation where such a claim would otherwise have been time-barred: in *Corner Post* itself. On remand and on the merits, the district court in that case vacated the Federal Reserve’s regulation limiting fees in debit card transactions, which had been in place since 2011.<sup>54</sup> We will continue to monitor how *Corner Post* is opening up new opportunities for challenges to regulations.

Jarkesy

The Supreme Court held in *Securities and Exchange Commission v. Jarkesy* that the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against the defendant for securities fraud.<sup>55</sup> The Court declined to apply the “public rights” exception, which permits Congress to place matters within agency adjudication and without violating the Seventh Amendment so far as the matter does not resemble a traditional action at common law.<sup>56</sup> As Justice Sotomayor noted in her dissent, the Court’s opinion in *Jarkesy* opens the door for litigants to challenge “the constitutionality of hundreds of statutes ... [whereby] dozens of agencies could be stripped of their power to enforce laws enacted by Congress.”<sup>57</sup>

In the year since it was decided, litigants have actively cited *Jarkesy*, mounting challenges based on the decision in at least sixty-one cases. While few courts initially sided with plaintiffs on these challenges,<sup>58</sup> that may be beginning to change. To date, we have tracked three circuit court decisions that squarely considered *Jarkesy*’s applicability. In one case, the Third Circuit rejected a *Jarkesy* challenge.<sup>59</sup> In two others, however, the Third and Fifth Circuits

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<sup>53</sup> 603 U.S. 799 (2024).

<sup>54</sup> *Corner Post, Inc.*, 2025 WL 2253474 (D.N.D. Aug. 06, 2025) (granting summary judgment to plaintiff).

<sup>55</sup> 603 U.S. at 110.

<sup>56</sup> In the Court’s formulation, suits concerning private rights—matters “made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789”—cannot be removed from the federal judiciary’s cognizance, but matters that “historically could have been determined exclusively by [the executive and legislative] branches” can be. *Id.* at 127-28.

<sup>57</sup> *Id.* at 200-01 (Sotomayor, J., dissenting).

<sup>58</sup> See, e.g., *Millenia Housing Mgmt. v. HUD*, 2025 WL 1222589 (N.D. Ohio Apr. 28, 2025) (rejecting *Jarkesy* challenge to a Department of Housing and Urban Development adjudication imposing penalties for violating contracts); *Lemelson v. SEC*, 2025 WL 1503815 (D.D.C. May 27, 2025) (rejecting *Jarkesy* challenge to SEC adjudication barring individual from participating in the securities industry).

<sup>59</sup> *Axalta Coating Systems LLC v. FAA*, 2025 WL 1934352 (3d Cir. July 15, 2025). While the Federal Aviation Administration conceded that the civil monetary penalty imposed was a

agreed that *Jarkesy* controlled, and concluded the challengers were entitled to have their cases heard in federal court.<sup>60</sup>

In a Fifth Circuit case concerning a \$57 million fine by the FCC against AT&T for mishandling customer data, the court relied principally on *Jarkesy* in weighing whether the adjudicatory proceedings were “legal in nature,” such that they were a suit in common law under the Seventh Amendment.<sup>61</sup> The court considered the remedies sought and what, if any, common law cause of action was analogous to the violation at issue. As to the remedy sought, the Fifth Circuit concluded that the penalties for not taking reasonable measures to protect customer data were legal remedies meant to “punish or deter” violators of the Telecommunications Act, without remedial or compensatory purposes.<sup>62</sup> The court also considered the analogous cause of action at common law to be negligence, given that the Telecommunications Act sought to require “reasonable measures” to protect customer data.<sup>63</sup> Because both the remedy and the cause of action were legal in nature, the court vacated the FCC’s forfeiture order.

The Third Circuit has also relied on *Jarkesy* to curtail administrative adjudications. In a case concerning the Department of Labor’s (DOL) in-agency adjudication of employer violations under the H-2A worker rights program, the court concluded that the employer was entitled to have its case heard in federal court.<sup>64</sup> In a similar inquiry to the Fifth Circuit’s inquiry in *FCC v. AT&T*, the Third Circuit considered the legal nature of the alleged violation and of the remedy sought. As to the alleged violation, the court reasoned that since H-2A worker protections were often incorporated as part of a contract between the employer and the H-2A worker, violations of these rights were analogous to a common law breach of contract claim.<sup>65</sup> And because the enforcement action called for civil penalties and back pay, which the Third Circuit considered legal remedies, it concluded that enforcement within DOL violated the Seventh Amendment.<sup>66</sup>

Democracy Forward Foundation will continue to monitor developments under *Jarkesy*.

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“prototypical common law remedy,” the court nonetheless concluded that the public rights exception applied. It reasoned that no analogous common law cause of action existed like violations of technical standards such as the hazardous materials regulations at issue. Thus, Congress could assign enforcement of those standards within the agency consistent with the Seventh Amendment. *See id.* at \*4-6.

<sup>60</sup> *AT&T, Inc. v. FCC*, 135 F.4th 230 (5th Cir. 2025); *Sun Valley Orchards, LLC v. U.S. Dep’t of Labor*, 2025 WL 2112927 (3d Cir. July 29, 2025).

<sup>61</sup> *AT&T, Inc.*, 135 F.4th at 236-37.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See Sun Valley Orchards*, 2025 WL 2112927.

<sup>65</sup> *See id.* at \*4-7.

<sup>66</sup> *Id.*

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