GOVERNING FOR IMPACT

Deploying the Major Questions Doctrine to Thwart Project 2025

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The Major Questions Doctrine (MQD) heightens the standard of judicial review for certain "extraordinary" executive branch actions. Federal courts at all levels have used the MQD to thwart the Biden-Harris administration's policy agenda, striking down important actions that would have saved lives, reduced climate emissions, and put more money in people's pockets.

When Donald Trump takes office again this January, this primer proposes that litigants planning to oppose his radical agenda in court deploy the MQD wherever plausible. Litigants should not allow legitimate skepticism about the doctrine's provenance, general anti-regulatory bias, or track record stand in the way of doing so — nor should they fear further legitimizing a doctrine that, no matter their actions, is here to stay. Several of the proposals outside advocates are preparing for a second Trump administration (including in Project 2025) would dramatically expand presidential authority in novel ways, and so likely would prove vulnerable to MQD challenges. And even if litigants ultimately lose, in the course of doing so they will generate precedent that constrains the MQD, which has proved elusive under a Democratic president. In that sense, deploying MQD challenges to Trump administration actions will often prove a "win-win."

This primer provides background on the MQD; explains why litigants should use the MQD to challenge policies central to the next conservative administration's agenda; lays out indicia of when the MQD is applicable to administration actions; and provides examples of potential Trump administration actions to which the MQD may apply, including Schedule F and invoking several old, rarely used statutes to justify deploying federal troops on U.S. soil.

I. BACKGROUND

The MQD, which arrived in force in *West Virginia v. Environmental Protection Agency*,[1] operates by subjecting "certain extraordinary cases" to a demanding legal standard, in which actions must have "something more than a merely plausible textual basis" in statute to avoid invalidation.[2] The Court referred to this heightened legal bar as "clear congressional authority."[3] Whatever its name, it marks a

[1] 597 U.S. 697 (2022). The *West Virginia* decision drew on a few decades of precedent to craft the MQD. *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022). For a thorough review of the MQD up until *West Virginia*, *see* Natasha Brunstein & Donald L. R. Goodson, "Unheralded and Transformative: The Test for Major Questions After West Virginia," 47 Wm. & Mary Env't L. & Pol'y Rev. 47 (2023), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1830&context=wmelpr.
[2] *West Virginia*, 597 U.S. at 723.
[3] *Id.* at 700.

break from the past several decades of judicial practice. Under the once-regnant *Chevron* doctrine,[4] courts deferred to agency legal interpretations about ambiguous statutes so long as those interpretations were reasonable. In other words, demonstrating "a merely plausible textual basis" was once all that an agency needed to do in order to survive legal challenge; after *West Virginia*, that was no longer true if a court deemed a rule to present a "major question."[5]

The *West Virginia* majority opinion articulated a two-step test for resolving MQD cases. First, a court asks whether a given exercise of executive power poses a "major question" — a task accomplished by assessing "the history and breadth of the authority … asserted, and the economic and political significance of that assertion."[6] Columbia Law Professor Thomas Merrill has offered one of the clearest distillations of this step, divided into three components. Per Merrill, the MQD applies to a particular action if it: (i) marks "a deviation from [the agency's] settled sphere of action (novel, unprecedented, unheralded)"; (ii) "has the effect of significantly changing the scope of the agency's authority (transformative, radical change, wholesale restructuring)"; and (iii) "is a big deal (sweeping and consequential, vast economic and political significance)."[7] Importantly, an action must share all three of these features to pose a major question.

Second, once deemed a major question, an administrative action will only survive if the government can point to "clear congressional authorization" for it.[8] With a single exception, the Supreme Court has found that every action that it has deemed to be major fails to meet the "clear congressional authority" standard (and so has been invalidated).[9] As a consequence, most MQD challenges hinge primarily on the first inquiry: whether the action at issue poses a "major question."

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[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court overturned *Chevron* in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024). And even though *Chevron* formally remained good law until 2024, the Supreme Court had declined to invoke the doctrine for several years. *See* Thomas W. Merrill, "The Major Questions Doctrine: Right Diagnosis, Wrong Remedy," 3, (2023), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5215&context=faculty_scholarship (hereinafter "Merrill Paper").

[5] We doubt, as some have suggested, that the Supreme Court's decision in *Loper Bright Enterprises* effectively overruled the MQD *sub silentio*. That theory is predicated on a characterization of the MQD — as a carveout from *Chevron* — that, even if it once held sway, is not in line with the Court's most recent MQD decisions. (For example, the majority's opinion in *West Virginia* never cited *Chevron*). And as a practical matter, the Court is unlikely to have reversed course so abruptly (it decided *West Virginia* in 2022 and invalidated the first Biden loan forgiveness program on MQD grounds in 2023). And several lower courts agree: they have continued to consider the MQD's application after the Supreme Court's *Loper Bright Enterprises* decision. *See, e.g., State v. Su*, No. 23-15179, 2024 WL 4675411, at *3 (9th Cir. Nov. 5, 2024); *Properties of the Villages, Inc. v. Federal Trade Commission*, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *6 (M.D. Fla. Aug. 15, 2024); *In re Yellow Corp.*, No. 23-11069 (CTG), 2024 WL 4194560, at *11 (Bankr. D. Del. Sept. 13, 2024).

[6] *West Virginia*, 597 U.S. at 721 (internal citations omitted).

[7] Merrill Paper at 6.

[8] *West Virginia*, 597 U.S. at 723.

[9] That exception came in *King v. Burwell*, 576 U.S. 473 (2015). Of the twenty-one lower court decisions to grapple with the doctrine in the year since the doctrine was established, only one upheld the agency action at issue under the second, "clear congressional authorization" step of the MQD inquiry. *See* Natasha Brunstein, "Taking Stock of West Virginia on its One-Year Anniversary," Yale J. Reg., https://www.yalejreg.com/nc/taking-stock-of-west-virginia-on-its-one-year-anniversary-by-natasha-brunstein/ (June 18, 2023).

II. The case for deploying the MQD

Some might hesitate to use the MQD to challenge a second Trump administration's regulatory agenda. For the following reasons, we believe that the benefits of utilizing the MQD outweigh the potential downsides.

First, many of the Trump administration's most extreme plans are vulnerable to MQD challenge. A quick scan of the policy planning documents available from Project 2025, the America First Policy Institute, and the Center for Renewing America — as well as experience in the first Trump administration — reveals that a second Trump administration will be quite different from traditional conservative presidencies. Rather than focusing exclusively on deregulation, it will make radical attempts to use the federal bureaucracy to further the MAGA movement's ends. Already, likely-future Trump appointees have identified rarely-used laws as potential sources of staggering amounts of Presidential authority to, among other things, deploy regular troops in American cities and prosecute pharmaceutical companies and pharmacies that mail abortion pills.[10] These efforts are some of the most egregious and extreme parts of Trump's agenda, so litigants have an obligation to use every tool available to slow or stop their implementation. They also happen to be precisely the kinds of executive branch overreach that the MQD is purportedly meant to prevent.

Moreover, even before West Virginia, litigants were employing MQD-style arguments with some success against the first Trump administration. For example, a court in the Southern District of New York vacated the Department of Health and Human Services' (HHS) so-called Conscience Rights Regulation after conducting a fulsome MQD-style analysis of the economic and political significance of the rule. The court concluded that "it [was] 'not sustainable' to conclude that Congress would cede 'such broad and unusual authority through an implicit delegation' to HHS."[11]

Second, even if MQD challenges are unsuccessful, they could help discipline the doctrine. No matter the outcome, advancing MQD claims offers upsides to pro-regulatory litigants under a conservative administration. Successful challenges will invalidate radical and dangerous policies. This is, of course, the ideal outcome. But even unsuccessful claims could be beneficial. Today, one of the primary challenges that the MQD poses to regulatory governance is its malleability. Because the Supreme Court has done such a poor job of articulating the doctrine's scope and application,[12] conservative

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[10] *See* Ken Cuccinelli & Adam Turner, Policy Brief: The U.S. Military May Be Used To Secure The Border, (Mar. 25, 2024), https://americarenewing.com/issues/policy-brief-the-u-s-military-may-be-used-to-secure-the-border/; Project 2025, Mandate for Leadership 562, (Accessed: Oct. 3, 2024), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf (urging a "campaign" to enforce the "criminal prohibitions" against "providers and distributors of abortion pills.").

[11] *New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 531 (S.D.N.Y. 2019) quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *see also Cook Cnty., Illinois v. Wolf*, 962 F.3d 208, 222 (7th Cir. 2020) (citing canonical MQD canonical case *FDA v. Brown & Williamson Tobacco Corp.* to explain that *Chevron* Step 1 requires consideration of "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.").

[12] Daniel Deacon & Leah Litman, "The New Major Questions Doctrine," 109 Va. L. Rev. 1009, 1012, (2023) (collecting citations of articles discussing the "radically indeterminate" nature of the MQD).

litigants and judges have wielded it as an all-purpose anti-executive branch tool.[13] However, if litigants deploy the MQD against a second Trump administration, some conservative judges may have new political motivations to narrow the doctrine such that it does not pose an obstacle to the Trump agenda.

This could yield fruitful precedent that will accrue to the benefit of a future pro-regulatory administration. Today, for example, whether a regulation poses a major question "sometimes has a bit of a 'know it when you see it' quality."[14] Analyses of recent MQD cases reveal that "many judges may view the doctrine as a little more than a grab bag of factors, which they seem to be choosing from at their discretion."[15] MQD challenges to Trump rules could help concretize the list of MQD factors at step one. They could also breathe some life into the doctrine's second step — its "clear congressional authority" inquiry — which has so far proved relatively inconsequential. Save for one case in 2015,[16] the Supreme Court has never found that a rule posing a major question clears that elevated statutory bar. Such developments would prove welcome news to a future progressive administration defending its rules in court.

In sum, MQD challenges to Trump rules will force conservative judges and justices to choose between upholding Trump-led policy priorities and preserving the MQD's current freewheeling nature; either outcome provides benefits to progressives.

Finally, the MQD is here to stay. No amount of clever briefing is likely to change the conservative Supreme Court supermajority's mind about the need for or the legitimacy of the MQD. Only a change in the Court's composition will achieve that. In the meantime, all that is left is to try and shape the doctrine — and, as noted above, the next few years will provide the best opportunity to do so.

III. Identifying MQD candidates

Organized in accordance with the MQD framework explained above, this section identifies certain regulatory characteristics that suggest an agency action may be vulnerable to MQD challenge. Because most actions deemed to pose a major question fail to clear the "clear congressional authority" standard, this section will focus on the MQD's first step: whether an action poses a major question.

When claims of authority mark a deviation from an agency's settled sphere of action (novel, unprecedented, unheralded). Administration actions that are unlike prior exercises of the same statutory authority may be especially vulnerable to MQD challenge.[17] Challengers should compare the

[13] They have used the MQD to constrain the government from doing everything from issuing licenses to making simple adjustments to longstanding regulations that determine workers' eligibility for overtime pay. *Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 831 (5th Cir. 2023); *Texas v. United States Dep't of Lab.*, No. 4:24-CV-499-SDJ, 2024 WL 3240618, at *6 n. 7 (E.D. Tex. June 28, 2024) (explaining that Texas raised MQD claims against the DOL's attempt to update overtime regulations).
[14] *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 423 (D.C. Cir. 2017) (J. Kavanaugh, dissenting).
[15] *See* Natasha Brunstein, "Major Questions in Lower Courts," 75 Admin. L. Rev. 661 (2024).
[16] *King v. Burwell*, 576 U.S. 473 (2015).
[17] Daniel Deacon & Leah Litman, "The New Major Questions Doctrine," 109 Va. L. Rev. 1009, 1071 (2023).

instant regulation to any past rules.[18] In particular, they should look to see whether the action is vastly more expensive than past iterations or deploys divergent regulatory mechanisms.[19] Actions that invoke a statutory authority for the first time or prove inconsistent with an agency's "contemporaneous" interpretation at the time of the statute's enactment are also suspect.[20]

When a proposed action would work a transformative expansion of an agency's regulatory authority. The Supreme Court has found administration actions to be "transformative" under the MQD for a variety of reasons. Litigants should look out for claims of authority that:

1. are beyond an agency's "wheelhouse" or traditional field of expertise;[21]
2. would permit the agency to effectively rewrite the overall statutory scheme or suspend other statutory provisions, especially through grants of emergency power;[22]
3. interfere with traditional state and local prerogatives;[23]

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[18] Richard L. Revesz and Max Sarinsky, "Regulatory Antecedents and the Major Questions Doctrine," 36 Gtown Enviro. L. Rev. 1 (2023).

[19] *Alabama Ass'n of Realtors*, 594 U.S. at 765. (noting that "no regulation premised on [the authority] has even begun to approach the size or scope of the eviction moratorium" at issue); *Biden v. Nebraska*, 143 S. Ct. at 2358 (explaining that the massive student loan cancellation program was a novel use of the HEROES Act authority to "modify" statutory and regulatory requirements because "[p]rior to the COVID-19 pandemic, 'modifications' issued under the Act were minor and had limited effect.").

[20] *West Virginia* 597 U.S. at 747 (J. Gorsuch, concurring); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 119 ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind..."); *see also Loper Bright Enterprises,* 144 S. Ct. at 2247 (noting that "respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time.").

[21] *Biden v. Nebraska*, 143 S. Ct. at 2382; *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 118, 142 S. Ct. 661, 665, 211 L. Ed. 2d 448 (2022) (noting that the OSH Act does not empower the agency to regulate public health more generally because it "falls outside of OSHA's sphere of expertise."); *King v. Burwell*, 576 U.S. 473, 486 (2015)(finding it implausible "that Congress would have delegated [an Affordable Care Act implementation] decision to the IRS, which has no expertise in crafting health insurance policy of this sort."); *Biden v. Nebraska*, 143 S. Ct. 2355, 2383, 216 L. Ed. 2d 1063 (2023) (citing *Alabama Association of Realtors* to explain that "intrud[ing] into ... the landlord-tenant relationship" was "hardly the day-in, day-out work of a public-health agency"); In the case of jointly administered statutes, an agency's action might reasonably be expected to be housed within the other agency by virtue of its traditional expertise. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) ("The Government's interpretation of the prescription requirement also fails under the objection that the Attorney General is an unlikely recipient of such broad authority, given the Secretary [of Health and Human Services]'s primacy in shaping medical policy under the CSA, and the statute's otherwise careful allocation of decisionmaking powers").

[22] In *Biden v. Nebraska*, the Court rejected the Department of Education's use of its emergency authority to "waive or modify" certain student loan-related requirements to effect large-scale debt cancellation because the interpretation upon which the action rested would have essentially granted the Department the authority to "rewrite the Education Act." 143 S. Ct. at 2373. Rather than make modest changes to requirements (modifications) or relaxing requirements (waivers), the Court explained that the Department purported to eliminate provisions altogether and replace them with "radically new text" that created an entirely new student loan cancellation program. *Id.* at 2371. The Court could not countenance this outcome because it would fundamentally change the statute "from one sort of scheme of regulation into an entirely different kind" without Congressional input. *Id.* at 2373 (cleaned up). This decision bolstered a widely held view that the MQD sometimes operates as a way to produce nondelegation outcomes without invoking the nondelegation doctrine wholesale. *See, e.g.,* Patrick J. Sobkowski, *Of Major Questions and Nondelegation*, Notice & Comment, (Jul. 3, 2023), https://www.yalejreg.com/nc/of-major-questions-and-nondelegation-by-patrick-j-sobkowski/.

[23] An administration action could run afoul of the principles of federalism based on the issues it tries to regulate or resources it attempts to control. *Alabama Ass'n of Realtors*, 594 U.S. at 764 (noting that the CDC's eviction moratorium "intrudes into an area that is the particular domain of state law: the landlord-tenant relationship."); *See also Kentucky v. Biden*, 23 F.4th 585, 609 (6th Cir. 2022)(complaining that the vaccine order "transfer[s] this

4. hide "elephants in mouseholes" or rely on "ancillary provisions" or "little-used backwater[s];[24]
5. seeks to implement programs via executive action that Congress has conspicuously declined to enact;[25] and/or
6. assert authority over a new class of entities or persons.[26]

When claims of authority are of vast economic and political significance. While there is no precise measure of "significance" under the MQD, the Supreme Court's cases offer some clues. An economically significant action may imply the authority to regulate an industry that is highly influential in the broader United States economy.[27] Or the action could impose significant costs on regulated entities, somewhere in the range of billions of dollars annually.[28] Meanwhile, politically

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traditional prerogative" of police and public health power to the federal government under the guise of economical and efficient contracting).

[24] *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 468 (2001); *West Virginia*, 597 U.S. at 729-30; *Alabama Ass'n of Realtors*, 594 U.S. at 760 (describing the provision in question as a "wafer-thin reed on which to rest such sweeping power."); *King v. Burwell*, 576 U.S. at 497-98 (doubting that "Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code."). The statutory language might be vague or modest, or the agency may rely only on its general rulemaking authority rather than specific grants of rulemaking authority. *West Virginia*, 597 U.S. at 723 citing *Whitman*, 531 U.S. at 468. A general grant of rulemaking authority is a provision in a statute that gives the agency broad authority to fulfill the purposes of a statute through regulation. *See, e.g.,* the Department of Housing and Urban Development's general rulemaking authority, at 42 U.S.C. § 3535(d): "The Secretary may delegate any of his functions, powers, and duties to such officers and employees of the Department as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties." (Emphasis added.). In the past, courts have been relatively receptive to the idea that general grants of rulemaking authority were intended to empower agencies to make substantive rules and not merely procedural or housekeeping rules. *See, e.g., American Hospital Association v. NLRB,* 499 U.S. 606 (1991) (upholding rules defining bargaining units for hospital employees); *National Petroleum Refiners Association v. FTC,* 482 F.2d 672, *cert. den.,* 415 U.S. 951 (1974) (upholding FTC Trade Regulation Rules defining "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce"); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir. 1972) (affirming the authority of the FDA to make binding rules that define "prescription drugs"). It is not clear whether the current Court would regard the regulations upheld in these cases as presenting "major questions." If so, they might have accepted challengers' arguments that general grants of rulemaking authority were not intended to authorize quasi-legislative rulemaking. For example, a general grant of authority to an agency "to promulgate regulations for the efficient enforcement of this Act," might not be regarded as clear enough delegation of authority to adopt binding, substantive rules.

[25] *West Virginia*, 142 S. Ct. at 2608-10 (citations omitted) (striking down a cap-and-trade program that Congress had "conspicuously and repeatedly declined to enact itself," calling the administration's action a legislative "work-around."); *Biden v. Nebraska*, 143 S. Ct. at 2373 (noting that Congress considered more than 80 student loan forgiveness bills and other student loan legislation in the leadup to the Department of Education's loan cancellation effort); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 113 (2022) (explaining that Congress had enacted significant Covid-19 legislation but "declined to enact any measure similar to what OSHA" promulgated."); *See also Alabama Ass'n of Realtors*, 594 U.S. at 760 (explaining that the CDC unlawfully acted to extend the eviction moratorium that Congress let expire).

[26] *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117 (noting that the Covid-19 Emergency Temporary Standard imposed costs directly on employees rather than on employers); *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 322 (2014) (noting that the number of pollutant sources subject to EPA regulation would increase from "fewer than 15,000 to about 6.1 million").

[27] *West Virginia*, 597 U.S. at 745 (J. Gorsuch, concurring) (explaining that the electric power sector is among the largest industries and has links with every other sector).

[28] *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 120 (noting that OSHA's requirements would force "billions of dollars in unrecoverable compliance costs"); *King v. Burwell*, 576 U.S. at 485 (discussing the authority at issue as "involving billions of dollars in spending each year"); *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 322 (2014) (noting that annual administrative costs for one part of the regulation would "balloon" to "$21 billion"); *Biden v. Nebraska*, 143 S. Ct. at 2372 (noting the Education Department's attempt to discharge $430 billion in student loans).

significant actions may be the subject of heated societal and political debates, including in Congress and the media.[29]

In addition to assessing how the administration justifies its claims of authority in formal rulemaking documents, litigants should monitor how the White House and agencies talk about their actions in less formal communications. This could come in the form of press statements, White House or agency fact sheets, and remarks or online posts from the President, cabinet members, and prominent administration staffers. Courts have at times taken such communications into account as evidence of the administration's intent to, for example, go around Congress.[30]

Finally, as courts apply the MQD in more contexts, the reach of the doctrine will become clearer. For example, it is possible that the MQD will come to apply beyond the confines of legislative, prospective rulemaking from administrative agencies; for instance, to decisions about the provision of government

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[29] *Biden v. Nebraska*, 143 S. Ct. at 2374 (noting that student loan cancellation raises questions "that are personal and emotionally charged, hitting fundamental issues about the structure of the economy."); *West Virginia*, 597 U.S. at 729 (finding it unlikely that Congress would have delegated an important question like "how much coal-based generation there should be over the coming decades"); *Gonzales v. Oregon*, 546 U.S. at 267 (noting that physician-assisted suicide "has been the subject of an earnest and profound debate"); Some commentators have even argued that conservative media can *create* the political controversies that conservative judges then cite as proof of majorness. Andrew Koppelman, *The Supreme Court, vaccination and government by Fox News*, The Hill, (Jan. 14, 2022), https://thehill.com/opinion/judiciary/589763-the-supreme-court-vaccination-and-government-by-fox-news/; Andrew Koppelman, *How the Supreme Court is using 'major questions' to deregulate big business*, The Hill, (Sept. 5, 2024), https://thehill.com/opinion/judiciary/4861577-how-scotus-uses-major-questions-to-deregulate-big-business/.

[30] In explaining that the OSHA's vaccine-or-test regulation should have come from Congress, Justice Gorsuch even cited a tweet from the White House Chief of Staff that implied that the OSHA regulation was a legislative "work-around." *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 122 citing *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 n.13 (CA5 2021) ("On September 9, 2021, White House Chief of Staff Ron Klain retweeted MSNBC anchor Stephanie Ruhle's tweet that stated, 'OSHA doing this vaxx mandate as an emergency workplace safety rule is the ultimate work-around for the Federal govt to require vaccinations.'"). While it may be effective political rhetoric, White House messaging like President Obama's "We Can't Wait" and "I've got a pen and a phone" campaigns may raise red flags in the courts. See Tamara Keith, *Wielding A Pen And A Phone, Obama Goes It Alone*, NPR, https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone (January 20, 2014); The Obama White House Archives, *We Can't Wait*, https://obamawhitehouse.archives.gov/economy/jobs/we-cant-wait (accessed: September 2, 2022).

benefits,[31] enforcement actions against individual entities,[32] and actions taken solely by the President rather than by an agency.[33]

IV. Potential MQD targets

This section identifies three likely candidates for MQD challenges under the incoming administration: an effort to re-implement the Trump administration's Schedule F order; new healthcare conscience regulations; and plans to use federal troops to police American cities. The proposals were developed by individuals and organizations that will have significant influence in a second Trump administration, including the Trump campaign, the Heritage Foundation's Project 2025, and the Center for Renewing America. For each proposal, we explain why a MQD challenge could prove fruitful.[34]

1. Schedule F

[31] The Supreme Court in *Biden v. Nebraska*, which invalidated the Biden administration's student debt cancellation plan, applied the MQD even though the Department of Education took its debt cancellation action outside of normal rulemaking procedures, instead through the waiver authority bestowed on it by the HEROES Act. The Court rejected the Department's argument that the MQD shouldn't apply to "the provision of government benefits," explaining that "major questions cases have arisen from all corners of the administrative state," not just regulatory actions. *Biden v. Nebraska*, 143 S. Ct. at 2375 (cleaned up).

[32] A spate of recent district court decisions upholding Securities and Exchange Commission (SEC) enforcement actions against cryptocurrency companies is illustrative. *Sec. & Exch. Comm'n v. Binance Holdings Ltd.*, No. CV 23-1599 (ABJ), 2024 WL 3225974 (D.D.C. June 28, 2024); *Sec. & Exch. Comm'n v. Terraform Labs Pte. Ltd.*, 684 F. Supp. 3d 170 (S.D.N.Y. 2023); *Sec. & Exch. Comm'n v. Coinbase, Inc.*, No. 23 CIV. 4738 (KPF), 2024 WL 1304037 (S.D.N.Y. Mar. 27, 2024). Rather than reject out-of-hand that the MQD could apply to an individual enforcement action because the action is not a prospective legislative rule, courts have dutifully applied the test of whether an enforcement action poses a major question. For example, calling the MQD "at bottom, a principle of statutory construction," Judge Rakoff of the Southern District of New York decided that the question of whether crypto-assets are securities for the purposes of an SEC enforcement action was not a "major question" because the crypto-current industry "though certainly important … falls far short of being a portion of the American economy bearing vast economic and political significance" and the fact that the SEC routinely determines whether new financial instruments are securities within the meaning of its statutes, so it "hardly amount[ed] to a transformative expansion in its regulatory authority." *Terraform Labs*, 684 F. Supp. 3d at 189-190.

[33] A majority of federal circuit courts to consider the question have determined that the MQD can apply when the President (rather than an executive agency) takes an action pursuant to congressional authorization. The Fifth, Sixth, and Eleventh Circuits all applied the MQD to the President's effort to impose Covid-19 vaccine obligations on federal contractors. *Kentucky v. Biden*, 23 F.4th 585, 606–08 (6th Cir. 2022); *Georgia*, 46 F.4th at 1295–97; *Louisiana*, 55 F.4th at 1031 n.40; *but see Mayes v. Biden*, 67 F.4th 921, 933 (9th Cir.) (declining to apply the MQD to the President's use of the statutory contracting powers because it is not an "agency action"), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023); *see generally* Samuel Buckberry Joyce, "Testing the Major Questions Doctrine," 43 Stanford Envi. L. J. 51 (2024). The Fifth Circuit explained that, because the "Constitution makes a single President responsible for the actions of the Executive Branch, … delegations to the President and delegations to an agency should be treated the same under the major questions doctrine." *Louisiana v. Biden*, 55 F.4th 1017, 1031 n. 40 (5th Cir. 2022) (internal quotations omitted).

[34] Whether and how these claims could be justiciable (e.g., who would have standing to bring suit or when an action becomes reviewable) lies beyond the scope of this primer.

Former President Trump has made no secret about his plans to politicize and drastically shrink the civil service.[35] Among the more audacious initiatives he will likely pursue is reinstating his short-lived Schedule F order.[36] The plan entailed shifting thousands of federal employees into a newly created employment classification, Schedule F, comprised of "career positions in the Federal service of a confidential, policy-determining, policy-making, or policy-advocating character."[37] Once re-classified, under the administration's theory, Schedule F employees would lose tenure and other civil service protections, enabling Trump's political appointees to fire them at will. The Schedule F order purportedly rested on the President's authority under 5 U.S.C. § 3302:

> The President may prescribe rules governing the competitive service. The rules shall provide, **as nearly as conditions of good administration warrant**, for — (1) **necessary** exceptions of positions from the competitive service (emphasis added).

The order offered a half dozen rather conclusory assertions as to why Schedule F was "necessary" "as nearly as conditions of good administration warrant."[38] A revived Schedule F order — if it is anything like President Trump's first one — could be well-suited to an MQD challenge.

First, a new Schedule F order would be novel. An administration action is novel under the MQD if it represents a marked departure (in size, scope, or kind) from past action taken under the same statutory authority.[39] Historically, only a very small number of federal employees have qualified as having a "confidential, policy-determining, policy-making, or policy-advocating character."[40] In fact, the number of confidential policy positions exempted from the competitive service has remained relatively steady, at around 1,500, over the last 70 years.[41] Past presidential uses of the §3302 authority to move competitive service positions into the excepted service appear to be both rare and,

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[35] *See, e.g.,* Ian Ward, *'A Very Large Earthquake': How Trump Could Decimate the Civil Service*, POLITICO, (Dec. 23, 2023), https://www.politico.com/news/magazine/2023/12/20/trump-civil-service-00132459.

[36] Joe Davidson, *Trump's second-term agenda plans a purge of the federal workforce*, Washington Post, (Jul. 26, 2024), https://www.washingtonpost.com/politics/2024/07/26/trump-agenda-project-2025-federal-workers-schedule-f/.

[37] Exec. Order No. 13957, Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67631 (2020), https://www.federalregister.gov/documents/2020/10/26/2020-23780/creating-schedule-f-in-the-excepted-service.

[38] For example: "Faithful execution of the law requires that the President have appropriate management oversight regarding" the professionals "in positions of a confidential, policy-determining, policy-making, or policy-advocating character." Exec. Order No. 13957, Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67631 (2020).

[39] *See, e.g., Biden v. Nebraska*, 143 S. Ct. at 2358 (2023) (explaining that the massive student loan cancellation program was a novel use of the HEROES Act loan term "modification" authority because "[p]rior to the COVID-19 pandemic, 'modifications' issued under the Act were minor and had limited effect."); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117 (explaining that the OSH Act empowered the Secretary to set "*workplace* safety standards, not broad public health measures" and criticizing OSHA's vaccine-or-test mandate as "strikingly unlike the workplace regulations that OSHA has typically imposed.").

[40] *See generally* Comment of Protect Democracy and Walter Shaub on RIN 3206-AO56 48, (Nov. 24, 2023), https://www.regulations.gov/comment/OPM-2023-0013-2134.

[41] *Id.* at 48.

with one exception, narrowly tailored[42] to address recruiting problems within specific agencies.[43] Even the order in that one exception, although applicable to multiple agencies, was confined to a single functional role — that of an administrative law judge.[44] An order expanding the universe of jobs "of a confidential, policy-determining, policy-making, or policy-advocating character" — by one estimate, to 50,000 positions — is far more ambitious.[45]

Second, a new Schedule F order would represent a "transformative expansion" of the President's authority under §3302.[46] The MQD contains a number of indicia of transformativeness, but those most relevant here are when administration actions assert authority over a new class of entities or persons,[47] when the asserted interpretation would effectively amend the authorizing statute,[48] and when statutory language may be too vague or modest to support the authority asserted.[49] All three of these indicia are present here. As noted above, the Schedule F order would re-classify tens of thousands of career civil servants into a new precarious classification, dramatically expanding the "excepted service" beyond its historical scope to include many more positions and people. Title 5 creates a comprehensive set of requirements for nearly all government workers.[50] Section 3302 recognizes the need for managerial flexibility and allows the President to create "necessary" exceptions to those default requirements. Schedule F would abuse that authority to create exceptions large enough to bend the federal bureaucracy to the President's whims, the precise outcome that the drafters of Title 5 sought to avoid with the enactment of the Civil Service Reform Act.[51] It is unlikely that Congress would have hidden such formidable authority in the general language found in §3302.[52] As the Supreme Court has explained, Congress does not typically "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[53]

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[42] The *Biden v. Nebraska* Court emphasized that past uses of the authority at issue in that case had "been extremely modest and narrow in scope." *Biden v. Nebraska*, 143 S.Ct. at 2372.
[43] See, e.g., Exec. Order No 13,842, Establishing an Exception to Competitive Examining Rules for Appointment to Certain Positions in the United States Marshals Service, Department of Justice, 83 Fed. Reg. 32753 (2018); Exec. Order No. 12,300, Exceptions from the Competitive Service, 46 Fed. Reg. 18683 (1981) (excepting from the competitive service certain positions within the Department of Agriculture Agricultural Stabilization and Conservation Service and the Farmers Home Administration). The statement in text is based on research into presidential executive orders issued under the authority of 5 U.S.C. § 3302. Further research would be important to substantiate that broader initiatives have not previously been undertaken through other presidential policy instruments or OPM rules.
[44] Exec. Order No. 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32755 (2018).
[45] Jonathan Swan, A radical plan for Trump's second term, (Jul. 22, 2022), https://www.axios.com/2022/07/22/trump-2025-radical-plan-second-term.
[46] *West Virginia*, 597 U.S. at 724.
[47] *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117 (noting that the Covid-19 Emergency Temporary Standard imposed costs directly on employees rather than on employers); *Util. Air Regul. Grp.*, 573 U.S. at 322 (noting that the number of pollutant sources subject to EPA regulation would increase from "fewer than 15,000 to about 6.1 million").
[48] *See supra* note 22.
[49] *West Virginia*, 597 U.S. at 723 citing Whitman, 531 U.S. at 468.
[50] *See* 5 U.S.C. § 3301 *et. seq.* (establishing examination, educational, and other eligibility requirements for the civil service).
[51] Senate Report No. 95-969 at 4 (Jul. 10, 1978)(explaining that one of the motivations of the Civil Service Reform Act was that the "public has a right to a Government which is impartially administered.").
[52] The Supreme Court is skeptical of using such "oblique" language to empower an agency to make "radical or fundamental change to a statutory scheme." *West Virginia*, 597 U.S. 697, 723, 142 S. Ct. 2587, 2609 (2022)(cleaned up).
[53] *Whitman*, 531 U.S. at 468 (2001).

Third and finally, a renewed Schedule F effort would likely be economically and politically significant under the MQD. The MQD tends to apply when a particular action's impacts amount to billions of dollars annually or greatly affect a sector that is deeply intertwined with the broader American economy.[54] Schedule F could lead to the firing of 50,000 civil servants, whose lost salaries would add up to billions of dollars annually. And the legal justification upon which the order rests implies that the statute gives the President virtually unbounded authority to modify civil service protections and working conditions for the entire workforce of the largest employer in the country, which is sure to have knock-on effects in the broader economy.

Meanwhile, a Schedule F-type order's political significance would be hard to overstate. Political significance under the MQD tends to flow from intense public discussion and partisan controversy.[55] Schedule F has been the subject of fierce public debate since President Trump issued the first Schedule F order in October 2020.[56] Media coverage of plans to reinstate the Schedule F order has emphasized its potentially vast impact and controversial nature. Further, civil service reform and the efforts to end the spoils system have been topics of controversy throughout American history.[57] The last time Congress turned its attention to a comprehensive rethinking of civil service law produced the Civil Service Reform Act of 1978.[58] The extraordinary care and planning, both professional and political, that went into its drafting and enactment belie the notion that a president alone, without new legislation, could dramatically reconfigure the categorization of executive branch appointees based on his own policy preferences.[59]

As the foregoing analysis illustrates, the second Trump administration's efforts to revive Schedule F would likely meet all three components of the MQD's first step test.[60]

2. Healthcare Conscience Regulations

A Project 2025 author wrote that the next Republican administration should "restore and enhance conscience protection regulations that allow medical practitioners to participate in federal health care programs without being compelled to provide sex changes or similar services."[61] This recommendation refers to the Trump HHS's 2019 regulation[62] that "purported to interpret" and implement "more than 30 statutory provisions that recognize the right of an individual or entity to abstain from participation in medical procedures, programs, services, or research activities on account of a religious or moral objection."[63] But the regulation did far more than interpret existing law. Instead, it created new

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[54] *See supra* notes 27-28.
[55] *See supra* note 29.
[56] *See, e.g.,* Joe Davidson, *Trump's second-term agenda plans a purge of the federal workforce*, (Jul. 26, 2024), https://www.washingtonpost.com/politics/2024/07/26/trump-agenda-project-2025-federal-workers-schedule-f/.
[57] *See, e.g.,* Senate Report No. 95-969 at 2 (Jul. 10, 1978)(describing civil service statutes and regulations as evolving responses to the 19th century spoils system).
[58] Pub. L. 95-454, 92 Stat. 1111 (1978).
[59] Felix A. Nigro, *The Politics of Civil Service Reform*, 3 Southern Rev. Public Admin. 196 (1979).
[60] As noted above, if an action is deemed "major," it is very unlikely for it to survive at the MQD's second step. *See supra* note 16.
[61] Project 2025 at 464.
[62] Department of Health and Human Services, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, (May 21, 2019).
[63] *New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 496 (S.D.N.Y. 2019).

substantive obligations by redefining statutory terms through regulation. For example, the 2019 rule sought to broadly define terms like "assist in the performance [of medical procedures]," to extend the scope of protections to as many entities, people, and activities as possible. It also authorized the HHS Office of Civil Rights (OCR) to terminate a recipient's funding under several federal programs altogether if they violated the regulation. Several states, localities, and non-governmental parties filed suit against the 2019 rule and three district courts vacated the rule before it was able to take effect.[64]

If a second Trump administration were to promulgate a similar regulation, the MQD could be an appropriate litigation tool to combat this effort.

First, claiming an implied delegation of rulemaking authority[65] to develop a conscience regulation of the scope that the first Trump administration implemented (and especially one that is "enhance[d]," per Project 2025) would be a novel and unprecedented use of relatively minor statutory provisions. The MQD finds an action novel or unheralded when an agency claims an authority it hadn't before (or hadn't near the time of statutory enactment).[66] The first statutory conscience provisions were enacted in 1973, but HHS did not promulgate any implementing regulations for more than thirty years, indicating that the "contemporaneous" interpretation of the statutes did not suggest a need or basis for substantive rulemaking.[67]

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[64] Per the HHS's 2024 final rule, "The courts' rationales for vacating the 2019 Final Rule were not identical, but each concluded that the rule was defective in a number of respects. One or more courts held that the 2019 Final Rule: (i) exceeded the Department's authority; (ii) was inconsistent in certain respects with the conscience statutes or other statutes, including the Emergency Medical Treatment & Labor Act (EMTALA) and Title VII of the Civil Rights Act; (iii) was arbitrary and capricious in its evaluation of the record, its treatment of the Department's conclusions underlying the 2011 Final Rule and reliance interests of funding recipients, and its consideration of certain issues relating to access to care and medical ethics raised by commenters; (iv) contained a particular definitional provision that was not promulgated in compliance with the notice-and-comment requirements of the Administrative Procedure Act (APA); and (v) had penalties for non-compliance with conscience provisions that violated the separation of powers and the Spending Clause." Department of Health and Human Services, Safeguarding the Rights of Conscience as Protected by Federal Statutes, 89 Fed. Reg. 2078, (Jan. 11, 2024).

[65] The courts largely agreed that HHS lacked explicit rulemaking authority for the substantive provisions of the 2019 (and, by extension, the 2008) rule. *See, e.g., City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1022 (N.D. Cal. 2019) (finding that the 2019 lacked proper authority for rulemaking); *New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 521 (S.D.N.Y. 2019) (finding that the housekeeping provisions HHS cited in the rule did not confer substantive rulemaking authority).

[66] *See supra* notes 17-20.

[67] Furthermore, the regulatory precedents that a second Trump administration would seek to reinstate were barely in effect, meaning that their reimplementation would still be relatively novel. Indeed, the substantive provisions that a second Trump administration would seek to implement were in effect for less than two years total out of the 51 year span since the statutory provisions were enacted. In 2008, the Bush administration issued regulations that included definitions very similar to those in the 2019 rule. *New York v. United States Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 504 (S.D.N.Y. 2019). Several provisions of the 2008 rule never took effect and the entire regulation was quickly rescinded under the Obama administration and replaced in 2011 with a more modest regulation that assigned complaints under the conscience statutes to the OCR. As mentioned above, the Trump administration's 2019 regulation was immediately litigated across the country and never took effect. The Biden-Harris administration's replacement regulations – which, like the 2011 rule, are modest and ministerial in nature have been in effect since July 2024. The replacement regulations are short, based on a different statutory provision that allows agencies to issue regulations that delegate administrative tasks, and only creates a complaint mechanism for conscience violations, rather than establishing new substantive definitions under the statutes. Department of Health and Human Services, Safeguarding the Rights of Conscience as Protected by Federal Statutes, 89 Fed. Reg. 2078, 2100 (Jan. 11, 2024).

Second, the new conscience regulations would dramatically expand HHS's authority. An action is transformative if it, among other things, radically expands the scope of an agency's authority, perhaps infringing on regulatory regimes elsewhere in government, and when it asserts authority to regulate entire new classes of entities.[68] Among the 2019 rule's more "consequential dimensions," a district court noted, was its departure from the Title VII framework by claiming to "supersede Title VII in the health care field," upending over half a century of equal opportunity law and practice and infringing on the Equal Employment Opportunity Commission's domain.[69] It also sought to expand HHS's authority over new activities and entities by broadening the definition of protected activities (including to things like scheduling operation rooms and providing information to patients) and expanding the definition of "health care entity" to include, in one of the statutes for the first time, pharmacists and medical laboratories.[70] Such a vast rewriting of the statutory provisions via regulation would have dramatically expanded the HHS OCR's role in policing workplace rights in a manner that could not be countenanced under the MQD.

Third, the conscience regulations would likely meet the MQD's definition of economic and political significance. An action is economically significant if it imposes billions of dollars in costs or if it significantly affects sectors that are central to the United States economy.[71] One of the reviewing district courts explicitly found significance in an MQD-style assessment.[72] HHS estimated that the rule would cost roughly $1 billion to implement in the first five years, not including public health costs.[73] And the district court noted that the rule would have further put "in jeopardy billions of dollars in federal health care funds."[74] The federal government spends more than $1 trillion on healthcare annually and healthcare is the largest industry in the United States by many measures.[75] Empowering the OCR to summarily deprive various entities of federal healthcare funding would surely cause disruptions throughout the economy.

And there is little question that the conscience regulations would meet the MQD's standard for political significance. The district court explained that the rule applied "across the vast health care industry" and "centrally concerned two political hot-button issues: abortion and assisted suicide."[76]

As demonstrated here, the second Trump administration's plans to enact conscience regulations would likely pose a major question, and therefore is highly likely to be invalidated under the MQD.

3. Deploying troops in American cities

Former President Trump regularly threatens to deploy federal troops in American cities to conduct regular law enforcement and combat urban crime.[77] The right-wing Center for Renewing America has

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[68] *See supra* note 26.
[69] *New York*, 414 F. Supp. 3d at 513.
[70] *Id.* at 515.
[71] *See supra* note 27-28.
[72] *New York*, 414 F. Supp. 3d at 530.
[73] *Id.* Of course, as noted above, MQD cases usually involve costs of billions of dollars annually. The conscience regulations may still be economically significant because of their unquantified costs (e.g., public health) and its related impacts on the healthcare sector generally.
[74] *Id.*
[75] *See, e.g.,* United States Census Bureau, Health Care Still Largest U.S. Employer, (Oct. 14, 2020), https://www.census.gov/library/stories/2020/10/health-care-still-largest-united-states-employer.html.
[76] *New York*, 414 F. Supp. 3d at 530.
[77] *See, e.g.,* Charlie Savage, et. al, *Deploying on U.S. Soil: How Trump Would Use Soldiers Against Riots, Crime and Migrants*, New York Times, (Aug. 17, 2024),

also floated this idea in its transition planning efforts and recently published a related paper that lays out how the President should use the Insurrection Act to deploy troops to the border.[78]

The Posse Comitatus Act (PCA) generally makes it unlawful to use regular federal troops for the purpose of domestic law enforcement, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress."[79] The Insurrection Act of 1807 constitutes a statutory exception to the PCA, providing:

> Whenever the President considers that **unlawful obstructions, combinations, or assemblages**, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may … use such of the armed forces, as he **considers necessary** to enforce those laws or to suppress the rebellion.[80]

And

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he **considers necessary to suppress**, in a State, any **insurrection, domestic violence, unlawful combination, or conspiracy**, if it— (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) **opposes or obstructs the** execution of the laws of the United States or **impedes the course** of justice under those laws.[81]

The Center for Renewing America argues that, in addition to the President's inherent executive authority and role as commander-in-chief of the armed forces, the Insurrection Act provides ample support for the President to deploy troops domestically because the surge of migration in the first quarter of 2024 overwhelmed "the ordinary course of judicial proceedings" and Mexican cartels and migrants "obstruct[]" the law and act in "unlawful combinations."[82] It is plausible that a second Trump administration would use a similar argument to justify deploying federal troops in cities even far away from the Southern border.

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https://www.nytimes.com/2024/08/17/us/politics/trump-2025-insurrection-act.html (noting his plans to deploy troops "[i]n places where there is a true breakdown of the rule of law, such as the most dangerous neighborhoods in Chicago."); Joe Gould, *Trump wants to send troops to the inner cities. A top senator wants to rein him in.*, POLITICO, (Jan. 24, 2024), https://www.politico.com/news/2024/01/24/trump-insurrection-act-deploy-military-00137598 (threatening to use the military in "crime dens" like Chicago and New York City).

[78] Ken Cuccinelli & Adam Turner, Policy Brief: The U.S. Military May Be Used To Secure The Border, (Mar. 25, 2024), https://americarenewing.com/issues/policy-brief-the-u-s-military-may-be-used-to-secure-the-border/.

[79] 18 U.S.C. § 1385.

[80] 10 U.S.C. § 252 (emphasis added).

[81] 10 U.S.C. § 253 (emphasis added). Other parts of the Insurrection Act allow the President to take other actions, but those are generally authorized at the request of local and state officials. *See, e.g.*, § 251.

[82] Ken Cuccinelli & Adam Turner, Policy Brief: The U.S. Military May Be Used To Secure The Border, (Mar. 25, 2024), https://americarenewing.com/issues/policy-brief-the-u-s-military-may-be-used-to-secure-the-border/.

Because the MQD likely extends to actions taken by the President,[83] including those that are not legislative regulations,[84] a second Trump administration's potential use of the Insurrection Act to deploy troops in American cities could be a candidate for an MQD-style challenge.[85]

First, deploying troops for domestic law enforcement purposes would be an unprecedented use of the President's authority under the statute. An action is unprecedented, unheralded, or novel when it is unlike prior invocations of the same authority or when the same authority has only been invoked sparingly.[86] Whereas former President Trump seeks to deploy troops in cities to address ambient urban crime levels (which have been falling since the pandemic[87]), prior invocations of the Insurrection Act occurred only in response to discrete events like rebellions or riots.[88] Presidents have only invoked the Insurrection Act in response to 30 crises in the 230 years since the law's enactment. Many of those 30 examples were made at the request of local or state officials (which makes a separate set of authorities available to the President) and only three invocations have occurred since the turmoil of the Civil Rights Era, when states and localities were openly defying federal law to maintain racist Jim Crow segregation.[89] And those later three invocations were in response to discrete crises arising out of specific events, rather than with the purpose of general crime prevention. For example, in 1987, President Reagan invoked the Act in response to a Georgia prison riot that occurred in response to the federal government's announcement that it would deport over one thousand of the prison's detainees. President H.W. Bush's 1989 invocation was aimed at looting and violence in the U.S. Virgin Islands following Hurricane Hugo. Three years later, President H.W. Bush deployed federal troops to Los Angeles to quell rioting following the acquittal of the police officers who beat Rodney King.[90] In contrast, deploying federal troops for general law enforcement on an ongoing basis to states and localities that do not request them would be an unusual use of an infrequently-used authority.

Second, this potential use of the Insurrection Act would mark a transformative development in the use of presidential power under the Act. Actions can be transformative under the MQD if they intrude on the domains of lower levels of government and when they assert authority over a new class of entities or persons.[91] Primary responsibility for public safety generally falls to state and local governments.[92] This is a deeply held principle in American law. An order deploying troops to conduct

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[83] *See supra* note 33.
[84] Like decisions regarding government benefits and enforcement actions against individual entities. *See supra* notes 31-32.
[85] It is worth noting that it is yet unsettled whether there are additional or different considerations under the MQD when it is applied to actions related to national security. *See* Curtis Bradley & Jack Goldsmith, "Foreign Affairs, Nondelegation, and the Major Questions Doctrine," 172 U. Penn. L. Rev. 1743, 1791-1801 (2024) (explaining that, while there is no national security exception to the MQD, the doctrine will "often lack bite" by its own terms, especially in foreign affairs contexts); Ganesh Sitaraman, "The National Security Consequences of the Major Questions
Doctrine," 122 Mich. L. Rev. 55 (2023) (explaining that the MQD may present challenges to national security and foreign affairs efforts because statutes on these matters are usually broadly worded and it is often difficult to cleanly distinguish between foreign and domestic affairs in a way that would be workable to create a foreign affairs exception to the MQD).
[86] *See supra* notes 17-20.
[87] Russell Contreras, New data shows violent crime dropping sharply in major U.S. cities, Axios, (Aug. 12, 2024), https://www.axios.com/2024/08/12/violent-crime-harris-trump-election.
[88] Joseph Nunn & Elizabeth Goitein, Guide to Invocations of the Insurrection Act, (Apr. 25, 2022), https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act.
[89] *Id.*
[90] *Id.*
[91] *See supra* note 26.
[92] U.S. Const. amend. X (reserving residual powers, including those to protect public safety, to the States).

local law enforcement would thus “significantly alter the balance between federal and state power.”[93] Additionally, it would dramatically expand the activities of the military within the borders of the country, subjecting new groups of Americans to military force.

Third, an order deploying troops to American cities would likely qualify as economically and politically significant. The MQD’s rough definition of economic significance focuses on the costs that an action imposes on entities or potential effects on the broader economy.[94] Such a drastic change in the role of the military in American life could require massive infusions of funding for the Department of Defense, and disruptive military operations in cities could destabilize local economies. On the political significance front, there is plenty of press coverage of former President Trump’s plans to use the military in this fashion, and the first Trump administration’s use of federal officers in cities sparked major controversy.[95] Additionally, advocates, experts, and members of Congress have urged clarifying amendments to the Insurrection Act and Posse Comitatus Act to prevent the President from abusing his power.[96]

Based on the presence of all MQD factors above, the President’s invocation of the Insurrection Act to police American cities likely poses a major question.

V. CONCLUSION

In the interest of halting or slowing down the most egregious parts of a new administration’s agenda, litigants should aggressively use all tools at their disposal — even those that have so far mostly benefited conservative causes. As this memo argues, the MQD could both prove a fruitful basis for challenging certain kinds of reactionary and dangerous executive actions and help discipline the doctrine to reduce the threat it poses to future regulatory governance.

[93] *Alabama Ass'n of Realtors*, 594 U.S. at 764 (internal quotations omitted).
[94] *See supra* note 27-28.
[95] John Yang, *Trump’s deployment of federal agents to quell Portland protests draws local ire*, PBS, (Jul. 20, 2020), https://www.pbs.org/newshour/show/trumps-deployment-of-federal-agents-to-quell-portland-protests-draws-local-ire.
[96] Ariela Rosenberg & Alex Tausanovitch, How to reform domestic deployment authorities, (Sept. 10, 2024), https://protectdemocracy.org/work/how-to-reform-domestic-deployment-authorities/; Bob Bauer, et. al, Principles for Insurrection Act Reform, (Apr. 8, 2024), https://www.ali.org/media/filer_public/32/a4/32a425d8-d80a-44e5-af39-7ff00ebf809d/principles-insurrection-act-reform.pdf.