2024 Supreme Court term may bring more change to administrative law

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Springtime at the Supreme Court is often a time of anticipation, and the 2023 Term is no different. The Court will wrap up oral arguments on April 25, hearing former President Trump's bid for immunity from criminal prosecution for his conduct relating to the 2020 election results.

But with opinions issued so far in only about a third of argued cases, the bulk of the Justices' work still lies ahead. They are poised to issue decisions on hot-button issues, including gun rights, abortion, and several First Amendment questions affecting businesses. *See* February Reuters Piece (https://bit.ly/3UvSGPl).

Many of those cases won't be decided until late June, and in the meantime, it's worth looking ahead to what may be in store for the 2024 Term. So far, the Justices have granted cert in only four cases — far fewer than the roughly 13 cases that the Court has typically granted by this time in the Term. There's nevertheless likely to be ample fodder for next Term's docket, especially in the realm of administrative law — an area that is particularly relevant for businesses.

The Justices are already grappling with several key administrative-law questions this Term, including whether to overrule the *Chevron* doctrine (*Loper Bright Enterprises v. Raimondo, Relentless v. Department of Commerce*), invalidate the SEC's in-house courts (*Securities & Exchange Commission v. Jarkesy*), and expand the accrual rules for challenges to agency rules under the Administrative Procedure Act (*Corner Post v. Board of Governors of the Federal Reserve System*). And other key administrative-law questions are looming on the horizon.

The Justices likely will be asked to revisit the contours of the major questions doctrine — the rule that an administrative agency lacks power to make decisions on "major questions" of extraordinary economic and political significance unless Congress "clearly" gave it such authority. The doctrine was expressly approved by the Court just two years ago in *West Virginia v. EPA*, and it has fueled regulatory challenges on a host of issues.

While *West Virginia* emphasized that the doctrine is reserved for "extraordinary cases," many litigants can argue that a given agency action is politically divisive, affects the national economy, breaks from the agency's past practices, or strays from what the *West Virginia* Court called the agency's "traditional lane."

West Virginia itself does not provide much clarity about the contours of what constitutes a major question. Nor did the Court offer much clarity last spring when it relied on the doctrine in *Biden v. Nebraska* to invalidate the Biden administration's student debt relief plan. Several cases percolating in the lower courts, however, may provide opportunities for the Justices to further articulate the scope of this potentially powerful tool for curbing agencies' power.

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One set of cases arises in the context of nuclear waste storage. To address delays in the construction of a permanent geologic depository for nuclear waste, the federal Nuclear Regulatory Commission (NRC) licensed temporary storage facilities for spent nuclear fuel. Texas, along with mineral rights owners, challenged the NRC's issuance of one such license to Interim Storage Partners to operate a temporary storage facility in Texas.

Last August, the 5th U.S. Circuit Court of Appeals agreed with the challengers that the NRC exceeded its authority under the Atomic Energy Act and the Nuclear Waste Policy Act. In reaching that conclusion, the panel in *Texas v. NRC* (no. 21-60743) relied on the Supreme Court's decision in *West Virginia*. Emphasizing that "[d]isposal of nuclear waste is an issue of great 'economic and political significance,'" the 5th Circuit determined that Congress had not clearly delegated authority to make "decision[s] of such magnitude and consequence" to the federal agency.

The United States and Interim Storage petitioned for rehearing en banc. Among other things, the petitioners challenged the panel's extension of *West Virginia* to this case and argued that the panel's limited view of the agency's authority conflicts with decisions from other circuits. The 5th Circuit denied rehearing en banc on March 14, 2024, by a sharply divided 9-7 vote. Two weeks later, the court

applied its holding in the Texas case to invalidate a separate license for temporary nuclear storage in New Mexico.

Meanwhile, a similar challenge to the NRC's authority is pending before the U.S. Court of Appeals for the D.C. Circuit, which heard oral argument in *Beyond Nuclear Inc. v. NRC* (no. 20-1187) on March 5, 2024. Regardless of how the D.C. Circuit rules, however, it is likely that a petition on these issues will soon make its way to the Justices.

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Later this spring, the Justices will consider a petition that asks them to take the major questions doctrine a step further by holding that, when it comes to major questions, only Congress can make decisions — it can't delegate those decisions to agencies. The petitioner in *Allstates Refractory Contractors v. Su* (no. 23-819) claims that Congress violated Article I of the Constitution — which vests all legislative power in Congress — by delegating broad authority to the Occupational Safety and Health Administration (OSHA) to enact and enforce "appropriate" safety standards for workplaces across America. In other words, the major questions doctrine is just the beginning of the constitutional inquiry: Congress' express delegation of decisionmaking authority on major questions doesn't end the analysis because Article I precludes Congress from ceding its lawmaking authority to another branch or entity (the so-called "nondelegation doctrine").

Given that the "safety standards for every working man and woman in the Nation" present a major question, Allstates argues that Congress could not constitutionally "pawn[] ... off" the power to promulgate such rules.

Although a divided 6th U.S. Circuit Court of Appeals rejected Allstates' challenge, several justices have expressed a desire to reinvigorate the nondelegation doctrine. In a 2019 case, *Gundy v. United States*, a narrow majority found no nondelegation problem with the Sex Offender Registration and Notification Act, but four justices — Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch — expressed a willingness to revive the erstwhile doctrine.

Allstates may provide just that opportunity. Should the Justices agree to take up the case, their decision could have major ramifications not only for OSHA (and therefore workplaces across the country) but also for a host of other regulatory agencies acting under Congress' express delegation of authority to make decisions on major questions.

Expressly reviving the nondelegation doctrine would bolster any number of regulatory challenges from businesses, but it also could threaten stability by undermining longstanding rules and regulatory regimes that businesses have come to rely upon. Curtailing OSHA's authority, for example, could shift safety regulation to states, potentially subjecting many businesses to a patchwork of compliance standards.

Meanwhile, lower courts are grappling with the legality of several other significant regulatory efforts, and some of those challenges may eventually make their way to the Supreme Court.

The 5th Circuit is currently considering a challenge to a Department of Labor rule allowing retirement advisers to consider environmental, social, and governance issues ("ESG") when selecting investments. Two dozen Republican states claim that the rule hinders advisers' duty of loyalty under the Employee Retirement Income Security Act (ERISA) and flouts statutory limits on DOL's power. The 5th Circuit likely will hear oral argument later this year in *Utah v. Su* (no. 23-11097).

In late March, a series of nine cases challenging the Securities and Exchange Commission's recent rule requiring some publicly traded companies to report emissions and disclose other climate-change risks was consolidated in the 8th U.S. Circuit Court of Appeals (*Iowa v. SEC*, no. 24-1522). The challengers include Republican states and the U.S. Chamber of Commerce, which claim that the SEC's new disclosure requirements exceed the agency's statutory authority, as well as environmental groups like the Sierra Club, who argue that the new rule doesn't go far enough.

The parties haven't yet filed their briefs on appeal, but the SEC agreed to stay its regulation in the hopes of facilitating a speedier resolution. Regardless of how the 8th Circuit ultimately rules, however, the Justices will probably be asked to weigh in. And if they do, their decision could impact a host of administrative-law doctrines, from major questions and nondelegation to *Chevron* deference (should it survive this Term).

Between the administrative-law questions pending on the 2023 Term's docket and potential issues in the pipeline, the landscape of administrative law may be in for some dramatic change. But decisions curbing agency power may be a double-edged sword for businesses: While doctrines restricting the administrative state can bolster challenges to unfavorable regulatory action, they may also inject instability by empowering attacks on longstanding rules that businesses find helpful and predictable. Businesses should be watching these developments closely, both at the Supreme Court and in the lower courts.

Shay Dvoretzky and Emily Kennedy are regular, joint contributing columnists on the U.S. Supreme Court for Reuters Legal News and Westlaw Today.

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