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US IMMIGRATION & NATIONALITY LAW

HOW THE MAJOR QUESTIONS DOCTRINE CAN UNDO SOME OF TRUMP'S POLICIES, INCLUDING ON BIRTHRIGHT CITIZENSHIP

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By Cyrus D Mehta and Kaitlyn Box*

Introduced by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the major questions doctrine holds that, "in certain extraordinary cases" where it is unclear whether an agency action was authorized by Congress, "given both separation of powers principles and a practical understanding of legislative intent, the agency must point to 'clear congressional authorization' for the authority it claims". Until now, the doctrine has largely been used by the conservative-majority Supreme Court to thwart Biden-era policies, but a recent New York Times op ed by Aaron Tang highlights the doctrine's potential to be a tool in challenging Trump's actions, including those relating to immigration.

Lawsuits have been filed challenging Trump's tariffs questioning whether there is clear authorization as they present a matter of vast economic and political significance. Like his tariffs, Trump's efforts to freeze federal funding, interfere with the states' administration of their elections and slash the government using the Department of Government Efficiency "DOGE") are all areas of major national significant that Congress has not authorized the president to decide, the lawsuits claim.

Even if the immigration arena, lawsuit's invoking the major questions doctrine challenging Trump's modification of birthright citizenship question whether federal law has granted the president authority to revoke birthright citizenship.

In a previous blog we examined the role of the major questions doctrine in the immigration context in *Washington Alliance of Technology Workers v. the U.S. Department of Homeland Security ("Washtech v. DHS")* and *Texas v. DHS*. The

dissent in *Washtech* indicated that the issue of whether DHS' 2016 Optional Practical Rule for students in F-1 visa status exceeds its statutory authority was a "major question", and finding that the doctrine applied, directed the district court upon remand to examine whether DHS had the authority to issue OPT regulations under this principle. The major questions doctrine arose again in *Save Jobs USA v. DHS*, which involved a challenge to the regulation providing work authorization to some H-4 spouses. There, the D.C. Circuit was not compelled by an argument that *Washtech* should be disregarded because it did not address the major questions doctrine, holding that because *Washtech* had already interpreted the relevant regulations after *West Virginia v. EPA*, it remained good law. The court in *Texas v. USA* cited *West Virginia v. EPA* in holding that DHS had no Congressional authority to implement the DACA program.

Trump may be hoisted by his own petard through the major questions doctrine in a birthright citizenship case. Santa Clara County California, in a lawsuit aimed at blocking the implementation of the Trump administration's executive order restricting birthright citizenship, invoked the major questions doctrine. On page 17 of its brief, Santa Clara County states:

Even if Section 301(a) could be construed to leave any ambiguity about the meaning of the phrase "subject to the jurisdiction thereof," there is no basis for any argument that in 1952 Congress intended that such an ambiguity serve as a delegation of broad authority to the President to define the parameters of a statute, let alone a constitutional right. It is difficult to imagine any question of greater "economic and political significance" than the scope of a provision that describes what group of people constitutes the American polity and may participate in its sovereignty. *See, e.g., West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (statutory ambiguities should not lightly be construed to delegate decision making authority on major questions of economic or political importance). Given these stakes, it is untenable to read the INA as granting the President the authority to resolve or disturb the statutory meaning.

As Tang points out, the major questions doctrine was developed by the Supreme Court at a time when *Chevron* required the court to give broad discretion to agency decisions. As our previous blog discusses, courts may have now have more latitude to strike down agency actions since the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which overturned *Chevron* and instructed courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the

Administrative Procedure Act requires".

The major questions doctrine can now serve as yet a further tool for courts to employ in resisting the Trump administration's efforts to make sweeping and destructive changes to immigration law and policy through executive power. Another example is the Trump administration's broad interpretation of the Alien Enemy Act beyond an armed conflict, to include migration and drug smuggling as an "invasion", thus triggering sweeping executive removal power. Would the courts consider whether a matter of such "vast … political significance" ought to be decided by the executive branch absent clearer instruction from Congress under the major questions doctrine?

*Kaitlyn Box is a Partner at Cyrus D. Mehta & Partners PLLC.