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Fair Questions, Major Answers: Rooting Fair Housing in an Incentive-Based Approach to Avoid Major Questions Concerns

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FAIR QUESTIONS, MAJOR ANSWERS: ROOTING FAIR HOUSING IN AN INCENTIVE-BASED APPROACH TO AVOID MAJOR QUESTIONS CONCERNS

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INTRODUCTION

The United States is racially segregated.[1] The vast majority (81%) of metropolitan regions with populations over 200,000 are more segregated now than they were in 1990.[2] Only two of the 113 largest cities in the United States are racially integrated.[3] Compared to segregated white neighborhoods, segregated communities of color have higher poverty rates and political polarization, reduced home values, and lower rates of homeownership.[4] The Fair Housing Act of 1968 (FHA) outlawed housing discrimination, but had no way to undo the nation's decades of segregation.[5] In fact, 83% of neighborhoods that were subject to discriminatory federal lending practices in the 1930s remain highly segregated communities of color today.[6] The neighborhood a child grows up in impacts whether they will attend college, their access to medical care, and their future earning potential.[7] Black and Latino children raised in highly segregated communities of

1. *See* Alana Semuels, *The U.S. is Increasingly Diverse, So Why is Segregation Getting Worse?*, TIME (June 21, 2021, 5:35 AM), https://time.com/6074243/segregation-america-increasing/ [https://perma.cc/H54G-8P3M]; Stephen Menendian et al., *The Roots of Structural Racism Project*, OTHERING & BELONGING INST. (June 30, 2021), https://belonging.berkeley.edu/roots-structural-racism [https://perma.cc/33EP-SBJP].

2. *See* Menendian et al., *supra* note 1.

3. The two cities are Colorado Springs, CO, and Port St. Lucie, FL. *See id.*

4. *See id.*

5. *See* 42 U.S.C. §§ 3601–31.

6. *See* Menendian et al., *supra* note 1; *see also infra* Part I.A.1 for discussion of federal housing discrimination.

7. *See* Semuels, *supra* note 1; *Neighborhoods Matter*, OPPORTUNITY INSIGHTS, https://opportunityinsights.org/neighborhoods/ [https://perma.cc/4M5P-4CS4] (last visited Jan. 10, 2023).

color will, as adults, earn thousands of dollars less a year than those raised in integrated and in white neighborhoods.[8] Integration benefits everyone, but is increasingly difficult to achieve.[9]

Fair housing advocates are attempting to address these issues but cannot singlehandedly resolve the long history of housing discrimination.[10] The only federal mechanism that could force or promote residential integration is an oft-forgotten provision in the FHA,[11] which states that federal agencies have a mandate to "affirmatively further" fair housing ("AFFH").[12] The AFFH mandate was ignored and unenforced for decades, but it has received renewed attention from recent presidential administrations.[13] The Obama Administration began to enforce AFFH nearly 50 years after it was enacted; the Trump administration quickly pulled back these efforts; and then the Biden administration restored the Obama administration's AFFH regulations.[14] The current iteration of AFFH is not set in stone, and the newly established major questions doctrine presents a looming jurisprudential challenge.[15] Commentators are split on this issue, and it is unclear how the new doctrine will impact administrative regulations.[16] This Note explores whether courts can use the major questions doctrine to invalidate attempts to promote fair housing through rules promulgated under AFFH. This Note conducts extensive research into the considerations driving the doctrine and, for the first time, analyzes the major questions doctrine in the context of the AFFH mandate and current AFFH regulations. This Note addresses the options for revising current fair housing regulations to avoid the strict review associated with the doctrine and proposes that incentivizing fair housing planning is the most practical solution.

Part I first discusses a brief history of federal housing legislation and the social and political contexts underlying each phase of national

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8. *See* Menendian et al., *supra* note 1.

9. *See* Semuels, *supra* note 1.

10. *See Fair Housing In New York*, FAIR HOUS. JUST. CTR., https://www.fairhousingjustice.org/about-us/fair-housing-new-york/ [https://perma.cc/3TD7-5WQ2] (last visited Jan. 3, 2023).

11. *See* 42 U.S.C. §§ 3601–31.

12. *See id.*

13. *See infra* Section I.A.1 for discussion of the failure to enforce the mandate to "affirmatively further" fair housing ("AFFH").

14. *See infra* Section I.A.2 for overview of the AFFH rule changes.

15. *See infra* Section II.B for analysis of AFFH under the new major questions doctrine.

16. *See infra* Section II.B for discussion of housing and administrative concerns under the major questions doctrine.

housing law, culminating in the modern iteration of the AFFH mandate.[17] Part I then provides an overview of the judicial theories courts use when analyzing agency actions, specifically looking at the major questions doctrine.[18] Part II analyzes the recent developments in the U.S. Supreme Court's use of the major questions doctrine, along with analyzing whether AFFH poses a major question.[19] Part III proposes that rooting the AFFH regime in a purely incentive-based approach could avoid the potential threat of major questions, while noting that such a move could result in reduced fair housing efforts.[20]

I. HISTORIES OF FAIR HOUSING AND MAJOR QUESTIONS

President Lyndon B. Johnson enacted the FHA in 1968 as part of the Civil Rights Act of 1968.[21] Meant to outlaw "housing discrimination and foster integration,"[22] the FHA made it illegal for public and private actors to discriminate in the "sale or rental" or housing on the basis of "race, color, religion, or national origin,"[23] and mandated that the recently-established[24] Department of Housing and Urban Development (HUD) Secretary "affirmatively . . . further" fair housing.[25] Congress established HUD as the proper agency[26] within the federal government to consider national housing and community concerns.[27] HUD is responsible for administering federal housing

17. *See infra* Section I.A.

18. *See infra* Section I.B.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See* Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), https://www.newyorker.comEPA/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act [https://perma.cc/6M9E-2K2E]; *Remarks Upon Signing the Civil Rights Act*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-civil-rights-act [https://perma.cc/U88T-UWTV] (last visited Jan. 2, 2023).

22. Adams, *supra* note 21.

23. 42 U.S.C. § 3604 (1968). Congress amended this statute in 1974 to include sex and in 1988 to include disabilities and familial status as protected categories. *See id.* (1974); *id.* (1988).

24. The Department of Housing and Urban Development (HUD) was created three years before the passage of the Fair Housing Act. *See id.* § 3531.

25. *Id.* § 3608(d).

26. Federal agencies are created by Congress as parts of the executive branch and make up much of what is often simply described as "the government." *See infra* Section I.B for the discussion of judicial review of an agency's interpretation of a statute.

27. *See* 42 U.S.C. § 3531 (establishing HUD "to provide for full and appropriate consideration, at the national level, of the needs and interests of the Nation's communities and of the people who live and work in them").

programs and enforcing the FHA.[28] Up until the 2010s, HUD's interpretation of the AFFH mandate resulted in very little enforcement action.[29] HUD's new interpretation of AFFH is more robust than its prior interpretation, but recent developments in the major questions doctrine could affect the validity of the new interpretation.[30]

Section I.A discusses a history of federal housing legislation and the AFFH requirement, focusing on the sociopolitical contexts of each major regulatory regime change and the recent back-and-forth on permissible enforcement of AFFH. Section I.B provides an overview of judicial review of agency action and the evolution of the major questions doctrine.

A. From Discrimination to Fair Housing

Periods of severe economic distress have led Congress to enact legislation intended to improve housing conditions, first during the Great Depression and again during the civil rights movements.[31] Early legislation resulted in increased discrimination and segregation.[32] Congress addressed these issues with its civil rights legislation in the 1960s, but not all the congressionally enacted policies have been equally enforced, most notably the AFFH mandate.[33]

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28. HUD's primary programs include mortgage and loan insurance, block grant programs for economic development and affordable housing, public housing, and homeless assistance. *See Questions and Answers about HUD*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/about/qaintro#:~:text=What%20Is%20HUD's%20Mission%3F,and%20enforce%20fair%20housing%20laws [https://perma.cc/85C2-43J7] (last visited Jan. 2, 2023).

29. *See infra* Section I.A.2 (discussing HUD's long-standing interpretation of AFFH as a good faith requirement); Ezra Rosser, *Affirmatively Resisting*, 50 FLA. ST. U. L. REV. (forthcoming 2023) (manuscript at 20) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4220183 [https://perma.cc/72FG-EXUU].

30. *See infra* Section II.B for analysis of AFFH under the new major questions doctrine.

31. *See infra* Section I.A.1 for overview of federal housing legislation.

32. *See infra id.* for history of discriminatory policies.

33. *See infra* Section I.A.1–2 for discussion of the historical lack of AFFH enforcement.

1. Federal Housing Legislation: A Historical Overview

The National Housing Act, passed in 1934,[34] created the Federal Housing Administration and charged it with the responsibility of "encourag[ing] improvement in housing standards and conditions"[35] and increasing the general housing supply.[36] Within a few years, the Federal Housing Administration improved housing conditions for millions of Americans,[37] but its policies entirely excluded people of color.[38] The Federal Housing Administration explicitly promoted segregation through discriminatory underwriting policies[39] or "redlining," and the subsidization of white-only planned communities.[40] Subsequent housing legislation continued to openly discriminate against people of color, leading to worsened segregation, housing instability, and unsafe conditions.[41]

In response to the civil rights movements of the 1960s, the federal government enacted sweeping legislation in an effort to create racial equality.[42] The Housing and Urban Development Act of 1965, a part of this legislative movement, expanded and improved federal housing programs for low- and middle-income families and provided funding

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34. *See* National Housing Act of 1934, Pub. L. No. 479, § 1 (codified as amended at 12 U.S.C. §§ 1701–50(g)).

35. *Id.*

36. *See generally National Housing Act: Hearings on H.R. 9620 Before the H. Comm. on Banking and Currency*, 73rd Cong. 2 (1932).

37. *See generally* FIFTH ANNUAL REPORT OF THE FHA 6 (1938).

38. *See generally* Samantha Ondrade, *Enforcement of the Fair Housing Act and Equal Credit Opportunity Act to Combat Redlining*, 70 DEP'T JUST. J. FED. L. & PRAC. 247 (2022) (discussing the Federal Housing Administration's discriminatory practice of associating minority neighborhoods with increased risk of mortgage default); RICHARD ROTHSTEIN, THE COLOR OF LAW (2017). *See also* Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america [https://perma.cc/Q9TM-9ATK].

39. *See* FED. HOUS. ADMIN., UNDERWRITING MANUAL § 937 (1939) ("If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.").

40. *See* Gross, *supra* note 38.

41. *See* NAT. HIST. LANDMARKS PROGRAM, NAT. PARK. SERV., CIVIL RIGHTS IN AMERICA: RACIAL DISCRIMINATION IN HOUSING 30–33 (2021) (reviewing discriminatory legislation such as the Housing Act of 1937 which supported segregation and the G.I. Bill of 1944 which barred black veterans from access to low interest home loans).

42. *See* P. SCOTT CORBETT ET AL., U.S. HISTORY 29.2 (2014), https://openstax.org/books/us-history/pages/29-2-lyndon-johnson-and-the-great-society [https://perma.cc/4VEJ-Y2TN] (providing historical overview of the civil rights movements and legislation outlawing discrimination in employment, public accommodations, schools, and voting).

for urban renewal.[43] President Johnson described the legislation as "the single most important breakthrough in the last 40 years,"[44] and a few weeks later established HUD to administer these housing and development programs.[45]

In the 1960s, President Johnson repeatedly called for federal legislation barring housing discrimination.[46] Congress refused to act[47] until the 1968 assassination of Dr. Martin Luther King, Jr. and the subsequent mass social unrest.[48] President Johnson signed the Civil Rights Act of 1968[49] a week after Dr. King's death, proclaiming that "fair housing for all . . . is now a part of the American way of life."[50] Title VIII of this Civil Rights Act, commonly known as the FHA, outlawed discrimination in the sale, rental, and financing of housing based on race, color, religion, and national origin.[51]

The FHA not only barred housing discrimination, but also required that HUD and other federal agencies affirmatively further the purposes and policies of the FHA.[52] There are two "affirmatively furthering" sections of the FHA,[53] which are together known as the AFFH.[54] The first section mandates that the executive branch administer HUD related activities "in a manner affirmatively to further the purposes of this subchapter."[55] The FHA does not have a stated

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43. *See* 42 U.S.C. § 3608(d).

44. *Remarks at the Signing of the Housing and Urban Development Act*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-housing-and-urban-development-act [https://perma.cc/MJ4U-CAMQ] (last visited Jan. 2, 2023).

45. The Federal Housing Administration and all other federal housing agencies were maintained and consolidated under HUD. *See* 42 U.S.C. § 3531.

46. *See January 12, 1966: State of the Union*, UNIV. VA., https://millercenter.org/the-presidency/presidential-speeches/january-12-1966-state-union [https://perma.cc/6E7Z-QP8M] (last visited Jan. 3, 2023).

47. *See History of Fair Housing*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history [https://perma.cc/BE62-ERXG] (last visited Jan. 2, 2023).

48. *See* Lorraine Boissoneault, *Martin Luther King Jr.'s Assassination Sparked Uprisings in Cities Across America*, SMITHSONIAN (Apr. 4, 2018), https://www.smithsonianmag.com/history/martin-luther-king-jrs-assassination-sparked-uprisings-cities-across-america-180968665/ [https://perma.cc/WV5G-Z96Z].

49. *See* Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 73.

50. *See Remarks Upon Signing the Civil Rights Act*, *supra* note 21.

51. *See* 42 U.S.C. § 3608(d).

52. *See id.* § 3608(e)(5).

53. *Id.*

54. *See* Nestor M. Davidson & Eduardo M. Peñalver, *The Fair Housing Act's Original Sin: Administrative Discretion and the Persistence of Segregation*, *in* PERSPECTIVES ON FAIR HOUSING 132, 136 (Vincent J. Reina et al. eds., 2021).

55. 42 U.S.C. § 3608(d).

purpose, but the FHA's co-sponsor, Senator Walter F. Mondale, stated that its purpose was to replace segregated communities with "truly integrated and balanced living patterns."[56] The second "affirmatively furthering" section states that HUD must administer its "programs and activities . . . in a manner affirmatively to further the policies of this subchapter."[57] The policy section of the FHA declares that the United States policy is "to provide, within constitutional limitations, for fair housing throughout the United States."[58] The exact phrase "affirmatively furthering fair housing" does not, however, appear in the FHA.[59]

Congress granted HUD broad discretion in administering the FHA and implementing the AFFH mandate.[60] Along with the AFFH mandates, Congress required that HUD[61] conduct studies on "the nature and extent of discriminatory housing practices,"[62] publish reports and recommendations from these studies,[63] and "cooperate with and"[64] assist groups working to "prevent or eliminate discriminatory housing practices."[65] Congress did not, however, provide any details or guidance on how to fulfill the AFFH mandate, implicitly leaving the specifics and implementation entirely up to HUD.[66] In the years immediately following the passage of the FHA, HUD Secretary George Romney attempted to fulfill the AFFH mandate and promote integrationist policies through restrictions of HUD funds, but his initiative was shut down in 1972.[67]

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56. 114 CONG. REC. 2706, 3422 (1968); *see also Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency on S. 1358, S. 2114, and S. 2280*, 90th Cong. (1967) (statement of Senator Walter F. Mondale).

57. 42 U.S.C. § 3608(e)(5).

58. *Id.* § 3601.

59. *See* Davidson & Peñalver, *supra* note 54, at 136 (describing the history of the AFFH phrasing).

60. *See* 42 U.S.C. § 3608; *see also* Davidson & Peñalver, *supra* note 54.

61. The exact language of the statute explicitly makes this requirement of the Secretary of HUD but permits the Secretary to delegate any of their "functions, duties, and powers to employees" of HUD, making this mandate department-wide. *See* 42 U.S.C. § 3608.

62. *Id.* § 3608(e)(1–4).

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* Davidson & Peñalver, *supra* note 54, at 136–37 (discussing HUD's discretion on implementing the AFFH mandate).

67. *See* Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM),

The Housing and Community Development Act of 1974 ("1974 Act") created grant programs for HUD to administer and further codified AFFH as a requirement that grant recipients must meet.[68] The majority of HUD grants are formula funding programs.[69] Unlike project grant programs where applicants compete for a limited amount of funds, formula funding grants are distributed to all applicants who meet certain eligibility criteria.[70] The 1974 Act requires that all recipients of federal housing funds certify that they "will affirmatively further fair housing" and conform to the FHA.[71] Not only are grantees required to make these certifications, but HUD may distribute funds "*only* if the grantee"[72] makes these certifications.[73] HUD must also conduct "reviews and audits"[74] on at least an annual basis to determine grantee compliance with the certification requirements and the FHA itself.[75] HUD is then permitted to compel compliance from grantees found to be in violation of the FHA through a variety of actions, including the withdrawal of funds.[76]

The AFFH mandate was, however, largely ignored by HUD for decades.[77] The 1974 Act's formula funds were used to develop viable urban communities,[78] but HUD did not enforce the AFFH mandate or

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https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law [https://perma.cc/Q7GW-NYPQ].

68. 42 U.S.C. §§ 5300–22.

69. HUD's largest grant program is the Community Development Block Grant program, a formula funding program established under the 1974 Act to assist local governments with developing urban and downtown areas. *See Community Development Block Grant Program*, DEP'T HOUS. & URB. DEV. [hereinafter HUD, *Community Development*], https://www.hud.gov/program_offices/comm_planning/cdbg [https://perma.cc/TKA6-3BK4] (last visited Jan. 9, 2023); *see also Fiscal Year 2022/2023 Funding Opportunities*, DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo/fundingopps [https://perma.cc/FG2N-FEGZ] (last visited Jan. 9, 2023).

70. Grantees must still submit applications for formula funding grants. *See* HUD, *Community Development*, *supra* note 69.

71. 42 U.S.C. § 5304(b).

72. *Id.* (emphasis added).

73. *See id.*

74. *Id.* § 5304(e).

75. *See id.*

76. *See id*. § 5304(e)(2).

77. *See* Hannah-Jones, *supra* note 67 (presenting the results of a 2012 groundbreaking study which found HUD knowingly funded municipalities engaging in discriminatory practices); *see also* Rosser, *supra* note 29.

78. *See* 42 U.S.C. § 5301(b) ("The Congress further finds and declares that the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable urban communities as social, economic, and political entities.").

require that governments integrate housing.[79] Between 1974 and 2012, over 1,200 communities benefitted from $137 billion in HUD funds, including communities with known segregationist housing policies.[80] HUD policy since the 1990s required these program participants to conduct an analysis of impediments to fair housing choice and certify a commitment to AFFH.[81] HUD provided vague and sparse guidance on how to conduct such an analysis of impediments,[82] and rarely looked at participants' submissions before distributing funds.[83] During this period, HUD withheld federal funds as a consequence of violating the FHA only twice, from the city of Joliet, Illinois and from Westchester County in New York.[84] Both instances occurred under the Obama administration.[85] The Obama administration prioritized housing access and affordability as a key element of an overall focus on expanding economic equality and mobility.[86]

2. Rule Changes, and Changes, and Changes

Under the Obama administration in 2015, HUD published the Affirmatively Furthering Fair Housing final rule, its first significant AFFH regulation since Secretary Romney's short-lived enforcement of the mandate in 1969.[87] This rule was meant to "make it easier for communities to implement"[88] the FHA and provide an explicit framework for HUD to start enforcing the AFFH mandate, nearly fifty

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79. *See* Hannah-Jones, *supra* note 67.

80. *See id*.

81. *See* Rosser, *supra* note 29, at 21.

82. *See* Noah M. Kazis, *Fair Housing, Unfair Housing*, 99 WASH. U. L. REV. ONLINE 1, 5 (2021).

83. *See* Rosser, *supra* note 29, at 22.

84. HUD officials withheld block grant funds from Joliet, Illinois over its attempt to demolish a federally subsidized apartment complex with mostly black residents. HUD also withheld funds from Westchester County for its failure to comply with the settlement terms of a discrimination lawsuit. *See* Hannah-Jones, *supra* note 67.

85. *See id.*

86. *See Remarks by the President on Economic Mobility*, WHITE HOUSE ARCHIVES (Dec. 4, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/remarks-president-economic-mobility [https://perma.cc/H6FT-DVMR].

87. *See* Affirmatively Furthering Fair Housing Rule, 80 C.F.R. § 42.271 (2015). *See generally* John Bliss, *Rebellious Lawyers for Fair Housing: The Lost Scientific Model of the Early NAACP*, WISC. L. REV. 1433 (2021).

88. *See Weekly Address: Making Our Communities Stronger Through Fair Housing*, WHITE HOUSE ARCHIVES (July 11, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/11/weekly-address-making-our-communities-stronger-through-fair-housing [https://perma.cc/LQ33-HDR2].

years after its passage.[89] While Congress granted HUD broad discretion in interpreting and implementing the AFFH mandate,[90] HUD rooted this regulation in its statutory interpretation of the 1974 Act's certification requirement and treated AFFH as a condition on federal funding.[91]

The new rule required HUD program participants[92] to conduct a fair housing assessment in lieu of the previously required analysis of impediments.[93] As part of the fair housing assessment, HUD would provide specific, individualized guidance and extensive data to participants to use in their fair housing planning.[94] This information was provided in order to allow local governments to determine for themselves the best ways to reduce racial disparities.[95] As all jurisdictions have different priorities and values, HUD recognized that it could not possibly create any specific plans that would meet the needs of every state or local government in the country, and that an attempt to do so could pose federalism concerns.[96] Accordingly, HUD did not provide any targets or clear outcomes, but rather required that local governments create and stick to whatever actionable fair housing plans would work for their community's needs.[97]

Importantly, HUD actively evaluated grantees' fair housing assessments for compliance and ended its longstanding practice of accepting any submission it received.[98] HUD rejected 35% of initial fair housing assessments for incompletion and noncompliance, a substantial increase from HUD's previous rejection rate of zero.[99] HUD worked with those grantees to revise their rejected submissions and bring their applications into compliance.[100] Grantees began to

89. *See id.*

90. *See* Davidson & Peñalver, *supra* note 54.

91. *See* Affirmatively Furthering Fair Housing Rule, 80 C.F.R. § 42.271 (2015).

92. HUD program participants include state and local governments who receive funding from HUD in the form of grants and loans, and organizations that participate in any of HUD's public housing, homeless assistance, and educational programs. *See Questions and Answers about HUD*, *supra* note 28.

93. *See* Affirmatively Furthering Fair Housing Rule, 80 C.F.R. § 42.271 (2015); *see also* Rosser, *supra* note 29, at 24.

94. *See* Rosser, *supra* note 29, at 24.

95. *See id.*; *see also* Kazis, *supra* note 82, at 5–6.

96. *See* Kazis, *supra* note 82, at 12–13.

97. *See* Rosser, *supra* note 29, at 25; *see also* Davidson & Peñalver, *supra* note 54, at 143.

98. *See* Rosser, *supra* note 29, at 25.

99. *See* Justin Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUS. POL'Y DEBATE 736, 748–49 (2019).

100. *See id.* at 749.

develop stronger fair housing plans and commit to concrete action.[101] AFFH was no longer simply a box to be checked — enforcing this mandate worked to create the first tangible steps towards long term change.[102]

In 2018, HUD Secretary Ben Carson, under the direction of President Donald Trump, suspended the 2015 regulations.[103] In 2020, HUD published the Preserving Community and Housing Choice final rule, repealing the 2015 regulations.[104] HUD stated that its repeal of the 2015 regulations was to reduce state and local government obligations and return to the previous understanding of the AFFH requirement as a general good faith commitment.[105] These regulations were met with criticism but remained in effect until 2021.[106]

The Biden administration quickly worked to reinstate the 2015 regulations.[107] Through a memorandum and a series of executive orders,[108] President Joseph Biden clarified that the AFFH requires an active effort to undo "historic patterns of segregation and other types of discrimination."[109] In 2021, HUD published an Interim Final Rule, Restoring AFFH Definitions and Certifications, rescinding the 2020

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101. *See* Kazis, *supra* note 82, at 6.

102. *See* Rosser, *supra* note 29, at 25; *see also* Kazis, *supra* note 82.

103. *See* Brakkton Booker, *Ben Carson Moves Forward with Push to Change Fair Housing Rule*, NAT'L PUB. RADIO (Aug. 13, 2018, 5:06 PM), https://www.npr.org/2018/08/13/638285344/ben-carson-moves-forward-with-push-to-change-fair-housing-rule [https://perma.cc/ED2Y-T4BV].

104. *See* Preserving Community and Neighborhood Choice Rule, 85 Fed. Reg. 47899 (Aug. 7, 2020); *see also* Richard Rothstein, *The Neighborhoods We Will Not Share*, N.Y. TIMES (Jan. 20, 2020), https://www.nytimes.com/2020/01/20/opinion/fair-housing-act-trump.html [https://perma.cc/9UNU-KKSL] (discussing the 2020 HUD rules and their effects on housing segregation).

105. *See* Preserving Community and Neighborhood Choice Rule, 85 Fed. Reg. 47899, 47904 (Aug. 7, 2020).

106. *See* Rosser, *supra* note 29, at 30; Davidson & Peñalver, *supra* note 54, at 144; *Affordable Housing Organizations Oppose HUD's Weakening of Nation's Fair Housing Responsibilities*, LOC. INITIATIVES SUPPORT COAL. (July 27, 2020), https://www.lisc.org/our-stories/story/affordable-housing-organizations-oppose-huds-weakening-nations-fair-housing-responsibilities/ [https://perma.cc/HN5W-ZNC2].

107. *See generally* Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 26, 2021) [hereinafter Biden Memo].

108. *See generally* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021) (entitled "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"); Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (entitled "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation").

109. *See* Biden Memo, 86 Fed. Reg. 7488 (Jan. 26, 2021).

rule that rescinded the 2015 rule.[110] Through this regulation, HUD once again began to require program participants submit AFFH certifications in order to receive federal funding.[111] The rule restored the voluntary fair housing planning process for grantees to use in creation of housing plans.[112]

HUD recently published a proposal for a new AFFH rule.[113] The proposed rule retains much of the 2015 rule's requirements and processes while improving upon certain steps.[114] If finalized,[115] the rule will simplify the fair housing analysis, require more community engagement, and provide HUD with more robust accountability and enforcement mechanisms.[116] The proposed rule continues the Biden administration's efforts to promote fair housing.[117]

It is common for federal agencies to frequently change the manner in which they interpret statutory directives.[118] Federal agencies

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110. *See generally* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications Interim Rule, 86 Fed. Reg. 30779 (June 10, 2021).

111. *See id.*

112. *See id.*

113. *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023); *see also* Heather R. Abraham et al., *Just A "Planning Rule": Enforcing the Duty to Affirmatively Further Fair Housing*, 31 J. AFFORDABLE HOUS. & CMTY. DEV. L. 203, 207–08 (2022).

114. *See* Press Release, HUD, HUD Announces New Proposed "Affirmatively Furthering Fair Housing" Rule, Taking a Major Step Towards Rooting Out Longstanding Inequities in Housing and Fostering Inclusive Communities (Jan. 19, 2023), https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_013 [https://perma.cc/BM4X-FNSE].

115. HUD is accepting public comments for the proposed AFFH rule until April 10th, 2023. HUD will then review the comments and decide whether to issue a final rule based on the proposed rule, issue a new proposal, or withdraw the proposed rule. If HUD issues a final rule based on this proposed rule, the final rule will include a preamble responding to significant issues raised in the public comments. For more information about HUD's rulemaking process, see *Rulemaking 101*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/general_counsel/Rulemaking-101#:~:text=HUD's%20regulations%20in%2024%20CFR%20Part%2010%20provide%20that%20generally,60%2Dday%20public%20comment%20period [https://perma.cc/9GSM-9TTY] (last visited Feb. 27, 2023).

116. *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8517–21 (Feb. 9, 2023).

117. *See* Biden Memo, 86 Fed. Reg. 7488 (Jan. 26, 2021); *see also* Press Release, White House, President Biden Announces New Actions to Ease the Burden of Housing Costs (May 16, 2022) [hereinafter Biden Housing Plan], https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/ [https://perma.cc/5GSE-XHHH].

118. *See* LEE MODJESKA, ADMINISTRATIVE LAW PRACTICE AND PROCEDURE § 1:8 (2022).

reexamine old policy as a routine matter,[119] especially when a new administration is fundamentally opposed to the policies of an old administration. However, not all new interpretations and changes in regulation are of equal impact. HUD's interpretation of the AFFH mandate as requiring action and active plans versus simply unenforced good faith could very well be considered a major question.[120]

B. Questions about Major Questions

Agency actions can be challenged on a variety of bases, including improper procedure,[121] arbitrary and capricious policy,[122] and incorrect statutory interpretation.[123] The judiciary has long granted agencies a high level of deference, deeming them subject matter experts. However, the level of deference awarded to agency actions is beginning to shift.[124] In cases regarding agency statutory interpretation, courts may apply the newly established major questions doctrine which does not grant any deference to agencies.[125]

1. Non-Delegation Doctrine and Chevron *Deference: Pre-2000*

The non-delegation doctrine holds that Congress may not delegate its inherent lawmaking powers without providing an "intelligible principle"[126] for agencies to follow. This standard has been an exceedingly low bar as it does not require Congress to offer any sort of

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119. *See id.*

120. *See infra* Section II.B.1 for discussion of whether HUD's current interpretation of AFFH could be considered major.

121. *See, e.g.*, United States v. N.S. Food Prod. Corp., 568 F.2d 240, 243 (2d Cir. 1977) (holding the FDA failed to follow the Administrative Procedure Act (APA) when it failed to disclose the basis of a regulation preventing the processing of whitefish); Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 93–95 (1943) (holding the Securities and Exchange Commission (SEC) violated the APA when its approval of a company reorganization plan was not supported by judicial principles); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1113 (D.C. Cir. 1993) (dismissing procedural challenge under the APA after finding the Mine Safety and Health Administration's interpretive rules did not have legal affect as alleged).

122. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding failure to provide basis or explanation for regulation constitutes an arbitrary and capricious decision in violation of the APA).

123. *See infra* Section I.B.1–3 for review of history and current doctrines regarding analysis of agency statutory interpretation.

124. *See infra* Section II.A for discussion of the major questions doctrine's impact on deference.

125. *See infra* Section I.B.3 for overview of the current version of the major questions doctrine.

126. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

justification for a delegation of authority, only an intelligible principle for the agencies to follow in their duties.[127]

For much of the twentieth century, courts used *Skidmore v. Swift & Co.* as a basis for their standard of review for agency statutory interpretation.[128] In *Skidmore*, the Supreme Court deferred to the interpretation that the Administrator of the Fair Labor Standards Act's offered and did not conduct its own interpretation of the statute.[129] The Court created a sort of sliding-scale factor test for courts to use in questions of agency statutory interpretation that could result in full deference, partial deference, or no deference at all.[130] Under the *Skidmore* test, courts would grant agencies a greater level of deference if their statutory interpretation demonstrated thorough consideration, valid reasoning, consistency with other pronouncements, or any other supporting factors.[131] The level of deference, dependent only on those factors, varied widely.[132]

In 1984, the more deferential *Chevron*[133] doctrine became the judicial standard.[134] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court held that if Congress's explicit delegation of authority could be read as a reasonable intention for an agency to have authority beyond that delegation, it could reasonably be inferred that Congress was inviting the agency to interpret the statute as such and uphold that agency's actions.[135] *Chevron* has two steps.[136] First, a court must ask "whether Congress has directly spoken

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127. *See* Meaghan Dunigan, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 247 (2017) ("[T]he nondelegation doctrine has rarely been invoked to strike down congressional delegation of legislative authority.").

128. *See* 323 U.S. 134, 140 (1944).

129. *See id.* (holding Administrator's determination that on-call hours spent waiting or engaging in non-work activities do not constitute working hours for purposes of wage calculation).

130. *See id.* ("We consider that the . . . interpretations . . . of the Administrator under this Act, while not controlling upon the courts . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

131. *See id.*

132. *See* Jim Rossi, *Respecting Deference: Conceptualizing Skidmore within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1109 (2001) ("*Skidmore* is commonly understood to be 'weak deference.'").

133. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

134. *See Chevron Deference*, 119 HARV. L. REV. 395, 395 (2005).

135. *See Chevron*, 467 U.S. at 842–44.

136. *See id.* at 842–43.

to the precise question at issue."[137] If Congress has, the court will not grant the agency *Chevron* deference and will look to what Congress has explicitly stated.[138] If Congress has not, the court moves to step two and must determine if the agency's interpretation is reasonable and permissible.[139] If the court finds that the interpretation is permissible, the agency's interpretation will prevail.[140]

In 2001, *Chevron* deference was slightly narrowed[141] through *United States v. Mead Corp*.[142] The *Mead* court held that certain agency actions did not qualify for *Chevron* deference, and instead would be given *Skidmore* weight.[143] *Mead* sets forth a preliminary inquiry whose outcome will direct the courts to apply either *Chevron* or *Skidmore*.[144] Under *Mead*, courts first ask if Congress intended for the agency to make rules with the force of law, and then look at whether the agency action was promulgated according to that authority.[145] If the answer to either of these questions is no the court will give an agency *Skidmore* weight.[146] If Congress did intend the agency to make rules with the force of law and they promulgated the rule under that authority, courts will use *Chevron* to decide the case.[147]

As all of these doctrines are hugely deferential, agency interpretations overwhelmingly prevail in cases where the Court uses any form of deference regime.[148] The current Court, however, has indicated that it is less inclined to automatically grant agencies any form of deference.[149] In cases where the Court opts to not defer to an agency's interpretation, it utilizes its own tools of statutory

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137. *See id.* at 842.

138. *See id.*

139. *See* Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 297–98 (2002) (describing the application of *Chevron*).

140. *See Chevron*, 467 U.S. at 843.

141. *See* Womack, *supra* note 139, at 308 (describing the "beginning of a new era of deference").

142. *See* 533 U.S. 218 (2001).

143. *See id.* at 219.

144. *See id.*; *see also* Womack, *supra* note 139, at 313 (discussing application of *Mead*).

145. *See Mead*, 533 U.S. at 219.

146. *See id.* at 220.

147. *See id.*

148. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100 (2008) (presenting a study of agency interpretation cases and the factors that affect whether an agency prevails).

149. *See infra* Section I.B.2–3 (explaining the major questions doctrine's impact on deference).

interpretation and judges agency action against that interpretive result without giving the agency interpretation any weight whatsoever.[150]

2. The Original Major Questions Doctrine: 2000–2021

In 2022, the Court used the phrase "major questions doctrine" for the first time.[151] The major questions doctrine itself, however, first appeared within the Supreme Court in 2000 in *FDA v. Brown & Williamson Tobacco Corp*.[152] The primary question in *Brown* was whether the Food and Drug Administration (FDA) had statutory authority to regulate tobacco products as it had asserted.[153] The Court analyzed this issue through both the *Chevron* framework and through the major questions doctrine. Under the first step of *Chevron*, the Court looked at whether Congress had "specifically addressed the question at issue."[154] The Court noted that the relevant statutes[155] required the FDA to remove unsafe drugs and devices from the market,[156] and that the FDA had long held that tobacco products were entirely unsafe.[157] The FDA had also asserted for decades that it had no authority to regulate tobacco products.[158] The Court concluded that this background certainly contributed to Congress's six subsequent tobacco-regulating statutes and that Congress would not have enacted these regulations if it intended for the FDA to have regulatory authority.[159] Accordingly, the Court found that Congress did speak to the issue at hand and thus did not grant the FDA authority to regulate tobacco products.[160]

The Court then addressed the nature of *Chevron* deference itself and provided for an explicit qualification to this general rule of

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150. The Court has most notably used its own tools of statutory interpretation in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), and King v. Burwell, 576 U.S. 473 (2015). *See infra* Section I.B.2 (discussing these cases).

151. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

152. *See* 529 U.S. 120 (2000).

153. Congress granted the FDA authority to regulate drugs and devices under the Food, Drug, and Cosmetic Act. In 1996, the FDA interpreted "drugs and devices" as including tobacco products and promulgated associated regulations. *See* 21 U.S.C. §§ 321(g)–(h), 393; 61 Fed. Reg. 44397 (1996).

154. *Brown*, 529 U.S. at 121.

155. 21 U.S.C. §§ 331(a), 360(c).

156. *See* United States v. Rutherford, 442 U.S. 544, 546, 556 (1979) (holding that the FDA must remove unsafe drugs and devices from the market).

157. *See Brown*, 529 U.S. at 121–22.

158. *See id.*

159. *See id.* at 122–23.

160. *See id.* at 161.

deference.[161] Noting that "extraordinary cases"[162] may create "reason to hesitate before concluding that Congress has intended . . . an implicit delegation"[163] of authority to an agency, the Court should analyze such issues outside of the *Chevron* framework.[164] This case fell under the extraordinary cases category, as the FDA "asserted jurisdiction to regulate an industry constituting a significant portion of the American economy"[165] *and* the "authority to ban" such products entirely.[166] While the Court did not lay out an explicit framework for determining what is considered "extraordinary,"[167] it noted that the issue's statutory history, the "breadth of the authority"[168] asserted, and the "economic and political significance"[169] of the issue required the Court to defer to Congress, not the FDA.[170]

In 2007, the Court again overturned an agency's statutory interpretation in *Massachusetts v. EPA*.[171] At issue in *Massachusetts*[172] was the interpretation that the Environmental Protection Agency (EPA) offered of the statutory phrase "air pollutant"[173] as not including greenhouse gases, meaning that the EPA did not have authorization to regulate greenhouse gases.[174] The EPA's interpretation was largely informed by the Court's holding in *Brown*: the EPA found that its regulation of greenhouse gases would result in "even greater economic and political repercussions than regulating tobacco."[175] This interpretation was challenged under allegations that

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161. *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 482 (2021).

162. *Brown*, 529 U.S. at 159.

163. *Id.*

164. *See id.*

165. *Id.*

166. *Id.*

167. *See id.*

168. *Brown*, 529 U.S. at 160.

169. *Id.*

170. *See id.*

171. 549 U.S. 497 (2007).

172. The EPA was petitioned in 1999 to regulate greenhouse gas emissions from new motor vehicles. After engaging in a lengthy notice and comment period, the EPA denied the rulemaking petition, holding that air pollutants did not include greenhouse gases. *See id.* at 500; *see also* 68 Fed. Reg. 52922, 52925 (2003). *See generally* MICHAEL ASIMOW ET AL., CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW Ch. 23 (2022) (discussing the agency rulemaking process, often generally referred to as "notice and comment").

173. Emission Standards for New Motor Vehicles or New Motor Vehicle Engines, 42 U.S.C. § 7521(a)(1).

174. *See Massachusetts*, 549 U.S. at 500; *see also* 68 Fed. Reg. 52922, 52925 (2003).

175. *See Massachusetts*, 549 U.S. at 512.

the EPA "abdicated its responsibility under the Clean Air Act."[176] The Court's analysis of the EPA's interpretation found the statute's definition of "air pollutant"[177] was intended to cover a broad array of pollutants and that greenhouse gases easily fit into this definition.[178] As such, the Court held that EPA had authority to regulate greenhouse gas emissions from new motor vehicles.[179]

The *Massachusetts* decision compelled the EPA to conduct new statutory interpretations regarding greenhouse gases.[180] The EPA's new interpretation was reviewed by the Court under the major questions doctrine in *Utility Air Regulatory Group v. EPA*.[181] This case regarded the EPA's new statutory interpretation that the defined regulations for stationary sources should include greenhouse gases, which greatly expanded these regulatory programs.[182] The expanded program would subject stationary sources to certain regulations based on their "potential to emit greenhouse gases,"[183] but altered the statutorily imposed regulations for such sources.[184] The EPA explained such alterations by noting that the programs were only designed to regulate a small number of industrial sources.[185] As such, subjecting "all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs"[186] and conflict with congressional intent.[187] The decision to define greenhouse gases as air pollutants in regards to stationary source regulations was quickly challenged.[188]

While *Massachusetts* established that the Clean Air Act's statute-wide definition of air pollutant included greenhouse gases,[189] in *Utility Air* the Court held that the EPA should use a "narrower, context-appropriate meaning"[190] for the Act's operative provisions, including

176. *Id.* at 505.
177. *See id.* at 532.
178. *See id.*
179. *Id.*
180. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 312 (2014).
181. *See id.* at 307.
182. Stationary sources, such as factories and powerplants, are subject to EPA regulatory programs if their potential for polluting emissions passes a certain threshold amount. *See id.* at 309.
183. *Id.* at 312.
184. *See id.* at 313.
185. *See id.* at 312.
186. *Util. Air*, 573 U.S. at 312.
187. *See id.*
188. *See id.* at 307.
189. *See* Massachusetts v. EPA, 549 U.S. 497, 532, 556 (2007).
190. *See Util. Air*, 573 U.S. at 316.

its stationary source regulatory programs.[191] Referencing *Brown*, the court stated that if an agency's statutory interpretation would "bring about an enormous and transformative expansion"[192] in that agency's "regulatory authority,"[193] it must demonstrate "clear congressional authorization"[194] to do so. The EPA itself had explicitly found that the new regulations would radically expand its regulatory programs beyond what Congress had intended.[195] The Court did not, however, then use its own methods to determine the best interpretation of the relevant statute as it did in *Brown*.[196] Instead, the Court treated the EPA's interpretation with "skepticism"[197] and overruled its interpretation.[198]

The Court's analysis in *Massachusetts* departs from the major questions doctrine seen in *Brown* and shifts to a rule succinctly described by then-Judge Brett Kavanaugh: "[i]f a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful."[199] It is possible to read *Utility Air* as a natural evolution of the version of the major questions doctrine seen in *Brown*, but merely one year after deciding *Utility Air*, the Court returned to the *Brown* version.[200]

In *King v. Burwell*, the Court looked at a tax credit rule the Internal Revenue Service (IRS) promulgated under the Affordable Care Act (ACA).[201] Congress enacted a number of reforms to improve the affordability and accessibility of health insurance and ultimately increase enrollment rates nation-wide.[202] These reforms included a coverage mandate, refundable tax credits, and "the creation of an 'Exchange' in each State" by either the state itself or the federal government.[203] The ACA provided for tax credits to any eligible

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191. *See id.*

192. *See id.* at 324 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

193. *Id.*

194. *Id.*

195. *See id.* at 312.

196. *See Util. Air*, 573 U.S. at 324 (citing *Brown*, 529 U.S. at 159); *see also* Sunstein, *supra* note 161.

197. *Util. Air*, 573 U.S. at 324.

198. *See id.* at 320.

199. U.S. Telecom Ass'n v. FCC, 855 F. 3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

200. *See* King v. Burwell, 576 U.S. 473, 479 (2015).

201. *See id.*

202. *See id.* at 481–82.

203. *See id.* at 481–82.

taxpayer enrolled in a "plan through 'an Exchange established by the state.'"[204] The IRS interpreted this language as applying to both state and federal exchanges and provided tax credits accordingly.[205] The Court did not grant the IRS *Chevron* deference, citing to *Brown*'s "extraordinary cases" carve-out.[206] Like in *Brown*[207] and *Utility Air*,[208] the Court's decision not to grant *Chevron* deference relied on the facts of the case.[209] As the tax credits "involv[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people,"[210] it was up to the Court, not the IRS, to answer the question of "whether those credits are available on Federal Exchanges."[211] Unlike *Utility Air*,[212] the Court engaged in its own statutory interpretation of the guiding section;[213] unlike *Brown*,[214] the Court agreed with the IRS interpretation and upheld the challenged regulation.[215]

The Court did not explicitly state that it was using the "major questions doctrine" in any of these cases, nor did it provide a clear framework for future applications of this doctrine. Rather, it made decisions on a case-by-case basis.[216]

3. Recent Major Developments: 2022

In 2022, the Supreme Court formally invoked the major questions doctrine for the first time in *West Virginia v. EPA*.[217] While the Court has used the major questions doctrine in analyzing a handful of cases over the past few decades, *West Virginia* was the first case where the Court explicitly named the doctrine.[218] This decision demonstrates a

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204. *Id.* at 474 (citing 42 U.S.C. § 18031).

205. *See id.* at 483 (citing 45 C.F.R. § 155.20 (2014)).

206. *King*, 576 U.S. at 485 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *see also* Sunstein, *supra* note 161.

207. *Brown*, 529 U.S. at 159–60.

208. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325 (2014).

209. *See King*, 576 U.S. at 485–86.

210. *See id.* at 485.

211. *See id.* at 486.

212. *See Util. Air*, 573 U.S. at 331.

213. *See King*, 576 U.S. at 486–98.

214. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

215. *See King*, 576 U.S. at 498.

216. *See* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 473 (2021) (discussing the fact-intensive nature of major questions doctrine analysis).

217. *See* 142 S. Ct. 2587 (2022).

218. *See id.* at 2609.

move away from the *Chevron* doctrine and a reduction in the amount of deference given to agency statutory interpretation.[219]

The EPA promulgated the Clean Power Plan rule in 2015 in an effort to reduce carbon dioxide emissions and reduce the nation's reliance on coal energy.[220] The EPA cited Section 111 of the Clean Air Act[221] as its source of authority for the regulation.[222] Section 111 authorizes the EPA to set a "standard of performance"[223] to regulate "emissions of air pollutants"[224] based on the EPA's determined "best system of emission reduction."[225] The Clean Power Plan rule shifted away from the EPA's previous performance standards and measures that mainly "caus[ed] plants to operate more cleanly."[226] To meet the new standards, coal power plants would have had to comply with one of the EPA's three identified methods of shifting towards cleaner energy.[227] The options were to "simply reduce"[228] operations entirely, to build a new clean energy source, or to "purchase emission allowances or credits as part of a cap-and-trade regime."[229] The EPA expected that these requirements would greatly reduce the amount of coal energy by 2030.[230] The EPA also anticipated the rule would have extensive compliance costs and likely result in coal power plant shutdowns and coal sector job elimination, [231] as well as clean energy job creation.[232] West Virginia and others quickly challenged the Clean Power Plan rule, and the Supreme Court agreed to hear the case.

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219. *See* Sunstein, *supra* note 161.

220. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64730 (Oct. 25, 2015) (to be codified at 40 C.F.R. pt. 60).

221. *See* 42 U.S.C. § 7411(d).

222. *See* 80 Fed. Reg. 64730.

223. 42 U.S.C. § 7411(a)(1).

224. *Id.*

225. *Id.*

226. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

227. *See id*. at 2593 (citing 80 Fed. Reg. 64730, 64667).

228. *Id.* at 2603.

229. *Id.*

230. *See id.* at 2604 (citing 80 Fed. Reg. 64665, 64694).

231. *See* EPA, EPA-452/R-15-003, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE, at 3-22, 3-30, 3-33, 6-24–6-25 (2015).

232. *See id.* at 6-31.

As in *Utility Air*[233] and *King*,[234] the Court cited to *Brown*, stating that the major questions doctrine is triggered in "extraordinary cases"[235] where the "history and the breadth"[236] of an agency's asserted authority hold deep "economic and political significance."[237] The Court held that the anticipated industry-wide shift from coal power to clean energy was of such importance that Congress could not have intended to grant the EPA such authority.[238] The Court repeatedly emphasized that the Clean Power Plan was different from the EPA's previous regulations under Section 111[239] and wrote that the change in regulation was essentially a "fundamental revision of the statute."[240] The Court also pointed to Congress's rejection of proposals to create a similar cap-and-trade program.[241] Altogether, the Court concluded that these circumstances prompted the use of the major questions doctrine.

In both *Brown*[242] and *King*,[243] the Court looked at the statute the agency pointed to and conducted an independent statutory interpretation to determine whether the agency's interpretation was correct.[244] Here, however, the Court leaned heavily on *Utility Air*,[245] writing that when the major questions doctrine is triggered, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims."[246] Looking at Section 111, the Court wrote that while the EPA was authorized to establish "emissions caps at a level reflecting the '. . . best system of emission reduction,'"[247] the word "system" could mean "almost anything"[248] and so does not constitute

233. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

234. *See* King v. Burwell, 576 U.S. 473, 485 (2015).

235. *West Virginia*, 142 S. Ct. at 2608 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

236. *Id.*

237. *Id.*

238. *See id.* at 2613.

239. *See id.* at 2610, 2612, 2614 (stating that the EPA had "never devised a cap" such as this, had always used "more traditional air pollution control measures," and had "never regulated in that manner").

240. *See id.* at 2612 (citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)).

241. *See West Virginia*, 142 S. Ct. at . at 2614.

242. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

243. *See* King v. Burwell, 576 U.S. 473, 492 (2015).

244. *See Brown*, 529 U.S. at 160; *King*, 576 U.S. at 492–97.

245. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

246. *West Virginia*, 142 S. Ct. at 2609 (citing *Util. Air*, 573 U.S. at 324).

247. *Id.* at 2614.

248. *Id.*

"clear authorization"[249] for a cap-and-trade scheme.[250] Even though Section 111 requires the EPA to "come up with the [emissions] cap itself,"[251] the Court determined that it was unlikely Congress intended the EPA to set emissions caps at such a level used in a cap-and-trade program.[252] As the Court did not find any such clear authorization for the EPA's plan in the statute,[253] it held the EPA's interpretation unlawful.[254]

The majority opinion in *West Virginia* only pointed to the factors of economic and political significance in its discussion of the major questions doctrine and did not provide a clear or comprehensive doctrine.[255] Justice Neil Gorsuch's concurrence, however, did further discuss the doctrine.[256] Justice Gorsuch, looking at the Court's history of major questions doctrine, came up with a list of three non-exclusive factors for when to apply the doctrine.[257] First, the doctrine applies "when an agency claims the power to resolve a matter of great 'political significance.'"[258] Politically significant matters may include those that face "earnest and profound debate across the country"[259] or those where the "agency's proposed course of action" is similar to bills rejected by Congress.[260] Second, an agency must root any regulation with significant economic impacts in clear congressional authorization.[261] Courts may look to the "overall statutory scheme,"[262] the "age and focus of the statute,"[263] the agency's "past interpretations" of the statute,[264] and the agency's "congressionally assigned mission and expertise"[265] to determine whether there exists a clear

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249. *Id.*
250. *Id.*
251. *Id.* at 2615.
252. *See West Virginia*, 142 S. Ct. at 2615.
253. *See id.* at 2609–14.
254. *See id.* at 2614.
255. *See id.* at 2609.
256. *See id.* at 2620 (Gorsuch, J., concurring).
257. *See id.* at 2620–22.
258. *See West Virginia*, 142 S. Ct. at 2620.
259. *Id.* (quoting Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006)).
260. *Id.* at 2621.
261. *See id.* (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); King v. Burwell, 576 U.S. 473, 485 (2015)).
262. *Id.* at 2622 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
263. *Id.* at 2623 (quoting *Util. Air*, 573 U.S. at 324).
264. *West Virginia*, 142 S. Ct. at 2623 (citing United States v. Philbrick, 120 U.S. 52, 59 (1887)).
265. *Id.*

congressional authorization. Third, the doctrine may apply when an agency's regulation affects an area that is traditionally left to state regulation.[266]

Justice Gorsuch's concurrence aptly recognizes many of the factors that the Court has used in its application of the major questions doctrine. His concurrence and the *West Virginia* majority opinion both, however, fail to address the disparity in the doctrine's application. As this note previously discussed,[267] in both *Brown*[268] and *King*[269] the Court found ambiguity in the applicable statutes and conducted an independent statutory interpretation to determine whether the agency interpretations were correct.[270] In *Utility Air*[271] and *West Virginia*,[272] the Court found that the agency interpretations were incorrect solely because the statute was not clear.[273] Future applications of the major questions doctrine will have to contend with this tension, and it is unclear exactly how the Court might do so.

II. ANSWERING THE MAJOR QUESTIONS

The Biden administration has strongly emphasized the need for more affordable and equitable housing and has instituted plans among a variety of agencies to increase the housing supply. The formal invocation of the major questions doctrine by the Supreme Court could disrupt those efforts.

The newest version of the major questions doctrine represents a significant change in judicial precedent and in the future of the regulatory state. The consequences of the major questions doctrine are unclear, but administrative officials and attorneys are concerned with where the Supreme Court is headed.[274] Given the worsening partisan divide in the country and the politicization of nearly every subject matter,[275] there is an understandable but concerning view among

266. *Id.* at 2621.
267. *See supra* Section I.B.2.
268. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).
269. *See* King v. Burwell, 576 U.S. 473, 485 (2015).
270. *See supra* Section I.B.2.
271. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).
272. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).
273. *See supra* Section I.B.2–3.
274. *See generally* Alison Frankel, *U.S. Supreme Court Just Gave Federal Agencies a Big Reason to Worry*, 44 No. 20 WESTLAW J. ASBESTOS 3 (2022).
275. *See generally* Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-

administrative law experts that "whether a case involves a major question seems to turn on whether Chief Justice Roberts and Justice Kavanaugh think it does."[276]

Section II.A first analyzes the facts relevant in each use of the major questions doctrine to create a more comprehensive understanding of the doctrine. Section II.B next discusses whether, under the factors identified in each case, HUD's current interpretation of AFFH could pose a major question and how the Court would likely resolve such an issue. Section II.C concludes with a review of current proposals for AFFH reform.

A. Understanding the Major Questions Doctrine

In 2022 alone, the Supreme Court has demonstrated not only a strong desire but an avid willingness to move away from a strict adherence to precedent.[277] In a variety of landmark cases, the Court revisited established precedents in all legal sectors, making it increasingly difficult to predict where the laws are headed.[278] This task is not made any easier when the Court establishes new doctrines without clear guidance on how to apply them.

Commentators have noted that the Court's decision in *West Virginia* did not use the major questions doctrine the way it had in prior cases, nor did it provide an explanation for its new analysis.[279] In his opinion in *West Virginia*, Chief Justice John Roberts observed that while the use of the label itself was new, it was merely the best way to describe the existing "common threads" between cases regarding "major" questions of agency statutory interpretation.[280] Indeed, many courts and commentators have used the major questions doctrine label to

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nature-of-its-political-divide/ [https://perma.cc/SVK3-388T] (reviewing study results indicating recent trends towards hyperpolarization).

276. *See generally* Frankel, *supra* note 274 (quoting Scott Nelson of Public Citizen).

277. *See generally* Shay Dvoretzky & Emily Kennedy, *Key Trends to Watch as the Supreme Court Reopens Its Doors*, 45 No. 2 WESTLAW J. ASBESTOS 9 (2022).

278. *See generally* Ariane de Vogue, *The Supreme Court Just Threw the Idea of Settled Law Out the Window*, CNN (June 28, 2022, 5:06 AM), https://www.cnn.com/2022/06/28/politics/supreme-court-stare-decisis-precedent/index.html [https://perma.cc/569C-R4NW] (reviewing the Supreme Court's 2022 term as overturning a variety of established precedents in areas from abortion to guns to religious freedoms).

279. *See generally* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, CATO SUP. CT. REV. 2021–2022 37 (2022); Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. F. 693 (2022).

280. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

describe the group of cases Roberts cites to.[281] The cited cases do not, however, define nor apply the doctrine in a clear or consistent manner.[282]

Today, the major questions doctrine applies as follows: when an agency makes a broad assertion of authority that is economically and politically significant[283] the agency's authority must come from a "clear congressional authorization" to prevail.[284] *West Virginia*'s explicit clear statement rule is a new addition to the major questions doctrine.[285] This section first analyzes the factors that have triggered the major questions doctrine and then discusses the Court's application of the clear statement rule. This section finally addresses the implications of Justice Gorsuch's concurrence in *West Virginia*.

1. What Makes a Question Major?

If an agency has asserted broad authority in such an economically and politically significant manner that the Court cannot help but ask where that authority comes from, it is an "extraordinary case"[286] subject to the major questions doctrine. In the few such cases available, the Court's analysis of whether the issue presents a major question relies almost entirely on examining the overall facts at hand rather than applying any sort of factor test. Even so, there are certain elements the Court tends to focus on.[287] Important factors include (a) the significance of the affected industry on the national economy, (b) the agency's statements, past regulations, and expertise, and (c) any relevant Congressional action or inaction.[288]

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281. *See supra* Section I.B.2–3 for discussion of the evolution of the major questions phrasing and doctrine.

282. *See supra* Section I.B.2–3; Sunstein *supra* note 161.

283. *See West Virginia*, 142 S. Ct. at 2595 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

284. *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

285. The Court's decision in *Utility Air* discussed the lack of a clear statement in its analysis of the EPA's interpretation of the statute, but this was not the deciding factor in the case, nor was it described as a rule of the doctrine. *See supra* Part I.B.2.

286. *Brown*, 529 U.S. at 159–60.

287. *See supra* Section I.B.2–3.

288. *See infra* Section II.A.1.a–c for a discussion of each factor.

a. Economic Impact

First, the Court has looked to economic significance in each case, though to a varying degree.[289] As this Note previously discussed,[290] in *Brown*, *Utility Air*, and *West Virginia* the Court's analysis included but did not hinge on the significance of the affected industry.[291] The Court in *Brown* only briefly mentioned the tobacco industry's significance, noting that the industry's great importance to the economy was inscribed within the U.S. Code.[292] In *Utility Air*, the Court noted that the EPA's own regulatory analysis found that the new program would drastically increase the number of affected parties and annual administrative and compliance costs, jumping from a million-dollar to a billion-dollar program.[293] *Utility Air* did not address a single industry, but rather the major financial impact on the economy as a whole that the challenged regulation would have caused.[294] Similarly, in *West Virginia*, the Court discussed the effects that the EPA's plan would have on the nation's energy industries.[295] The analysis was more focused on the political significance of shifting from coal to clean energy, but the Court did acknowledge the relevance of the plan's expected negative impact on the coal industry.[296]

King differs from the other cases, as the Court's analysis of whether the relevant question was major almost entirely hinged on the industry's economic significance.[297] The Court noted that the tax credits at issue involved billions of dollars per year and impacted millions of people's health insurance costs.[298] This significantly affected such a large part of the U.S. economy and population that the Court could not assume Congress intended for an agency to resolve the

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289. *See Brown*, 529 U.S. at 137; *Util. Air*, 573 U.S. at 321–22; *West Virginia* , 142 S. Ct. at 2613.

290. *See supra* Section I.B.2–3.

291. *See Brown*, 529 U.S. at 137; *Util. Air*, 573 U.S. at 321; *West Virginia*, 142 S. Ct. at 2613.

292. *See Brown*, 529 U.S. at 137 (citing to 7 U.S.C. § 1311(a)); *see also* Griffith & Proctor, *supra* note 279, at 698.

293. *See Util. Air*, 573 U.S. at 321–22 (stating that the EPA's old program affected roughly 15,000 stationary sources with annual administrative costs of $74 million, and its new program would affect over six million stationary sources with annual administrative costs of $22.5 billion).

294. *See id.*

295. *See West Virginia*, 142 S. Ct. at 2613.

296. *See id.*

297. *See* King v. Burwell, 576 U.S. 473, 485 (2015).

298. *See id.* at 485–86.

relevant question.[299] While economic significance is not always dispositive to whether a question is "major," it has played a recurring role in each case and is likely a critical factor.

b. Agency History

In addition to economic impact, the Court often looks to the agency's statements, past regulations, and expertise regarding the matter. In *Utility Air*, the EPA acknowledged that its new interpretation ran contrary to congressional intent and would drastically expand its authority beyond the parameters of the authorizing statute.[300] The Court's analysis largely focused on these statements and it agreed with the EPA that its interpretation was a major shift in regulation that Congress had not intended.[301] In *Brown*, a key factor in the Court's analysis was that the FDA's new interpretation contradicted its decades of statements that the agency lacked any authority to regulate tobacco.[302] The Court specifically noted that the change in interpretation was not the issue, as agencies must be permitted to adapt to new circumstances.[303] Rather, this change in interpretation posed a major problem because Congress likely would not have enacted tobacco-specific legislation outside of the FDA's purview if it had intended for the FDA to have authority over tobacco regulation.[304]

Similarly, in *West Virginia*, the majority opinion discussed at length that the EPA's new interpretation of the statute was different from its previous interpretations.[305] Unlike *Brown*, however, the Court found the newness of the interpretation very relevant to its analysis.[306] While the question of whether the EPA's prior limited interpretation was the *only* appropriate interpretation of the statute was not before the Court, it discussed this issue at length.[307] The Court's conclusion appears to indicate that, if given the opportunity, it would have held that the EPA

299. *See id.*
300. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321–22 (2014).
301. *See* Sohoni, *supra* note 279, at 273.
302. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 151 (2000).
303. *See id.* at 156–57.
304. *See id.* at 157.
305. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).
306. *See id.* at 2615; *Brown*, 529 U.S. at 151.
307. *See West Virginia*, 142 S. Ct. at 2615.

has no authority to change its interpretation.[308] The Court further looked at the EPA's role within the relevant statutory scheme and concluded that neither the EPA nor any agency should decide the future of the nation's energy grid, as such a determination is inherently political and best left to Congress.[309] In *King*, the Court did not look to the IRS's previous statements or regulations, but like in *West Virginia* it looked to the nature of the statutory scheme as compared to the IRS's jurisdiction and found that questions of healthcare policy were not appropriate for the IRS to decide.[310] The question of agency expertise also points to the Court's observation that Congress has jurisdiction over politically significant topics.[311]

c. Congressional Action or Inaction

The Court may additionally look to any relevant congressional action or inaction regarding the matter. In *Brown*, the Court analyzed the multiple statutes enacted by Congress to regulate tobacco and found the congressional actions were all taken against the "backdrop" of the FDA's historically asserted lack of authority.[312] The congressionally enacted statutes not only relied on the FDA's lack of authority, but explicitly stated that no agency possessed any authority to regulate certain aspects of the industry.[313] The Court also found relevant that Congress had considered and rejected multiple bills seeking to grant the FDA authority to regulate tobacco but did not rely on this "failure to act" in its conclusion.[314] In *West Virginia,* however, the Court looked to multiple bills considering a similar scheme to the EPA's proposed regulation that Congress had considered and rejected, and found Congress' rejection of the scheme relevant to its holding.[315]

The above factors have not held equal weight throughout all the major questions doctrine cases, but they are all relevant in the Court's

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308. *See id.* ("To be sure, it is pertinent to our analysis that EPA has acted consistent with such a limitation for the first four decades of the statute's existence. But the only interpretive question before us, and the only one we answer, is more narrow.").

309. *See id.* at 2610; *see also* Adler, *supra* note 279, at 53.

310. *See King*, 576 U.S. at 486 ("This is not a case for the IRS."); *West Virginia*, 142 S. Ct. at 2614; *see also* Griffith & Proctor, *supra* note 279, at 699.

311. *See West Virginia*, 142 S. Ct. at 2615.

312. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000); *see also* Griffith & Proctor, *supra* note 279, at 693.

313. *See Brown*, 529 U.S. at 144 (noting Congressional bar of agency regulation on tobacco product advertisements and labels).

314. *Id.* at 155.

315. *See West Virginia*, 142 S. Ct. at 2614.

analyses.[316] The elements of economic significance and agency action have been relevant to the Court in each case, and congressional action or inaction on the issue was a key part in *Brown* and *West Virginia*.[317] While the Court had not previously relied on the change in interpretation itself or congressional inaction in its conclusions, its shift towards heavy reliance on these elements in *West Virginia* indicates that courts may give these factors more weight in determining whether an issue falls under the major questions doctrine.[318]

2. How Clear is Clear Enough?

In *West Virginia*, the major questions doctrine includes a clear statement principle: agencies seeking to resolve a major question must be able to point to a statute that unambiguously grants them the authority to regulate the specific issue at hand.[319] Chief Justice Roberts wrote that the Court has used the doctrine on numerous occasions without acknowledging that no previous iteration of the doctrine included an explicit clear statement principle.[320]

The majority opinion in *West Virginia* cites to "one cryptic sentence"[321] from *Utility Air* as precedent for a clear statement principle.[322] The cited passage in *Utility Air* was not part of its description of the major questions doctrine, but was instead a supplemental consideration that appeared *after* the Court had already decided to overrule the EPA's interpretation of the statute.[323] The opinion in *West Virginia* did not address this discrepancy, nor did it provide a general understanding of what constitutes clear or unclear authorization.[324]

The Court's analysis of whether the EPA had clear congressional authorization or not depended entirely on the interpretation of the

316. *See id.*; *Brown*, 529 U.S. at 144; Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); King v. Burwell, 576 U.S. 473, 486 (2015).

317. *See West Virginia*, 142 S. Ct. at 2614; *Brown*, 529 U.S. at 144.

318. *See West Virginia*, 142 S. Ct. at 2614.

319. *See id.* at 2609; *see also supra* Section I.B.3 (discussing the new iteration of the major questions doctrine).

320. *See West Virginia*, 142 S. Ct. at 2609; *see also* Sohoni, *supra* note 279, at 272.

321. *West Virginia*, 142 S. Ct. at 2635 (Kagan, J., dissenting).

322. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

323. *See* Sohoni, *supra* note 279, at 273.

324. *See West Virginia*, 142 S. Ct. at 2614.

word "system" [325] and whether cap-and-trade programs or generation shifting are emission-reducing "systems" within the meaning of the statute.[326] The Court held that, while these programs can "be described as a 'system,'" [327] so can any program, because the word "system" itself is "an empty vessel"[328] that lacks specific meaning.[329] The Court was not convinced by the EPA's argument that its interpretation as permissible because "system" is used in other provisions of the statute to describe cap-and-trade programs and "sector-wide mechanisms for reducing pollution."[330] The EPA has specific authority to establish an emissions cap based on its determination of the "best system of emission reduction."[331] The cap-and-trade and generation shifting provisions, however, both use such "trading systems as a means of *complying* with an *already established emissions limit*."[332] The Court held that a cap-and-trade program rooted in an existing emissions limit is sufficiently different from using a cap-and-trade program to create a new emissions limit, and for this reason the word "system" in Section 111 cannot be interpreted in the same way as in the other provisions.[333]

The opinion further discussed the interpretation of the word "system," noting that "such a vague statutory grant is not close to the sort of clear authorization required by our precedents."[334] This language was the sole explanation for why the word "system" does not constitute clear congressional authorization for the EPA's planned programs.[335] The Court failed to provide any examples of what a clear authorization might look like. Even though the analysis relied on the idea of precedential requirements, it did not cite to any cases whatsoever.[336] While the opinion leaves uncertainty as to what exactly

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325. *Id.* ("All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting 'the application of the best system of emission reduction . . . adequately demonstrated.'" (quoting 42 U.S.C. § 7411(a)(1))).

326. *See id.*

327. *Id.*

328. *Id.*

329. *See West Virginia*, 142 S. Ct. at 2614.

330. *Id.*

331. 42 U.S.C. § 7411(a)(1).

332. *See West Virginia*, 142 S. Ct. at 2615.

333. *See id.* ("It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion . . . . It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.").

334. *Id.* at 2614.

335. *See id.*

336. Only two cases are cited to throughout Section III.C of the Court's *West Virginia* opinion. The Court's introduction to the Section quotes the "clear

constitutes clear congressional authorization, the Court notes what it is not: broad, ambiguous, or vague statutory language.[337]

Before *West Virginia*, scholars understood the major questions doctrine in "two radically different ways — weak and strong."[338] The weak version retained *Chevron*'s holding that Congress delegates to federal agencies the power to interpret statutes, with the caveat that the delegation does not include an implicit power to interpret statutes when a major question is at hand.[339] The weak version required independent evaluation of the legal question at hand, not a clear statement of authority, and could result in agency win or loss.[340] The strong version, "rooted in the nondelegation doctrine," was inherently hostile to broad agency assertions of power and leaned towards resolving cases "unfavorably to the agency."[341] *Utility Air* used the strong version and treated the agency interpretation with skepticism.[342] *King* and *Brown*, on the other hand, fall under the weak version, where the Court resolved the questions on its own without granting deference.[343]

In 2021, scholar Cass Sunstein suggested that the strong version was likely reserved for "extreme cases" wherein an agency utilized "some 'unheralded' term" to justify an incredible expansion in power and authority.[344] *West Virginia* expanded upon the strong version by explicitly adding a clear statement rule to the doctrine.[345] Under the current major questions doctrine, vague or ambiguous statutes are not enough to justify expansions of agency authority even though the Court has previously held that they *are* enough.[346] The Court did not acknowledge its precedent of interpreting ambiguous statutes as authorizing broad agency action.[347] The clear statement rule creates a discrepancy between *West Virginia* and the Court's previous holdings,

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congressional authorization" from *Utility Air,* , and it then cites to *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) to describe the idea that just because a word can have one meaning doesn't mean it should have that meaning. *See West Virginia* 142 S. Ct. at 2614–15. It is possible that the Court did not cite to any cases when referencing precedent because no cases support the Court's assertion.

337. *See id.*; *see also* Sohoni, *supra* note 279, at 275.

338. Sunstein, *supra* note 161, at 477.

339. *See id.* at 478.

340. *See id.* at 477.

341. *Id.*

342. *See id.*

343. *See id.* at 483.

344. *Id.* at 487.

345. *See* Sohoni, *supra* note 279, at 273.

346. *See id.* at 280.

347. *See id.* at 281.

including *Brown* and *King*, and it is difficult to discern how this tension might be resolved.[348]

3. Taking Justice Gorsuch Seriously

In his concurrence in *West Virginia*, Justice Gorsuch expressed support for a stricter interpretation of the major questions doctrine, which could potentially conflict with the non-delegation doctrine and significantly limit Congress's ability to delegate authority to federal agencies.[349] He provided non-exhaustive factors for what constitutes both a major question and a clear congressional statement.[350] These factors are neither necessary nor sufficient to a court's analysis under the major questions doctrine, as the doctrine requires looking to the overall circumstances.[351] While Justice Gorsuch presents his factors as easily discernable from the Court's history and simple to apply,[352] together they do not describe a multi-factor test, but rather the exact kind of "all-things-considered, open-ended inquiry"[353] that the majority uses. However, the majority did not share Justice Gorsuch's strong federalism and nondelegation concerns.

Along with matters of economic and political significance, Justice Gorsuch argues that the major questions doctrine should apply in cases when an agency "intrude[s] into . . . state law"[354] and attempts to "regulate vast swaths of American life."[355] However, the very nature of the administrative state is to regulate "vast swaths" of life.[356] The federal government has jurisdiction and authority over the entire nation, and so nearly any agency action could be challenged under Justice Gorsuch's version of major questions doctrine. Not only does Justice Gorsuch bring up federalism concerns, but he questions the entire concept of congressional delegations of authority.[357]

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348. *See id.*

349. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., concurring).

350. *See supra* Section I.B.3 (describing Justice Gorsuch's factors); *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

351. *See* Sohoni, *supra* note 279, at 288 (discussing the overall circumstances approach the Court takes under the major questions doctrine).

352. *See West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) ("[I]t seems to me that our cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.").

353. Sohoni, *supra* note 279, at 288.

354. *West Virginia*, 142 S. Ct. at 2621 (2022) (Gorsuch, J., concurring).

355. *Id.*

356. *Id.*

357. *Id.*

While serving on the Tenth Circuit, then-Judge Gorsuch repeatedly questioned the basic legitimacy of the administrative state.[358] He described agency action as "so-called 'delegated' legislative authority,"[359] and asked whether or not "Congress [can] really delegate its legislative authority . . . to executive agencies?"[360] His view of permissible delegations of authority is rooted in cases decided in the nineteenth-century, when the regulatory state was significantly smaller.[361] Scholars argue about whether this could result in the elimination of a huge swath of the regulatory state.[362] Justice Gorsuch's views on non-delegation and federalism are more extreme than most.[363] Nevertheless, Justice Gorsuch's strongly held convictions on what is and is not constitutionally permissible could very well influence other justice's future decisions.

It has become increasingly difficult to predict how the current Court will rule or which justices will sign on to what opinions, given the Court's current make-up.[364] Today's court is less united than it has been for years.[365] Over the last decade, 43% of all decisions were unanimous, whereas last Term only 29% of cases were unanimous.[366] Indeed, while 9-0 was the most common voting alignment for years, the 2021 Term was dominated by 6-3 decisions, largely split along the party lines of each justice's nominating president.[367] While only Justice Alito signed onto Justice Gorsuch's *West Virginia* concurrence, five justices

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358. *See* Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 726 (2019).

359. Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016).

360. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring).

361. *See* Elliott, *supra* note 358, at 726 (summarizing then-Judge Gorsuch's concurring opinion that Congress may only authorize agencies to make "factual findings and design[] tax stamps").

362. *See id. But see generally* Clay Phillips, *Slaying "Leviathan" (or Not): The Practical Impact (or Lack Thereof) of a Return to a "Traditional" Nondelegation Doctrine*, 107 VA. L. REV. 919 (2021) (arguing that Justice Gorsuch's proposed nondelegation doctrine, while more restrictive than current rulings, would not pose concern for most of the government).

363. *See* Ned Terrace, *Executive Commandeering: How Delegation to the Executive Branch Affects State Sovereignty*, 74 RUTGERS U. L. REV. 773, 800 (2022).

364. *See generally* Dvoretzky & Kennedy, *supra* note 277 (discussing the recent shift in voting patterns among the Court's Justices as opposed to prior years).

365. *See id*.

366. *See id.*

367. *See id.*

who share Justice Gorsuch's federalism concerns have indicated support for a stronger nondelegation doctrine.[368]

B. Applying the Major Questions Doctrine to Affirmatively Furthering Fair Housing

Housing law experts have begun to consider the implications of *West Virginia v. EPA* on HUD's authority.[369] Some civil rights lawyers and HUD consultants remain confident that AFFH is untouchable by the major questions doctrine.[370] They focus on the fact that AFFH is clearly outlined in statutes, has been upheld by courts, and that "housing regulations are not considered so socially or economically consequential"[371] that they could fall under the major questions doctrine.[372] Michael Allen, a civil rights lawyer who has worked on AFFH cases, stated that he believed the major questions doctrine is "not a threat"[373] to AFFH, "[i]f you assume the intellectual honesty of the EPA case analysis."[374] On the other hand, HUD consultant Myron Orfield noted that "[Justices Neil] Gorsuch and [Clarence] Thomas think the whole administrative state is a bad thing," and expressed deeper concerns for the future of AFFH.[375] Allen's view represents those who are confident in Chief Justice Roberts' control over the court. Orfield speaks to those who are not.[376]

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368. *See* Sohoni, *supra* note 279, at 291 (describing the relationship between the nondelegation and major questions doctrines); *see also* Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 440 (2022) (discussing the changes in the Court's makeup as creating potential votes for Justice Gorsuch's approach to nondelegation); Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 576 (2022) (discussing the likelihood of an expansion of the nondelegation doctrine).

369. *See* Meir Rinde, *Could This Supreme Court Ruling Affect Fair Housing?*, SHELTERFORCE (Aug. 25, 2022), https://shelterforce.org/2022/08/25/could-this-supreme-court-ruling-affect-fair-housing/ [https://perma.cc/FQE3-ELLF] (interviewing housing law experts and administrative officials on their reactions to the *West Virginia* ruling).

370. *See id.*

371. *Id.*

372. *See id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *See generally* Adam Liptak, *June 24, 2022: The Day Chief Justice Roberts Lost His Court*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/abortion-supreme-court-roberts.html [https://perma.cc/2FFH-V7F9] (reviewing the 2022 Supreme Court Term as one controlled by the conservative majority, not Chief Justice Roberts).

Congress clearly and explicitly provided HUD with the authority and duty to follow the AFFH requirement in multiple statutes.[377] The Court subsequently affirmed this authority.[378] The major questions doctrine is only applicable to questions of agency authority, not challenges to statutes, and so the AFFH statutory requirement itself is not in question or at risk. The Obama and Biden administrations' interpretations of AFFH, however, are.[379] This Section analyzes the Obama and Biden administrations' interpretation of AFFH under both the current iteration of the major questions doctrine and under the additional factors that Justice Gorsuch has proposed in his West Virginia concurrence. This Section first looks at whether the Court would classify AFFH as a major question and then examines whether HUD has clear congressional authorization for its interpretation of AFFH.

1. Does Affirmatively Furthering Pose Major Questions?

The major questions doctrine applies to cases where an agency has asserted broad authority with economic and political significance.[380] As this Note discussed,[381] to determine whether an assertion of authority has economic and political significance the Court tends to look at the economic impact of the regulation, the agency's statements, regulations, and expertise, and any congressional action or inaction on the issue.[382] In his concurrence, Justice Gorsuch also identifies federalism concerns as a relevant factor in determining whether a question is major.[383] Currently, all participants in HUD funding programs must comply with AFFH by conducting a fair housing assessment and fair housing planning, and failure to comply could result in the withholding or withdrawal of funds.[384]

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377. *See* 42 U.S.C. §§ 3601–19.

378. *See* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527–28 (2015).

379. HUD's new proposed rule regarding AFFH was released in February 2023. This Note's analysis remains applicable, as the new rule seeks to strengthen HUD's enforcement mechanisms. *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023).

380. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

381. *See supra* Section II.A.1.

382. *See generally, e.g.*, *West Virginia*, 142 S. Ct. 2587; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); King v. Burwell, 576 U.S. 473 (2015).

383. *See West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

384. *See supra* Section I.A.2–3; *see also Questions and Answers about HUD*, *supra* note 28.

a. Economic Impact

The Court considers a variety of factors in determining the economic significance of a given issue.[385] Relevant factors include the size of the relevant industry, the number of affected people, the amount of money involved, and whether the agency's new interpretation would greatly expand its authority and increase costs.[386] The housing industry represents roughly 15–18% of the annual gross domestic product (GDP).[387] The general issue of housing affects essentially every person in the country, and the exponential increase of housing costs over recent decades has increased its impact on people's lives.[388] HUD provides federal funding to every state in the U.S., the Commonwealth of Puerto Rico, and hundreds of cities and counties.[389] For example, HUD has allocated over $95 billion to grantees in nearly fifty years through the Community Development Block Grant (CDBG) program alone.[390] Similarly to the IRS in *King*,[391] the current AFFH interpretation does not expand HUD's authority in terms of affected parties or costs, but allows for HUD to withhold or withdraw federal funding if program participants do not comply with the fair housing planning processes.[392] As the housing industry and HUD's funding programs both cost billions of dollars and affect nearly every person and government in the country, the Court is likely to find that AFFH's potential impact poses great economic significance as it did in *King*.[393]

385. *See supra* Section II.A.1.a for discussion of economic factors.

386. *See supra* Section II.A.1.

387. *See Gross Output by Industry*, U.S. BUREAU OF ECON. ANALYSIS, https://apps.bea.gov/iTable/?reqid=150&step=2&isuri=1&categories=gdpxind#eyJhcHBpZCI6MTUwLCJzdGVwcyI6WzEsMiwzXSwiZGF0YSI6W1siY2F0ZWdvcmllcyIsIkdkcHhJbmQiXSxbIlRhYmxlX0xpc3QiLCIxNSJdXX0= [https://perma.cc/8DVH-EUNB] (last visited Jan. 1, 2023).

388. *See* Eric Biber et al., *Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and the Climate*, 2022 UTAH L. REV. 1, 2 (2022).

389. *See Questions and Answers about HUD*, *supra* note 28 (summarizing the size of the Community Development Block Grant Program).

390. *See id.*

391. *See* King v. Burwell, 576 U.S. 473 (2015).

392. *See supra* Section I.A.2 for review of the current AFFH regulations.

393. *See King*, 576 U.S. at 485–86.

b. Agency History

The Court also looks to the agency's history regarding the issue at hand.[394] This analysis includes factors such as past or present agency statements, past agency regulations, and the agency's area of expertise.[395] HUD has a limited history of AFFH interpretations, and its 2015 regulation marked a shift in policy from its previous lack of enforcement.[396]

HUD's 2020 rule[397] argues that the 2015 AFFH requirements constitute a "fundamental expansion" of HUD's prior regulations that pose significant economic concerns.[398] The rule also reflects federalism concerns and argues that "states and local jurisdictions . . . have traditionally regulated zoning and development policy" and federal government regulation of zoning and development are unconstitutional infringements on state sovereignty.[399] In the 2021 rule, HUD explains that the 2020 rule's interpretation was inconsistent with the statute and HUD's prior interpretations.[400] HUD notes that the interpretation of the AFFH mandate as requiring action is not "economically significant" nor would it "have federalism implications," as HUD itself is required by Congress to ensure that grantees comply with all funding requirements including AFFH.[401] While the 2021 interim rule does not specifically address the major questions doctrine, the overall discussion clearly indicates that HUD does not believe that its 2015 regulations or 2021 reinstatement of those regulations would pose major questions for the Court.[402] The current major questions doctrine, however, is not particularly concerned with agency *support* for its interpretation, as evident in *West Virginia*: the Court is more likely to give weight to past statements that conflict with

394. *See supra* Section II.A.1 for discussion of agency history as a factor in major questions doctrine analysis.

395. *See generally, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); *King*, 576 U.S. 473.

396. *See* Davidson & Peñalver, *supra* note 54.

397. *See* Preserving Community and Neighborhood Choice Rule, 85 Fed. Reg. 47899 (Aug. 7, 2020) (to be codified at 24 CFR pts. 5, 91, 92, 570, 574, 576, 903).

398. *Id.* at 47904.

399. *Id.*; *see also West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (describing federalism concerns).

400. *See* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications Interim Rule, 86 Fed. Reg. 30783 (June 10, 2021) (to be codified at 24 CFR pts. 5, 91, 92, 570, 574, 576, 903).

401. *Id.* at 30789.

402. *See id.*

the new interpretation.[403] The Court will likely find HUD's 2020 interpretation of AFFH relevant in supporting the idea that the current iteration of AFFH poses a major question.[404]

Further, the Court in *West Virginia* indicated that an agency interpretation may trigger the major questions doctrine simply if that interpretation is new.[405] For decades, HUD treated AFFH as a good faith obligation.[406] HUD rarely confirmed that its program participants were complying with the minimal AFFH requirements, and almost never enforced the mandate.[407] HUD's 2015 and 2021 interpretations of AFFH require real action and permit HUD to take enforcement action against governments that do not comply, which shifts away from its previous interpretation and regulations. [408] This change in interpretation is not, however, entirely new.[409] In HUD's early days, Senator Romney's AFFH initiative withheld funds from governments with discriminatory housing policies unless they began the process of eliminating those policies and thus complying with AFFH.[410] While this initiative was short-lived, it is relevant to the discussion of whether HUD's newest interpretation of AFFH conflicts with all its previous regulations. However, it is unclear how the Court would treat Senator Romney's interpretation. It was only in effect for a few years, and the Court may consider the following decades of consistent interpretation more persuasive.[411] In *West Virginia*, the Court specifically noted that the EPA's consistent limited interpretation was relevant to its analysis.[412] While HUD's interpretation of AFFH differs from *West Virginia* in that it is not entirely new, the Court may very well still deem the shift in policy significant enough to fall under the major questions doctrine.

The Court also looks at the importance of the question to the overall statutory scheme and whether the agency has expertise to answer

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403. *See West Virginia*, 142 S. Ct. at 2610.

404. *See* Preserving Community and Neighborhood Choice Rule, 85 Fed. Reg. 47904 (Aug. 7, 2020) (to be codified at 24 CFR pts. 5, 91, 92, 570, 574, 576, 903).

405. *See West Virginia*, 142 S. Ct. at 2608 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) ("EPA 'claim[ed] to discover in a long-extant statute an unheralded power.'").

406. *See* Rosser, *supra* note 29, at 5.

407. *See id.* at 20–22.

408. *See id.* at 54.

409. *See* Hannah-Jones, *supra* note 67.

410. *See id.*

411. *See id.*

412. *See West Virginia,* 142 S. Ct. at 2596.

questions within that realm.[413] Unlike *King*,[414] AFFH is not the main focus of the FHA, and HUD undoubtedly has vast expertise in regards to housing questions.[415] As in *West Virginia*, however, the Court might not consider HUD's housing expertise relevant to the questions of what fair housing is and what it means to affirmatively further it.[416] The EPA surely had relevant expertise in looking at coal emissions, but the Court determined that the broader question, of what the nation's energy future should look like, was best left to Congress.[417] The Court might determine that HUD is the proper agency to determine the meaning of AFFH, but its decision in *West Virginia* seems to indicate that, when a question affects a larger policy idea, the Court will use the major questions doctrine.

c. Congressional Action or Inaction

In certain major questions doctrine cases, the Court has looked to any congressional action or inaction on the issue to discern congressional intent.[418] Unlike *Brown*,[419] Congress has not enacted much legislation regarding AFFH since its initial measures.[420] The original 1968 Act applied the AFFH mandate to all executive agencies operating within the realm of housing and development,[421] and the 1974 Act extended this mandate by requiring AFFH certifications from all HUD grantees.[422] Beyond these acts Congress has not addressed AFFH, nor are there any identifiable instances wherein Congress considered and rejected a more specific definition of AFFH.[423] This factor would likely would not play a significant role in the Court's analysis of whether or not AFFH poses a major question.[424]

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413. *See supra* Section II.A.1.b for discussion of agency expertise.

414. *See* 576 U.S. 473, 486 (2015).

415. *See supra* Section I.A.1–3 for discussion of HUD's history and experience.

416. *See West Virginia*, 142 S. Ct. at 2615.

417. *See id.*

418. *See supra* Section II.A.1.iii for review of congressional action and inaction as impacting major questions review.

419. *See* Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–44 (2000).

420. *See generally* Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL'Y REV. 1 (2020) (reviewing the lack of legislative reform to AFFH and proposing amendments).

421. *See* Fair Housing Act, 42 U.S.C. §§ 3600–19 (1968).

422. *See* Housing and Community Development Act, 42 U.S.C. § 5304(b)(2) (2004).

423. *See* Davidson & Peñalver, *supra* note 54, at 137–38 (discussing the history of housing legislation); Abraham, *supra* note 420.

424. *See* Sohoni, *supra* note 279, at 288.

d. Justice Gorsuch's Concerns

Justice Gorsuch's concurrence in *West Virginia* promoted an expansion of the nondelegation doctrine and argued that the major questions doctrine should apply in cases that have federalism concerns.[425] He wrote that the Court should ask major questions when an agency seeks to regulate an area of law that is traditionally reserved to state governments.[426] Justice Gorsuch's concurrence does not have the force of law, but a majority of the justices on today's Court share his federalism concerns and have indicated support for a stronger nondelegation doctrine.[427] HUD's 2015 and 2021 interpretations of AFFH appear to acknowledge these federalism concerns by intentionally focusing on processes rather than outcomes.[428] Regardless, the fact that the newer interpretation of AFFH requires state and local governments to take certain actions or face funding cuts may cause concern for Justice Gorsuch.[429] Indeed, the 2020 rule cites federalism as one of the primary reasons HUD was rescinding the 2015 interpretation.[430] Should federalism concerns continue to play a large role in the Court's decisions, it is very possible that the Court could read the 2015 and 2021 interpretations of AFFH as unduly imposing on state governments and thus posing a major question.

None of the above factors are necessary or sufficient to determine whether a question is major, nor are they all present in every major questions doctrine case.[431] However, the Court's emphasis in *West Virginia* on previously minor factors indicates that the realm of major questions is growing. It is very possible that, if challenged, the Court would determine that AFFH does pose major questions.

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425. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

426. *See id.*

427. *See* Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 576 (2022) (describing the Court's interest in expanding nondelegation doctrine); Terrace, *supra* note 363, at 800–03 (arguing that the Court should expand its current nondelegation doctrine); Carlos A. Hernandez, *From Arlington to Tennessee: The Beginnings of a Chevron Deference Farewell Tour?*, 47 SW. L. REV. 179, 181 (2017) (describing the "resurgence of a federalism-based judicial narrative" as reducing the authority of the administrative state).

428. *See* Kazis, *supra* note 82, at 12 ("The 2015 AFFH rule solved this problem by turning to process. It did *not* decree any particular vision of urban development. Instead, it helped grantees develop their own vision of fair urban development.").

429. *See id.* at 4.

430. *See* Preserving Community and Neighborhood Choice Rule, 85 Fed. Reg. 47903 (Aug. 7, 2020) (to be codified at 24 CFR pts. 5, 91, 92, 570, 574, 576, 903).

431. *See* Sohoni, *supra* note 279, at 288.

2. Does the Department of Housing and Urban Development Have Clear Congressional Authorization?

In *West Virginia*, the Court added a clear statement principle to the major questions doctrine without providing guidance on how to apply this principle.[432] The Court's description of the word "system" as vague and potentially applicable to anything[433] indicates that ambiguous phrasing does not constitute a clear congressional authorization.[434] The 1968 Act includes the phrase "affirmatively furthering" or "affirmatively further" numerous times, mandating that the executive branch "affirmatively further" both the policies and the purposes of the Act.[435] The Act does not have a stated purpose and its stated policy is to provide for fair housing for all — and yet the act does not actually define "fair housing."[436] The question of what constitutes fair housing has been the subject of fierce debate for decades with a variety of proposed approaches.[437] HUD itself acknowledged these debates in its 2015 and 2021 interpretations of AFFH by allowing local governments to define fair housing for themselves.[438] Fair housing is an inherently broad concept,[439] and if the Court applies the same analysis as it did in *West Virginia* it could easily decide that it is too broad to constitute a clear congressional statement.

While the vague understanding of fair housing could pose a problem for HUD, it is more likely that the Court would take issue with the phrase "affirmatively furthering."[440] For decades HUD interpreted "affirmatively furthering" in a very limited manner by only requiring a good-faith commitment to the concept of fair housing.[441] Just as in

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432. *See supra* Section II.A.2 (attempting to discern what a clear statement is and is not).

433. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2614–15 (2022).

434. The Court did not address the discrepancies the clear statement rule created within its own precedent, but it is entirely unclear how the Court might resolve this tension in the future and such a question is out of scope for the purposes of this Note. For more discussion on this topic, see Sohoni, *supra* note 279.

435. Fair Housing Act, 42 U.S.C. §§ 3601–19 (1968).

436. *See* Kazis, *supra* note 82, at 7–9.

437. *See id.* at 8 (describing competing visions of fair housing including a mobility approach and a place-based approach).

438. *See id.* at 8; *see also* Rosser, *supra* note 29, at 25.

439. *See* Myron Orfield & William Stancil, *Challenging Fair Housing Revisionism*, 2 N.C. CIV. RTS. L. REV. 32, 38 (2022).

440. *See* Kazis, *supra* note 82, at 4 (arguing that HUD's definition of fair housing is broad and flexible).

441. *See* Rosser, *supra* note 29, at 22 (describing the previous AFFH requirements as "little more than a box-checking exercise" wherein fund recipients had to certify only the existence of fair housing planning without submitting the actual planning).

West Virginia, the Court would likely find HUD's previously limited interpretation of AFFH very relevant to its analysis.[442] The vague nature of both "affirmatively furthering" and "fair housing" are thus unlikely to meet the Court's standard for a clear congressional statement of authority.

Any efforts by HUD to strengthen the AFFH mandate or define fair housing[443] likely face the same issue of unclear congressional authorization. HUD's newly proposed AFFH rule is subject to this same analysis.[444] The proposed rule retains the current interpretation and most of the current regulations but imposes additional requirements and expands HUD's enforcement authority.[445] These expansions likely lend credence to a stronger challenge under the major questions doctrine than this Note discusses.[446]

HUD's 2015 and 2021 interpretations of AFFH as requiring detailed fair housing planning has not yet been challenged under the major questions doctrine. The contentious history and nature of these housing issues could easily see future litigation, especially given the recent focus on housing in news and politics.[447] If, or when, HUD's current interpretation of AFFH is challenged, the Court is likely to consider the question of defining AFFH a major one due to its broad economic significance and its differences from HUD's prior interpretations. Under the major questions doctrine as established in *West Virginia*, HUD would have to point to clear congressional authorization for its interpretation to prevail, and the nature of the AFFH mandate is inherently ambiguous. Ultimately, if the current iteration of AFFH is challenged, the Court will likely overturn HUD's interpretation.

C. Show Me the Money

If the current rule is challenged, the Court will likely find that HUD's interpretation of AFFH both poses a major question and is not rooted in clear congressional authorization. As HUD has not finalized

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442. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

443. *See* Kazis, *supra* note 82, at 11 (discussing Supreme Court dicta language as a potential barrier for a robust AFFH mandate).

444. *See* Abraham et al., *supra* note 113.

445. *See infra* Section I.B.2 for an overview of the proposed rule's changes from the current regulations.

446. *See* Kazis, *supra* note 82, at 11 (discussing potential challenges to a robust AFFH mandate).

447. *See* Rosser, *supra* note 29, at 26–33 (describing the Trump Administration's fervent efforts to reduce housing protections and eliminate associated regulations).

the new AFFH rule, this Section focuses on HUD's current AFFH regulations.[448] This Section's analysis remains applicable to the proposed rule as it expands upon HUD's 2015 and 2021 rules.[449] Ensuring that the AFFH mandate is not at risk under the major questions doctrine would require either enactment of clear congressional authorization or HUD amendment of the AFFH regulation in a way that avoids major question concerns. This Section first discusses potential congressional action that could clarify HUD's authority, and then discusses options for HUD to alter its current AFFH regulations.

Congress could enact several statutory reforms to the FHA to ensure that HUD's authority is clear. Commentators have proposed congressional amendments including definitions for both "affirmatively furthering" and "fair housing" and the creation of accountability frameworks and additional enforcement mechanisms.[450] There have also been calls for even stronger fair housing legislation, such as a type of affirmative action housing plan that could ensure access to fair housing across the nation.[451] A definitional amendment would resolve the current lack of clarity within the AFFH provisions and is thus most relevant to the discussion of the major questions doctrine.[452] This amendment would include a purpose statement affirming that fair housing requires the government take proactive steps and dedicate federal resources towards reversing the United States's history of segregation.[453] It would also define AFFH, and could use the existing definition from the Obama 2015 rule that outlines the specific goals AFFH is designed to meet.[454]

HUD could alternatively shift its AFFH regulations from a condition on federal funds to a purely incentive-based approach. Such an approach would likely turn AFFH from a major question to a minor

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448. *See* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516 (Feb. 9, 2023).

449. *See id.*

450. *See* Abraham, *supra* note 420, at 52 (2020) (proposing three statutory amendments to the FHA that would strengthen AFFH).

451. *See* Micah Tempel, *Affirmative Action Housing: A Legal Analysis of an Ambitious but Attainable Housing Policy*, 57 REAL PROP. TR. & EST. L.J. 107, 110 (2022) (detailing what an affirmative action housing program could look like given constitutional considerations). *See generally* ROTHSTEIN, *supra* note 38.

452. *See* Abraham, *supra* note 420, at 53.

453. *See id.* at 54.

454. *See id.* at 55; 24 C.F.R. § 5.151 (2021) ("[AFFH] means taking meaningful actions that . . . address significant disparities in housing needs and . . . opportunity, replacing segregated living patterns with truly integrated [ones, and] . . . transforming . . . areas of poverty into areas of opportunity.").

one by allowing governments to opt-in to fair housing planning.[455] Federal incentive structures can take the form of positive incentives or negative incentives.[456] A positive incentive structure is one in which the federal government provides rewards for compliance with its desired regulations, typically in the form of tax credits[457] or boosts to grant applications.[458] A negative incentive structure requires that participants take additional costly action if they fail to comply with desired regulations.[459] The Biden administration's current zoning reform efforts provide an example of a positive incentive structure.[460] That plan recognizes that zoning policy is traditionally governed by state and local governments and avoids federalism concerns by making zoning reform purely opt-in and tied to smaller federal grants.[461]

A negative incentive structure can be seen in the National Environmental Policy Act (NEPA).[462] NEPA requires federal

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455. *See generally* Rachel Manning, *Reaching the Individual: A Proposed Federal Framework to Reduce Community-Based Greenhouse Gas Emissions*, 30 FORDHAM ENV'T. L. REV. 123, 141 (2019) (discussing a similar incentive approach for emissions reductions standards); Jennifer Forbes, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177, 200–01 (2005) (discussing attempts to encourage urban revitalization through opt-in tax).

456. *See, e.g.*, Manning, *supra* note 455, at 137 (describing a proposed positive incentive structure for emissions reductions); Kery Murakami, *Biden is Doubling Down on a Push to Roll Back Single-Family Zoning Laws*, ROUTE FIFTY (Apr. 12, 2022), https://www.route-fifty.com/infrastructure/2022/04/bidens-10-billion-proposal-ramps-equity-push-change-neighborhoods-cities/365581/ [https://perma.cc/FVR6-EBPH] (reviewing the Biden Administration's efforts to reform zoning laws through a positive incentive structure). *Cf.* Kazis, *supra* note 82, at 17–18 (reviewing environmental impact statement requirements as a form of negative incentives that governments attempt to avoid).

457. *See* Manning, *supra* note 455, at 138 (proposing tax incentives for compliance with environmental programs).

458. Many federal grants require detailed applications that are extensively reviewed through a point system, and applicants with the most points are selected to receive federal funds. The Biden administration has announced that governments who engage in zoning reform will receive additional points on certain grant applications, making it more likely that they will be selected to receive those funds. *See* Biden Housing Plan, *supra* note 117.

459. *See* Kazis, *supra* note 82.

460. *See* Biden Housing Plan, *supra* note 117.

461. *See NMHC and NAA Statement on Biden Administration Plan to Increase Housing Supply*, NMHC (July 27, 2022), https://www.nmhc.org/news/press-release/2022/nmhc-and-naa-statement-on-biden-administration-plan-to-increase-housing-supply/ [https://perma.cc/CAG3-WF7X]; *see also* Michael A. Wolf, *Check State: Avoiding Preemption by Using Incentives*, 36 J. LAND USE & ENV'T. L. 121, 123 (2020) (discussing an incentive-based approach as avoiding federalism concerns).

462. *See* Kazis, *supra* note 82, at 17 (describing the EIS negative incentive structure in relation to options for HUD to strengthen AFFH).

agencies planning on taking action that would significantly affect the environment to produce an environmental impact statement (EIS).[463] As preparation of an EIS is extremely costly in both money and time, agencies often avoid taking action that would require an EIS.[464] Noah Kazis writes that AFFH reform should include negative incentives like the NEPA regulations requiring creation of an EIS.[465] For example, HUD could develop a list of unfair housing practices and require jurisdictions engaging in those practices to participate in an extensive fair housing planning process.[466]

Both positive and negative incentive structures have governmental precedent and both encourage governments and agencies to comply with the desired regulation. HUD could take a similar incentive-based approach. The AFFH fair housing assessment is currently a required part of HUD grant applications.[467] HUD could instead provide grant application boosts as a reward to applicants who complete this assessment. HUD manages formula funding grants as well as competitive grants.[468] Formula programs are not competitive and the formulas are statutorily prescribed so there is no way for HUD to provide any application boost to formula program participants.[469] However, HUD could reward jurisdictions who conduct fair housing assessments with boosts to competitive grant applications. HUD could alternatively require that governments who fail to meet some fair housing criteria must complete a fair housing assessment as a negative incentive.

A congressional amendment could ensure that even if HUD's interpretation does trigger the major questions doctrine, HUD would prevail under the clear statement rule. A purely incentive-based approach to AFFH could reduce the economic significance and

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463. *See id.*

464. *See id.*; *see also* Bradley C. Karkkainen, *Towards a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 904–05 (2002).

465. *See* Kazis, *supra* note 82, at 17–18 (describing the NEPA incentives and suggesting a similar HUD program).

466. *See id.*

467. *See generally* Restoring Affirmatively Furthering Fair Housing Definitions and Certifications Interim Rule, 86 Fed. Reg. 30779 (2021).

468. Formula funding programs provide funds to all eligible applications, whereas competitive grants are more limited and only award funds to top applicants. *See supra* note 65 and accompanying text.

469. *See Types of Funding*, U.S. DEP'T JUST., https://www.ojp.gov/funding/grants101/types-funding [https://perma.cc/TUA8-B24X] (last visited Jan. 9, 2023) (explaining the differences between formula grants and competitive grants).

federalism concerns, preventing the Court from classifying HUD's interpretation as a major question in the first place.

III. STAY POSITIVE: AN INCENTIVE-BASED APPROACH

Incentive-based approaches pose their own, unique concerns, including legal challenges and potentially reduced compliance.[470] This Part addresses the primary considerations of congressional action and negative and positive incentive structures.

First, congressional action would likely resolve the issue of major questions most effectively, but, considering the current politics in Congress, this is not a realistic solution. Second, negative incentive structures are a more compliant solution, but likely pose similar major questions concerns as the current AFFH regime. Applying a structure under AFFH would require HUD to create some sort of metric to determine when governments must engage in a fair housing assessment. Finally, positive incentive structures are unlikely to trigger the major questions doctrine but could see reduced compliance and ineffective implementation. This Note proposes that a positive incentive-based approach to AFFH is the most practical solution to avoiding major questions doctrine implications, despite certain flaws.

Congressional action to amend the FHA presents arguably the best solution for the major questions dilemma in terms of efficacy, but the worst solution in terms of plausibility. By codifying the definitions of fair housing and "affirmatively furthering" Congress would eliminate the need for HUD to engage in statutory interpretation of AFFH.[471] As previously discussed in this Note, the major questions doctrine is applied in challenges to agency statutory interpretation, and explicit congressional definition would prevent any such challenges.[472] Congress could alternatively grant HUD explicit authority to determine the meaning of AFFH. This measure would allow for HUD to shift its definition of AFFH over time and adapt to changing circumstances. While an amendment like this would not entirely prevent challenges under the major questions doctrine, it would provide the clear congressional authorization that is necessary for an agency's interpretation to prevail under such challenges.[473]

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470. *See* Manning, *supra* note 455, at 141–43.

471. *See* Abraham, *supra* note 420, at 53–56.

472. *See supra* Section I.B for discussion of the major questions doctrine.

473. *See supra* Section II.A.2 for discussion of the clear statement rule in the major questions doctrine.

Calls for congressional action and actual action are, however, entirely different matters. Fair housing and anti-discrimination policies are not supported evenly across political parties,[474] and party polarization has been growing in Congress for decades.[475] The first few days of the newly convened 118th Congress demonstrated sharp divisions even within the parties.[476] The Republican party, holding a slim majority in the House of Representatives, could not agree on a speaker until the 15th round of voting, making this the longest speaker contest in 164 years.[477] These intense divisions, both between and among the parties, make major legislative action extremely unlikely.[478]

Incentive-based approaches are more feasible than congressional action. However, they are not entirely without issue. A negative incentive based AFFH regime and HUD definition of unfair housing[479] would likely not survive a major questions doctrine challenge. As this Note discusses extensively above, one of the main concerns for AFFH under the major questions doctrine is whether HUD has the authority to interpret the AFFH statute.[480] A negative incentive-based approach would create great economic costs for jurisdictions that are non-compliant, just as the current AFFH regulation does in allowing HUD to rescind funding.[481] The mechanics of these costs are slightly different, but ultimately the burden would remain on local governments. As the Court is likely to find that the definition of fair housing poses major questions[482] and that HUD is not the proper agency to make this determination,[483] the Court would likely heavily

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474. *See* Abraham, *supra* note 420, at 66–67 (discussing the viability of FHA amendments).

475. *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 OHIO ST. L.J. 5, 12 (2022) (explaining polarization generally and within Congress); *see also* B. DAN WOOD & SOREN JORDAN, PARTY POLARIZATION IN AMERICA: THE WAR OVER TWO SOCIAL CONTRACTS 263–64 (Cambridge University Press 2017) (citing studies documenting increased congressional polarization since the 1980s).

476. *See* Clare Foran et al., *McCarthy Elected House Speaker After Days of Painstaking Negotiations and Failed Votes*, CNN (Jan. 7, 2023, 9:11 AM), https://www.cnn.com/2023/01/06/politics/mccarthy-speaker-fight-friday/index.html [https://perma.cc/QPU8-HNA4].

477. The Republican party holds a four-person majority in the House of Representatives. Electing a speaker requires a simple majority of votes, and almost every Congress has elected a speaker on the first ballot. *See id.*

478. *See* Abraham, *supra* note 420, at 67 (acknowledging that amending the FHA to strengthen AFFH is unlikely in the current political climate).

479. *See* Kazis, *supra* note 82, at 17–18.

480. *See supra* Section II.B.2 for consideration of HUD's statutory authority.

481. *See supra* Section I.A.2 for overview of HUD's powers to enforce AFFH.

482. *See supra* Section II.B.1.

483. *See supra* Section II.B.2.

scrutinize any HUD definition of unfair housing under a negative incentive-based regime.[484]

A positive incentive-based approach would likely avoid the major questions doctrine, but it would come with significant compliance costs.[485] Positive incentives would not force any jurisdiction to engage in the current detailed fair housing assessment process, but rather would reward jurisdictions that do so.[486] HUD could boost any competitive grant applications for jurisdictions that engage in the fair housing assessment and planning process. This greatly reduces the economic significance of the interpretation and the regulations, as HUD would no longer be asserting authority over a broad sector of the economy by mandating these assessments.[487] Potential federalism concerns would also lessen, as a reward is not a requirement.[488] Federalism is rooted in the concept that certain areas of law are reserved to the states and applies to federal laws and regulations that impose requirements upon state and local governments.[489] HUD's current AFFH requirements, while much stronger than the previous requirements, remain open-ended and lack definitive goals.[490] The AFFH rule provides HUD with limited enforcement power[491] and an

484. HUD's definition of unfair housing practices could also pose litigation concerns on the basis of race-conscious policymaking. Unfair housing practices include segregation and discrimination and identifying such practices must involve consideration of race. The Court's upcoming 2023 term includes cases regarding affirmative action in higher education, and there is concern that the Court might hold that consideration of race in any form is unconstitutional. This issue is important, but outside the scope of this Note. *See, e.g.*, Kazis, *supra* note 82, at 16 (describing unfair housing practices as those "historically or quantitatively associated with discrimination, segregation, and other forms of unfair housing"); Davidson & Peñalver, *supra* note 54, at 144 (analyzing the Court's increased skepticism on race-conscious policy); *see also* Adam Liptak & Anemona Hartcollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/4XRZ-JWFF]; H. Juanita Beecher, *Supreme Court Will Hear University Affirmative Action Cases*, 19 FED. EMP. L. INSIDER 4 (2022).

485. *See* Kazis, *supra* note 82, at 13.

486. *See* Manning, *supra* note 455.

487. *See supra* Section II.A.1.a for discussion of the factor of economic significance within the major questions doctrine.

488. *See supra* Section II.A.1.d for analysis of the major questions doctrine's federalism concerns.

489. *See supra* Section II.A.1.d.

490. *See* Terrace, *supra* note 363 (discussing the concept of federalism).

491. *See* Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, 40 MISS. C. L. REV. 5, 92–93 (2022).

incentive-based approach would entirely remove HUD's ability to enforce the AFFH mandate. Under such an approach governments that do not want to comply with the AFFH requirements simply would not have to.[492] Further, while most of HUD's funding comes from formula programs, HUD can only tie a positive incentive to its competitive grants.[493] Jurisdictions that only apply for formula funding and not competitive grants would thus have no incentive to engage in fair housing assessments.

Positive incentives are not very strong incentives, but they could encourage governments ambivalent on the matter to participate in more detailed fair housing planning.[494] Should the current AFFH requirements be challenged and overruled by the Supreme Court, HUD would have to return to its prior minimal requirements.[495] The old interpretation of AFFH and associated regulations did not require actual fair housing planning — HUD only required jurisdictions to assert that they had conducted some planning.[496] HUD rarely enforced this minimal requirement and routinely distributed federal funds to grantees who had not checked this box.[497] Returning to HUD's old AFFH regulations would likely see far fewer fair housing plans than both the current AFFH regulation and the proposed positive incentive-based AFFH regulation. Positive incentives will help HUD avoid the major questions doctrine and present an improvement from past regulations.

CONCLUSION

HUD's recent efforts to improve the state of fair housing are admirable, especially within the broader context of the United States government's long history of promoting discriminatory housing practices. The Supreme Court's recent embrace of the major questions doctrine, however, poses serious concerns for HUD's ability to maintain its current interpretation of the AFFH mandate. To address these concerns, HUD could shift away from its current AFFH requirements towards an incentive-based regime. Positive incentives

492. *See, e.g.*, Manning, *supra* note 455, at 143 (discussing financial incentives as often failing to compel broad change).

493. *See supra* Section II.C for a discussion of formula programs vs. competitive grant programs.

494. *See id.* (arguing that financial incentives *do* encourage some compliance).

495. *See supra* Section I.A.2 for overview of HUD's historical treatment AFFH interpretations and requirements.

496. *See* Rosser, *supra* note 29.

497. *See id.*

would likely see reduced government participation in fair planning, but they present a middle ground solution to this issue — less than the current regulations, more than the old ones. This type of compromise may not create fair housing options for all, but it might increase fair housing for some.