Section of Environment, Energy, and Resources
American Bar Association

Environment, Energy, and Resources Law: The Year in Review 2023

Chapter Y · Constitutional Law

Chapter Y: CONSTITUTIONAL LAW
2023 Annual Report[1]

I. SUPREME COURT CASES DECIDED IN 2023

In its 2022 Term, the Supreme Court issued four opinions in the environmental field, including one on animal law, two on Indian tribal rights, and one case interpreting the Clean Water Act as applied to wetlands. Each case involved differing majorities and in two cases the Court had narrow 5-4 majority opinions. Further, the Court took one action vacating a stay by a court of appeals as to a natural gas pipeline running through a national park.

A. The Dormant Commerce Clause does not apply to California's ban on pork products from mistreated pigs.

In *National Pork Producers Council v. Ross,* the Court held that a California statute that forbids the in-state sale of pork products derived from breeding pigs "confined in a cruel manner" does not violate the dormant Commerce Clause.[2] Some members of the Court have questioned the "negative" or "dormant" application of the Commerce Clause at all.[3] But, the Court did not reach that expansive position and instead held that the traditional strict scrutiny rule against state laws that directly discriminate against commerce

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[2]598 U.S. 356, 390-91 (2023) (The California law, adopted by a popular referendum under the designation of Proposition 12, deems confinement "cruel" if it prevents a pig from "lying down, standing up, fully extending [its] limbs or turning around freely." *Id.* at 365-66).

[3]*See* South Dakota v. Wayfair Inc. et al., 585 U.S. 162, 189-90 (2018) (Thomas, J., concurring) (". . . [A] quarter century of experience has convinced me that *Bellas Hess* and *Quill* "can no longer be rationally justified.") (The same is true for this Court's entire negative Commerce Clause jurisprudence.); *id.* at 190 (Gorsuch, J., concurring) ("My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine."); American Trucking Ass'n v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Thomas, J., concurring)(" '[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense and has proved virtually unworkable in application' and consequently, cannot serve as a basis for striking down a state statute)(citations omitted); Tyler Pipe Indus. V. Wash. Dept. of Revenue, 423 U.S. 232, 259 (1987) (Scalia, J, with whom Rehnquist, C.J., joins, concurring in part and dissenting in part)(" It takes no more than our opinions this Term, and the number of prior decisions they explicitly or implicitly overrule, to demonstrate that the practical results we have educed from the so-called "negative" Commerce Clause form not a rock but a "quagmire," (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). "Nor is this a recent liquefaction.").

from other states did not apply.[4] California banned the sale of pork products from in-state as well as out-of-state producers who confined their pigs in a cruel fashion. Therefore, it did not involve a "discriminatory" application of a law favoring local in-state pork producers.

The majority in *National Pork Producers* rejected two ancillary bases for invoking the dormant commerce clause. The first alternative argument invoked by the challengers is the "extraterritoriality doctrine." According to the petitioners,[5] this doctrine involves an " 'almost per se' rule forbidding enforcement of state laws" that practically "control commerce" outside of the legislating state. The majority of the Court, however, rejected that argument. Instead, it held that the cases cited by the petitioner in support of a per se rule were, in fact, variations of the classic "no discrimination on out-of-state goods" cases and did not establish this new "extraterritoriality" doctrine.[6]

This left petitioners with an alternative theory that urged the Court to weigh the relative "burden imposed on interstate commerce" and reject California's law on that basis. Petitioners cited to the *Pike* standard in support of this alternative argument.[7] The Court rejected that alternative theory as well. For the majority, the request to utilize the Commerce Clause as a "freewheeling" judicial power to weigh costs and benefits was a step too far.[8]

One commentator suggests that the decision in *National Pork Producers* portends a greater receptivity toward dismissal of other cases challenging state clean energy laws as somehow offending the "extraterritorial" limits of the Commerce Clause.[9] Time, and other cases, will tell.

B. Sackett v. EPA (Part II)[10]—Scope of "waters" subject to Clean Water Act Curtailed.

In *Sackett v. EPA*, the Court unanimously rejected the "significant nexus" test for determining whether a wetland is covered under the Clean Water Act. However, the Court essentially split 5-4 over selection of an appropriate alternative standard. A 5-member majority of the Court held that for a wetlands area to be regulated it must have a "continuous surface connection" with a regulated (Navigable) waterway which makes it "difficult to determine where the 'water' ends and the 'wetland' begins."[11] In so doing the Court majority essentially endorses Justice Scalia's plurality opinion in *Rapanos v. U.S*,[12] a divided decision without a majority, but with a concurring decision by Justice Kennedy supporting the "significant nexus test" that was routinely used by Courts of Appeal in

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[4]*See* S. Kalen, THE DORMANT COMMERCE CLAUSE AND THE ENVIRONMENT, Ch. 6, pg. 153, PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW (ABA & James May eds. 2011).

[5]Petition for Writ of Certiorari, National Pork Producers Council et al. v. Ross, 598 U.S. 356 (No. 21-468) (The petitioners were two agriculture-based trade associations, the National Pork Producers Council and the American Farm Bureau Federation).

[6]*Id.*

[7]Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[8]*National Pork Producers,* 598 U.S. at 380-381.

[9]Ari Peskoe, *The Supreme Court ends a looming legal threat to state clean energy laws*, ABA TRENDS (Sept. 1, 2023).

[10]This is the second time that Mr. Sackett and his wife have had a Supreme Court hearing. In the first case, *Sackett v. EPA*, 566 U.S. 120 (2012), the Court held that EPA's compliance order constituted a final decision which could be immediately challenged by the Sacketts. This second case, decided in 2023, is the final result of that challenge.

[11]598 U.S. 651, 651 (2023).

[12]547 U.S. 715 (2005).

deciding wetland challenges. In rejecting Justice Kenney's "significant nexus" test, the majority took a very narrow interpretation of the word "waters" in "waters of the United States," the jurisdictional hook for both Section 402 and 404.

The Justices concurring in judgment only, led by Justice Kavanaugh, stressed that in 1977 Congress amended the Act to include wetlands that were "adjacent" to a regulated waterway and that the "ordinary meaning" of the term "adjacent" has not changed since 1977.[13] In her concurrence, Justice Kagan says "adjacent" is broader than the majority opinion, and that this decision is just like the *West Virginia v. EPA* where the Court imposed its own policy preferences, effectively rewriting the law.[14]

Whether the current decision in *Sackett* brings clarity is still an outstanding question.[15] Although EPA promptly revised its current rule interpreting the scope of the Clean Water Act's application to wetlands, that new rule, the "Revised Definition of Waters of the United States; Conforming", is subject to likely future litigation which might further "muddy" the proverbial waters.[16]

C. Two cases involving tribal rights

1. Court rejects Navajo Nation's claim that the federal government must actively provide potable water to its reservation

In its 5-4 decision in *Arizona v. Navajo Nation*, the Court rejected the claims of the Navajo Nation requesting that the federal government do something to provide more water to its reservation property located in the arid Southwest.[17] The majority framed the issue as whether the United States, under its 1868 treaty with the Navajo, was obligated to take "affirmative" steps to ensure delivery of water to the tribal reservation.[18] Beneath the framing of the key issue, however, was a dramatically different view of the Tribe and its treaty rights. For the majority, it was an interpretation issue: Did the Treaty of 1868 between the U.S. and the then-sovereign Tribe (Navajo) expressly commit the U.S. to provide potable water to the tribe? Justice Kavanaugh, who drafted the majority opinion, and Justice Thomas, in his concurrence, state that there is no specific language in the Treaty that would obligate the federal government to undertake protection of additional rights beyond what the Navajo currently have.

For the dissenters, Justice Gorsuch paints a poetic and powerful picture of the history of the Navajo, who after a series of wars with the U.S., were consigned to a program for their "removal and isolation" and assimilation into a new life apart from what many deemed their prior unconfined "wild and predatory life."[19] The dissenters point out that various oral promises about water were made at the time by General Sherman, the lead negotiator for the U.S.[20]

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[13] 598 U.S. 651, 717-18 (2023) (Kavanaugh, J., with whom Sotomayor, Kagan, and Jackson join, concurring in judgment).

[14] 598 U.S. 651, 717-18 (2023) (Kagan, J. with whom Sotomayor and Jackson join, concurring in judgment).

[15] *See* Robin K. Craig, *Does Sackett bring clarity to waters of the United States?,* AM. BAR ASS'N (Jun. 30, 2023).

[16] *See* Susan L. Stephens, *Here we go again: EPA releases Amendments to WOTUS rule post-Sackett,* AM. BAR ASS'N (Nov. 1, 2023).

[17] 599 U.S. 555 (2023).

[18] *Id.* at 558.

[19] *Id.* at 575-580 (Gorsuch J., with whom Sotomayor, Kagan, and Jackson, JJ. join, dissenting).

[20] *Id.* at 578 (referencing assurances by General Sherman that the Navajo would have "plenty of water").

One set of commentators, including the lead counsel for the State of Arizona, concluded that this case was in essence a preservation of the status quo in a complex set of treaties, prior Supreme Court decisions, and scarce water rights.[21]

2. Court upholds the Indian Child Welfare Act against a panoply of constitutional challenges.

Haaland v. Brackeen is a 7-2 decision in which the Court upheld the constitutionality of the Indian Child Welfare Act (ICWA).[22] Enacted in 1978, the ICWA governs adoption procedures for Indian children with the aim of preserving the culture by keeping Indian children connected to Indian families. The statute thus goes to the heart of a congressional process to secure continuity for native families.

In *Haaland,* the underlying individual claimants asserted rights in three separate adoption proceedings in which they (non-Native Americans) sought to adopt Native American children. In each case, tribes sought to intervene and prevent the adoption. The adopting families, along with the States of Texas, Indiana, and Louisiana, sued the United States, the Department of Interior, the Bureau of Indian Affairs, and the Department of Health and Human Services ("Federal Defendants") to challenge the constitutionality of the ICWA on several grounds. While the Fifth Circuit upheld the ICWA itself as constitutional, it held that some of its provisions did not hold up. The Supreme Court reversed that portion of the Fifth Circuit's decision challenging the Act.

The Court held that Congress' power "to legislate with respect to the Indian tribes is 'plenary and exclusive'" under Article I of the Constitution.[23] This authority derives from three distinct sources, which include the Indian Commerce Clause, Treaty Clause, and the structure of Constitution.

As to the Indian Commerce Clause, which allows Congress "[t]o regulate Commerce . . . with the Indian Tribes," it must be interpreted to include "not only 'trade' but also 'Indian affairs.'"[24] That is, the Indian Commerce Clause is broader than the Interstate Commerce Clause and thus confers in the Federal Government "virtually all authority over Indian commerce and Indian tribes."[25]

The Treaty Clause allows the President, with the advice and consent of the Senate, to "make Treaties" with Native American tribes. While conceding the treaty power "does not literally authorize Congress to act legislatively" as it is in Article II rather than Article I, the Court observed that treaties made pursuant to the treaty power "can authorize Congress to deal with matters with which otherwise 'Congress could not deal.'"[26]

Further, the Court noted that principles inherent in the Constitution, namely the Federal Governments powers described as "'necessary concomitants of nationality'" authorize "Congress to act in the field of Indian affairs,"[27] including "creating departments of Indian affairs, appointing Indian commissioners, and ... 'securing and preserving the friendship of the Indian Nations.'"[28]

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[21]Rita P. McGuire & Nicole D. Klobas, *The Supreme Court's decision in Arizona v. Navajo Nation: A tale of scare water and treaty rights in the Southwest*, AM. BAR ASS'N (Nov. 1, 2023).
[22]599 U.S. 255 (2023).
[23]*Id.* at 272.
[24]*Id.* at 273 (citing U.S. CONST. art. I, § 8, cl. 3; Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)).
[25]*Id.* at 273 (citing Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 62 (1996)).
[26]*Id.* at 274 (citing United States v. Lara, 541 U.S. 193, 200 (2004)).
[27]*Id.* (citing Morton v. Mancari, 417 U.S. 535, 551-52 (1974)).
[28]*Haaland*, 599 U.S. at 279.

Justice Gorsuch wrote a separate puissant concurrence explaining the historical context of the ICWA, including the movement away from an older policy of simply removing Indian children from their families.[29]

D. Natural Resources: The Court vacates a stay of pipeline construction through a National Forest

The Mountain Valley Pipeline (MVP) is a proposed 303-mile natural gas pipeline which runs through the Jefferson National Forest in West Virginia and Virginia. The pipeline is substantially complete, but construction has been stalled pending challenges related to two remaining approvals from the Forest Service and the Bureau of Land Management (BLM) authorizing construction in the Jefferson National Forest. In a petition for review of the administrative action filed with the Fourth Circuit, The Wilderness Society and others challenged the continued construction of the pipeline. On July 10, 2023, the Fourth Circuit issued a one-sentence stay order halting all construction in the Jefferson National Forest without explanation. Immediately thereafter, the Petitioners, the Pipeline owner, and others applied to the U.S. Supreme Court for an order vacating the Fourth Circuit's stay. The applications from the pipeline owner and others came shortly after President Biden signed into law the Fiscal Responsibility Act of 2023 (Ac"), which, in addition to raising the debt ceiling, contained a provision to aid the completion of MVP. Specifically, the Act "ratifies and approves," "notwithstanding any other provision of law," all administrative actions "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline"[30] The applicant argued that this Act effectively deprived the Fourth Circuit of jurisdiction to hear the petitions for review filed by The Wilderness Society and others. The Supreme Court acted with alacrity, and within two weeks of the initial application, it vacated the stays issued by the Fourth Circuit in three pending cases.[31]

II. SUPREME COURT CASES SET IN 2023 FOR HEARING IN 2024

A. The Court will examine EPA's Good Neighbor Rule

On December 20, 2023, the Court announced it would hear four cases (now consolidated) involving challenges to EPA's disapproval of various State Implementation Plans (SIPs) under the Clean Air Act.[32] These cases, including one brought by the States of Ohio, Indiana, and West Virginia, seek to stay EPA's disapproval of the SIPs. EPA based its disapproval on the State plans' inconsistency with EPA's separate rule attempting to reduce ozone impacts from "upwind" states on "downwind" recipient states. EPA's rule is commonly referenced as its "Good Neighbor Plan", and the combined cases are scheduled for argument on February 21, 2024.

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[29] *Id.* at 279 (Gorsuch, J., with whom Kagan and Jackson, JJ. joined). Justice Gorsuch in the concurrence noted that: "In all its many forms, the dissolution of the Indian family has had devastating effects on children and parents alike).

[30] Fiscal Responsibility Act of 2023, Pub. L. no. 118-5, § 324 (c)(1), 137 Stat. 47 (2023).

[31] Mountain Valley Pipeline, LLC, v. The Wilderness Society, et al., 144 S. Ct. 42 (July 27, 2023).

[32] Order of the Court dated Dec. 20, 2023 in Nos. 23A349 (Ohio v. EPA), 23A350 (Kinder Morgan v. EPA), 23A351 (Am. Forest & Paper Assn. v. EPA) and 23A384 (U.S. Steel v. EPA).

B. Loper Bright Enterprises v. Raimondo, Relentless, Inc. v. Department of Commerce and the scope of judicial deference to administrative agencies.

On May 1, 2023, the Supreme Court granted the petition for certiorari in *Loper Bright Enterprises v. Raimondo*. The case challenges a federal rule that requires fisheries to pay the salaries of compliance observers on their boats, a rule promulgated by the National Marine Fisheries Service. In its grant, the Court specifically advised it would consider the decades-old *Chevron* doctrine. In *Chevron v. Natural Resources Defense Council*, the court held that when a federal law is ambiguous, courts should defer to an agency's reasonable interpretation of the statute. Criticism of the doctrine has increased recently, but until now, the Supreme Court has sidestepped or ignored the doctrine. In *Loper*, however, the petitioners specifically asked the court to overrule *Chevron*, or at least narrow it. The Solicitor General opposed certiorari. In October 2023, the Court granted certiorari in a similar case from the First Circuit, raising the same question about the continued viability of *Chevron* in *Relentless, Inc. v. Department of Commerce*. The Court consolidated both cases for argument, which is set for January 17, 2024.

III. SUPREME COURT AND OTHER CASES DISCUSSING THE "MAJOR QUESTIONS" DOCTRINE

On June 30, 2023, the Court issued its opinion in *Biden v. Nebraska*,[33] which for the second time invoked the "major questions doctrine." *Biden v. Nebraska* was issued on the first anniversary of *West Virginia v. EPA*,[34] which for the first time articulated the major questions doctrine as a distinct constitutional concept. Relying on this newly-minted doctrine, the Court in *West Virginia* concluded that the Obama Administration's Clean Power Plan was a "major question" because of its economic and political significance. The Court further held that the EPA overstepped its authority under Section 111(d) of the Clean Air Act (CAA) because that section did not provide explicit authority for EPA to require a shift from coal-fired electricity to sources that emit fewer greenhouse gases. Rather, the CAA only authorized technological pollution controls of the type traditionally imposed by EPA under the CAA.

In *Biden v. Nebraska*, the Court again invoked the major questions doctrine, this time rejecting the Biden Administration's plan to forgive $430 billion of federal student loans under the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act). While the case does not directly implicate environmental law, it helps define, and arguably expands, the contours of the major questions doctrine.

The Biden Administration asserted that, in light of the COVID pandemic, its debt forgiveness plan is authorized by a provision of the HEROES Act authorizing the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to"[35] student loan programs "as the Secretary deems necessary in connection with a war or other military operation or national emergency."[36] Chief Justice Roberts' majority opinion rejecting this claim starts as a run-of-the-mill statutory interpretation case. The majority relies on dictionary definitions of the key terms "modify" and "waive" to conclude that the complete cancellation of student debts cannot reasonably be characterized as either a modification or waiver.[37]The Court then took an extra step, invoking the major questions doctrine, to reject the Administration's claims about Congress's intent in enacting the

[33]143 S. Ct. 2355 (2023).
[34]597 U.S. 697 (2022).
[35]Waiver authority for response to military contingencies and national emergencies, 20 U.S.C. § 1098bb(a)(1).
[36]*Biden,* 143 S. Ct. at 2358.
[37]*Id*.

HEROES Act.[38] The Court's decision sheds some light on when the major questions doctrine can be invoked and how it is to be applied.

As formulated by the Court in *West Virginia*, the doctrine requires that, absent "clear congressional authorization," courts presume Congress does not delegate issues of major political or economic significance to executive agencies.[39] In permitting the Administration to "waive or modify" student loan requirements, the majority concludes that the HEROES Act did not provide clear authorization to cancel up to $20,000 in student debt for eligible borrowers, as opposed to modifying or waiving specific terms governing loan repayment.[40]

At the outset, following *West Virginia v. EPA*, the Court concludes that the student loan relief program's $430 billion price tag has "economic and political significance" that is "staggering by any measure," thus establishing the threshold requirement for applying the major questions doctrine.[41]

On the other hand, unlike in *West Virginia*, the Court does not claim that student loans are outside the expertise of the Department of Education. Hence, it appears that an agency acting outside its area of expertise may indicate that the agency acted beyond its authority under the major questions doctrine, but that such a showing is not necessary. Likewise, several other factors the Court pointed to in *West Virginia* are not discussed in *Biden*.[42]

Finally, the Court rejects the government's argument that the major questions doctrine should not apply, or should apply with less force, when federal benefits, as opposed to federal regulations, are involved. This distinction is invalid, according to the majority, because the power of the purse is one of the central powers of Congress, and it follows that Congress is no less likely to delegate the spending power than the power to regulate without a clear statutory statement authorizing the Executive Branch to exercise that power.[43]

Justice Barrett's concurring opinion[44] takes a relatively limited view of the nature of the major questions doctrine, in contrast to the view espoused by Justice Gorsuch in his *West Virginia* concurrence.[45] A comparison of these opinions suggests that there is no consensus among the Court's majority as to the fundamental nature of the major questions doctrine. Justice Barret's concurrence is aimed primarily at rebutting "the charge that the [major questions] doctrine is inconsistent with textualism."[46] According to Justice Barrett, the major questions doctrine is simply an ordinary canon of statutory interpretation, similar to the canon that words in a statute must be interpreted in context.[47] In her view, the doctrine recognizes that, in the constitutional context of legislation, Congress is unlikely to delegate power to the Executive Branch using ambiguous or obscure language.[48] In this way, "the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation."[49]

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[38]*Id.* at 2368.
[39]*Id.* at 2361, 2373, 2375.
[40]*Id.* at 2375.
[41]*Id.* at 2372-2373.
[42]*Biden,* 143 S. Ct. at 2377 (Barrett, J. concurring) (noting that "The major questions doctrine reinforces that conclusion but is not necessary to it.").
[43]*Id.* at 2374-2376.
[44]*Id*. at 2376.
[45]West Virginia et al., v. Env't Protection Agency, 597 U.S. 697, 735 (2022).
[46]*Biden*, 143 S. Ct. at 2376.
[47]*Id.*
[48]*Id*. at 2380.
[49]*Id*. at 2376.

In this respect, Justice Barrett's concurrence departs from Justice Gorsuch's concurrence in West Virginia, which characterizes the major questions doctrine as a strong rule of interpretation, like the rule requiring courts to interpret statutes to avoid constitutional issues even if the court must adopt a strained interpretation of the statute. Thus, "nothing but express words, or an insurmountable implication" from statutory language would suffice to provide the necessary statutory authorization for an administrative rule.[50] If the major questions doctrine is treated as such a strong rule of interpretation, it would require courts to reject statutory interpretations that create a delegation of Congressional authority to the Executive Branch if there is any question about the scope of the delegation, even if the statute could reasonably be read to create such a delegation. Justice Barrett's view, however, would not permit courts to employ the major questions doctrine to reject the most plausible interpretation of the statute. The future resolution of this unresolved question is likely to have a major impact on the development of the major questions doctrine.

In addition, courts will be required to resolve a variety of questions arising from *West Virginia* and *Biden.* These include, for example, how big an economic impact a particular rule must have to meet the threshold requirement that the question is "major." Similarly, because the list of factors relied on in *West Virginia* is not the same as the list of factors considered in *Biden,* it is unclear which of the factors cited in the two cases must be met before a statute can be struck down as a violation of the major questions doctrine or, alternatively, if the test is a flexible one, requiring only some subset of the various factors to be present to invoke the doctrine.

It is also becoming clear that, as the courts work out the details of the doctrine, it will become a staple of administrative law across a wide spectrum of cases. Two recent cases suggest how the doctrine may be applied in the context of environmental law. In *North Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, the Fourth Circuit invoked the major questions doctrine in rejecting claims that bycatch disposed of in the ocean by shrimp trawlers must be regulated as a "discharge of pollutants" under the Clean Water Act.[51] By contrast, the U.S. District Court for the District of Alaska in *Alaska Industrial Development & Export Authority v. Biden* concluded that the major questions doctrine did not apply to a challenge of the Administration's temporary moratorium on oil and gas leasing on the arctic coastal plain.[52]

The doctrine has also been raised in a variety of other contexts. For example, it has been cited to support the conclusion that federal regulation of "ghost guns" oversteps federal firearms statutes.[53] On the other hand, the doctrine was unsuccessfully raised in the context of: a preemption challenge to state regulation of the abortion drug mifepristone;[54] in a dispute about Medicare reimbursements;[55] a Securities and Exchange Commission rule on disclosure of board diversity of exchange members;[56] and the Department of Labor's new interpretation of the term "investment advice fiduciary."[57]

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[50] *West Virginia,* 597 U.S. at 736.
[51] 76 F.4th 291, 296, n.5 (4th Cir. 2023)
[52] No. 3:21-CV-00245-SLG (D. Alaska Aug. 7, 2023).
[53] VanDerStok v. Garland, 86 F.4th 179, 195 (5th Cir. 2023).
[54] *See* GenBioPro, Inc. v. Sorsaia, No. CV 3:23-0058 (S.D. W. Va. Aug. 24, 2023).
[55] *See* Medica Ins. Co. v. Becerra, No. 1:22-CV-1440-RCL (D.D.C. Sept. 28, 2023), *appeal filed*, No. 23-5276 (D.C. Cir. Nov. 27, 2023).
[56] *See* Alliance for Fair Bd. Recruitment v. Sec. & Exch. Comm'n, 85 F.4th 226, 256 (5th Cir. 2023).
[57] *See* Fed'n of Americans for Consumer Choice, Inc. v. U.S. Dep't of Lab., No. 3:22-CV-00243-K-BT (N.D. Tex. June 30, 2023).