

“REASONABLE DISTANCE”: THE MAJOR QUESTION OF THE BORDER PATROL’S 100-MILE BORDER REGION

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INTRODUCTION

In 2008, Vermont Senator Patrick Leahy was driving through New York on his way back to Vermont when he was confronted with a temporary immigration checkpoint on the highway.¹ This was odd, because he was at least 125 miles from any international border.² At the temporary immigration checkpoint, Border Patrol agents ordered Senator Leahy from his vehicle and asked him to prove that he was a U.S. citizen.³ Senator Leahy asked what authority the Border Patrol had to stop and seize him in this way, this far from the border. Reportedly, the agent then pointed to his firearm and said, “[t]hat’s all the authority I need.”⁴

In truth, a Border Patrol agent has more authority than just his weapon. The Immigration and Nationality Act, passed in 1952, authorizes immigration officers to perform warrantless searches within a “reasonable distance” of the border.⁵ A subsequent regulation promulgated in 1957 by the Justice Department, which housed the Border Patrol at the time, interpreted the phrase “reasonable distance” to be “100 air miles from any external boundary.”⁶ The Justice Department’s interpretation expanded the Border Patrol’s geographic jurisdiction, thus granting itself broad authority over a majority of the country’s population. Despite its enormous implications, the agency promulgated this provision with little discussion or proper administrative procedure.⁷

Since 1957, Border Patrol activities have steadily encroached into the interior of the country and now impact millions of people every year.⁸ In the early 1950s, there were about 1,100 border agents⁹—today, there are nearly 20,000.¹⁰ This dramatic expansion of the Border Patrol force, combined with the broad authority granted to agents by the regulation, has reshaped life in the border zone. In this region, legal residents and citizens have diminished privacy rights and are subject to extensive government monitoring, even

1. Melissa del Bosque, *Checkpoint Nation*, HARPER’S MAG., Oct. 2018, at 35, 40.

2. *Id.*

3. *Id.*

4. *Id.*

5. 8 U.S.C. § 1357(a)(3).

6. 8 C.F.R. § 287.1(a)(2) (2025).

7. WASH. LEGIS. OFF., ACLU, Customs and Border Protection’s (CBP’s) 100-Mile Rule 3 n.10 (2014).

8. Deborah Anthony, *The U.S. Border Patrol’s Constitutional Erosion in the 100-Mile Zone*, 124 PENN. ST. L. REV. 391, 431 (2020).

9. *Border Patrol History*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/border-security/along-us-borders/history> (last updated Sep. 25, 2025) [hereinafter *Border Patrol History*].

10. *Border Facts*, SBCC, <https://www.southernborder.org/border-facts#> (last visited Dec. 14, 2025).

though they live far from the actual border.¹¹ Two-thirds of the U.S. population lives within this zone, which covers most of the country’s ten largest cities and the entirety of several states.¹² Despite this extraordinary imposition, evidence suggests that interior operations of the Border Patrol fail to serve their intended purpose: only 2% of Customs and Border Protection’s total arrests of deportable non-citizens occurred at temporary checkpoints far from the border.¹³ At the same time, individuals in this region face constant circumscription of their constitutional rights.¹⁴

Actions taken by executive agencies—such as the border regulation promulgated by the Justice Department—rely on delegated authority from Congress. Congress frequently delegates authority and does so with explicit language, or in broader, more general terms.¹⁵ However, the Constitution requires clear congressional intent that does not offend the separation of powers for an agency to issue a *major* rule. The Major Questions Doctrine addresses this “particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”¹⁶ This doctrine states that if an agency attempts to use ambiguously supplied authority to make a rule on a subject of extreme “economic and political significance,” the rule is unlawful absent explicit congressional authorization.¹⁷

The Justice Department’s expansive interpretation of “reasonable distance” in the Immigration and Nationality Act is an example of such agency overreach. The Department’s 100-mile border zone implicates enormous social, economic, political, and constitutional issues and is a major question that Congress must speak to directly.

Part I of this Article outlines the history of the reasonable distance provision of the Immigration and Nationality Act and the subsequent regulation defining that distance as 100 miles. Then, it provides an overview

11. Anthony, *supra* note 8, at 401.

12. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 1.

13. Tanvi Misra, *Inside the Massive U.S. ‘Border Zone’*, BLOOMBERG (May 14, 2018), <https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone>.

14. *See generally* JAMES LYALL ET AL., AM. C.L. UNION, RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL’S INTERIOR ENFORCEMENT OPERATIONS 5 (2015) (detailing Border Patrol operations throughout the border region and revealing repeated violations of border residents’ civil and constitutional rights).

15. KATE R. BOWERS, CONG. RSCH. SERV., IF10277, THE MAJOR QUESTIONS DOCTRINE (2022).

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

17. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000); *see U.S. Telecom Ass’n v. Fed. Commc’ns Comm’n*, 855 F.3d 381, 419 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (outlining the “overlapping and reinforcing presumptions” against agency authority to issue “a major rule” with ambiguous delegation).

of the Supreme Court’s Major Questions Doctrine and how it serves to preserve constitutional separation of powers by requiring clear congressional authorization for issues of extraordinary significance. Part II utilizes the Court’s Major Questions framework to analyze the law and regulation underlying the 100-mile border zone. The analysis shows how this definition goes beyond an appropriate delegation and instead must be determined by Congress. This Article concludes by arguing that, if presented, the Supreme Court should vacate the regulation defining “reasonable distance” from the Immigration and Nationality Act as “100 air miles” because it exceeds the proper constitutional authority of an agency.

I. BACKGROUND

A. The Immigration and Nationality Act of 1952

The Immigration and Nationality Act of 1952 (INA)¹⁸ consolidated several existing laws related to immigration. Congress has amended the INA many times, but it remains a landmark piece of legislation and contains many important provisions governing immigration law.¹⁹

One provision of the INA authorizes immigration officers to perform warrantless searches within a “reasonable distance” of the border.²⁰ Five years later, in 1957, the Justice Department promulgated a regulation interpreting the phrase “reasonable distance” to mean “100 air miles” from any external boundary.²¹ In doing so, the Justice Department created a border region that rings the country. This ring extends 100 miles into the interior, where the Border Patrol has broad authority and operates with little oversight.

Over the first half of the twentieth century, the Border Patrol developed into the primary agency tasked with securing the borders.²² The Border Patrol began as a loose collection of mounted watchmen patrolling borderlands on horseback and officers assigned to inspection stations.²³ Prohibition and increased immigration related to global wars brought renewed attention to border enforcement, and the Border Patrol grew to fulfill an expanded

18. 8 U.S.C. §§ 1101–1503.

19. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> (last updated July 10, 2019).

20. 8 U.S.C. § 1357(a)(3).

21. 8 C.F.R. § 287.1(a)(2) (2025).

22. See *Border Patrol History*, *supra* note 9 (describing the Border Patrol’s rapid expansion following its establishment in 1924 and focusing particularly on the increasing enrollment of Border Patrol agents during the WWII years).

23. *Id.*

mission.²⁴ During this same period, national policies created a patchwork of laws, executive orders, and proclamations related to immigration and illicit goods.²⁵

The INA revised and recodified that patchwork of laws, creating a comprehensive U.S. immigration policy.²⁶ Congress enacted the bill over President Truman’s veto.²⁷ The President acknowledged that a revision to the nation’s immigration laws was “long overdue,” but he had fundamental concerns with various provisions of the bill.²⁸ In particular, he noted that “changes made by the bill . . . would result in empowering minor immigration . . . officials to act as prosecutor, judge, and jury.”²⁹ He cautioned against granting of such authority, finding it to pose a “serious risk of unreasonable invasions of privacy.”³⁰

A significant provision of the INA granted “any officer or employee” of the Border Patrol power to perform warrantless searches and seizures “within a reasonable distance of any external boundary of the United States.”³¹ During deliberations of what would become this provision of the INA, Senator Revercomb of West Virginia expressed concern over granting a “blanket right of search without warrant” to any law enforcement official.³² However, his concerns were overcome by claims of the necessity for unbridled authority in order to effectively enforce immigration laws.³³

In 1957, the Justice Department promulgated a regulation interpreting the “reasonable distance” language from Section 1357.³⁴ The agency defined the term to be “100 air miles from any external boundary.”³⁵ There is no record of how the Justice Department came to this determination.³⁶ Some have speculated that the 100-mile distance was the standard distance that the Justice Department “considered to be reasonable regarding the availability of witnesses for examination, responses to subpoenas, and numerous other

24. *Id.*

25. JOYCE C. VIALET, CONG. RSCH. SERV., 91–141 EPW, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 1 (1991).

26. *Id.* at 14.

27. *Id.*

28. Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 1 PUB. PAPERS 441, 441 (June 25, 1952).

29. *Id.* at 444.

30. *Id.*

31. 8 U.S.C. § 1357(a)(3).

32. 79 CONG. REC. 10334 (1946) (quoting Sen. Chapman Revercomb of West Virginia).

33. *Id.* (quoting Sen. Richard Russell of Georgia).

34. 8 U.S.C. § 1357(a)(3).

35. 8 C.F.R. § 287.1(a)(2) (2025).

36. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 3.

discovery issues under other federal laws.”³⁷ However, if true, that standard distance was not tailored to the context of immigration.

With this new and expanded authorization, the Border Patrol began conducting enforcement activities deeper into the interior of the country. These activities take the form of “extended border searches,” fixed immigration checkpoints, and roving patrols.³⁸

The Supreme Court authorized much of what the Border Patrol does in the border zone. Consistently, the Court has held that the governmental interest in deterring the “illegal entry of aliens”³⁹ and securing the border outweighs the “modest” intrusion⁴⁰ that a “brief questioning” imposes.⁴¹ The Court thus determined that such questioning in the context of border enforcement is “consistent with the Fourth Amendment.”⁴² The Court identified that a “brief detention[s] of travelers,” made for the “sole purpose of conducting a routine and limited inquiry into residence status,” presents a “minimal” intrusion.⁴³ With this perspective, the Court has sanctioned diminished Fourth Amendment protections based on the exigencies of the border context.⁴⁴

B. The Major Questions Doctrine

The Supreme Court’s Major Questions Doctrine is a clear statement rule that requires Congress to speak directly—or unambiguously articulate its intent—on matters of significant economic, political, and social importance.⁴⁵ Delegation of lawmaking authority to executive agencies is a fundamental aspect of administrative function. However, the Constitution establishes separate powers among branches and creates a system of checks and balances to prevent any one branch from overreach.⁴⁶ The durability and

37. *Id.* at 3 n.10.

38. HILLEL R. SMITH, CONG. RSCH. SERV., LSB10559, U.S. CUSTOMS AND BORDER PROTECTION’S POWERS AND LIMITATIONS: A PRIMER 4 (2021).

39. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543, 549 (1976).

40. *See Brignoni-Ponce*, 422 U.S. at 878–79.

41. *See Martinez-Fuerte*, 428 U.S. at 566 (holding that a vehicle stop at a fixed checkpoint for brief questioning of its occupants, even though there is no reason to believe the particular vehicle contains illegal aliens, is consistent with the Fourth Amendment).

42. *Id.*

43. *Id.* at 558–60.

44. Hannah Robbins, *Holding the Line: Customs and Border Protection’s Expansion of the Border Search Exception and the Ensuing Destruction of Interior Fourth Amendment Rights*, 36 CARDOZO L. REV. 2247, 2249 (2015).

45. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1009–12 (2023).

46. U.S. CONST. art. I, § 1; *id.* art. II, § 2, cl. 2; *id.* art. III, § 1.

resilience of our system of government rests squarely on this balanced separation of authority. Courts serve a vital function in maintaining the separation of powers by exercising judicial review to preserve that balance.⁴⁷

The Court first applied the Major Questions Doctrine with force in *Food & Drug Administration v. Brown & Williamson Tobacco Corporation*.⁴⁸ In that case, the Food and Drug Administration (FDA) attempted to regulate tobacco products with the agency’s existing statutory authority under the Food, Drug, and Cosmetics Act.⁴⁹ In seeking to regulate tobacco in this way, the FDA would have regulated a substance that did not fit easily into the statutory definition of “drug or device.”⁵⁰ Moreover, the FDA’s actions pushed the agency outside of its traditional purview and into an area where Congress had already passed comprehensive legislation.⁵¹ Reviewing this, the Supreme Court held that the agency exceeded its appropriate regulatory authority.⁵² The Court found it “extremely unlikely” that Congress intended to authorize the agency to regulate tobacco given the “economic and political significance” of the issue.⁵³

Building on this logic, the Court focused on the significant implications of the EPA’s attempt to regulate vehicle emissions in *Utility Air Regulatory Group v. EPA*, holding that the agency went beyond its delegated authority.⁵⁴ Under the Clean Air Act, Congress granted the EPA authority to regulate emissions from stationary sources through setting attainment standards and issuing permits.⁵⁵ The agency attempted to use this authority to regulate greenhouse gas emissions from motor vehicles by designating vehicles as “stationary sources.”⁵⁶ The Court concluded that the agency’s interpretation was “unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority.”⁵⁷ Additionally, the EPA could have significant influence on the national economy without “clear congressional authorization.”⁵⁸

Beginning in 2021, the Court further crystallized the Major Questions Doctrine and identified factors that it looks to when finding an agency action exceeds a reasonable delegation. In *Alabama Association of Realtors v.*

47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

48. 529 U.S. 120, 159 (2000).

49. *Id.* at 125.

50. *Id.* at 142.

51. *Id.*

52. *Id.* at 143.

53. *Id.* at 147.

54. 573 U.S. 302, 310, 325 (2014).

55. *Id.* at 308–10.

56. *Id.* at 310.

57. *Id.* at 324.

58. *Id.*

Department of Health & Human Services, the Court reviewed a nationwide moratorium on evictions imposed by the Centers for Disease Control (CDC) as part of its response to the COVID-19 pandemic.⁵⁹ The Court determined that the CDC’s interpretation of “necessary” from its enabling statute, which it relied on for the moratorium, provided no limiting principle and would give the agency “a breathtaking amount of authority.”⁶⁰ The Court also noted that preventing landlords from evicting tenants implicated values of federalism and intruded on States’ traditional authority as the primary regulator of the landlord-tenant relationship.⁶¹ In striking down the eviction moratorium, the Court explained that its “precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power.”⁶²

Similarly, in 2022, the Court struck down a rule enacted by the Occupational Safety and Health Administration (OSHA) that mandated vaccines for “much of the nation’s workforce” as part of the Government’s response to the COVID-19 pandemic.⁶³ The Court declared that OSHA’s rule was “no ‘everyday exercise of federal power,’ but rather a significant encroachment into the lives . . . of a vast number of employees.”⁶⁴ An action with such significant implications, the Court reiterated, requires “Congress to speak clearly.”⁶⁵

During the same term, the Court reviewed EPA’s nationwide effort to regulate coal-fired power plants in *West Virginia v. EPA*.⁶⁶ In striking down EPA’s rule, the Court articulated the Major Questions Doctrine in its clearest terms. The Court again explained that in “‘extraordinary cases’ . . . the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”⁶⁷ The Court cited both separation of powers principles and “a practical

59. 141 S. Ct. 2485, 2486 (2021).

60. *Id.* at 2489.

61. *Id.*

62. *Id.* (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass’n, 140 S. Ct. 1837, 1849–50 (2020)).

63. Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab. & OSHA Admin, 142 S. Ct. 661, 662 (2022).

64. *Id.* at 665 (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).

65. *Id.* (quoting Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

66. 142 S. Ct. 2587, 2599–2600 (2022).

67. *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160 (2000)).

understanding of legislative intent” for its reluctance to read an expansive delegation into ambiguous statutory text.⁶⁸

Through this line of cases, the Court exercised a targeted application of nondelegation, requiring explicit congressional authorization for “transformative” expansions in agency authority.⁶⁹ When an agency attempts to exercise “expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough.”⁷⁰

II. THE MAJOR SOCIAL, ECONOMIC, AND POLITICAL SIGNIFICANCE OF THE 100-MILE BORDER REGION

The Border Patrol’s interpretation of “reasonable distance” has vast economic, social, political, and constitutional implications. Defining the border region as “100 air miles” results in many of the country’s largest cities, and even entire states, falling within the Border Patrol’s jurisdiction.⁷¹ This means nearly two-thirds of Americans live within an area where constitutional exceptions exist because of the governmental interest in securing the border.⁷² The vastness of this region, in turn, requires extraordinary levels of funding and resource allocation. The Border Patrol’s long history of abusing its power and colluding with other law enforcement agencies to circumvent constitutional protections ultimately displays the dangers of allowing an overly broad definition of “reasonable distance.”⁷³ It is highly unlikely that Congress would authorize an agency to decide something of such economic, social, and political importance. The definition of the “reasonable distance” within which the Border Patrol can exercise its

68. *West Virginia*, 142 S. Ct. at 2609 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

69. Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 483 (2021).

70. *U.S. Telecom Ass’n v. Fed. Commc’ns Comm’n*, 855 F.3d 381, 421 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting).

71. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 1.

72. *Id.*

73. See *100 Year Anniversary of Border Patrol Violence and Impunity: Fighting for Our Dignity*, SBCC, https://www.southernborder.org/100_years_of_fighting_for_our_dignity (last visited Dec. 14, 2025); see also *Abuse of Power and Its Consequences*, SBCC, https://www.southernborder.org/border_lens_abuse_of_power_and_its_consequences (last visited Dec. 14, 2025); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (involving a Border Patrol agent’s unconstitutional, warrantless search of vehicle); *Bond v. United States*, 529 U.S. 334, 335 (2000) (involving a Border Patrol agent’s illegal search of bus passenger’s belongings); *Hernandez v. Mesa*, 140 S. Ct. 735, 740 (2020) (involving a Border Patrol agent’s cross-border shooting and killing of a 15-year-old Mexican national); *Vermont v. Walker-Brazie*, 2021 Vt. 75, ¶ 43, 215 Vt. 492, 512, 280A.3d 24, 37 (2020) (involving a Border Patrol agents’ obtaining evidence in violation of Vermont Constitution).

broad authority is a major question that the agency cannot appropriately define itself. Rather, Congress must clearly and specifically define it.

A. Social Significance

The social significance of a border region that encompasses many of the country's largest cities, and hundreds of millions of Americans, is hard to overstate. Exceptions to constitutional rights that pertain to border enforcement authorities heighten this significance. This geographic coverage and breadth of authority create conditions for arbitrary and abusive application of governmental power. The distance within which the Border Patrol can exercise its expansive authority under its "100 air mile" definition is an extraordinary encroachment into the lives—and rights—of a vast number of Americans.

The 100-mile border region encompasses the entire eastern seaboard (including Washington, D.C., New York City, Philadelphia, and Boston); most of California (including San Diego, Los Angeles, San Francisco, and Sacramento); almost the entirety of the states surrounding the Great Lakes; and the entirety of several states (Florida, Hawaii, Michigan, Maine, New Hampshire, Rhode Island, Vermont).⁷⁴ Thus, hundreds of millions of Americans are potentially subject to "investigatory detention and warrantless search" by Border Patrol agents.⁷⁵

Residents of some parts of the border region refer to it as a "band of isolation"—a "no man's land"—where "local residents perpetually live with diminished rights and constant government intrusion and suspicion in their lives."⁷⁶ In Vermont, Border Patrol agents operating far from the northern border and enforcing drug laws rather than immigration laws caused Vermont residents to complain "that driving in their state feels like 'being in Eastern Europe under communism.'"⁷⁷ The Border Patrol asserts that interior checkpoints are necessary to "effectively secure the border against 'illegal aliens' and 'illegal narcotics.'"⁷⁸ However, these checkpoints result in the arrest of U.S. citizens at a "significantly higher" rate than non-citizens.⁷⁹ The

74. Anthony, *supra* note 8, at 399.

75. WASH. LEGIS. OFF., ACLU, *supra* note 7, at 1.

76. Anthony, *supra* note 8, at 401; see David Branham, Sr., *The Influence of Seclusion: Immigration and Border Security Attitudes of Registered Voters Living Behind the Interior Border Patrol Checkpoints in the State of Texas*, 16 MIDSOUTH POL. SCI. REV. 1, 1 (2015) (detailing the daily impacts of living within the 100-mile border region and the constant state of suspicion and surveillance experienced by those attempting to lead normal lives in the region).

77. Robbins, *supra* note 44, at 2267.

78. Anthony, *supra* note 8, at 401.

79. Anthony, *supra* note 8, at 402.

Tenth Circuit determined that a search that occurred over 200 miles from the border was too far removed and exceeded the agency’s authority.⁸⁰ The Court noted that the “further one gets from the border . . . the greater the likelihood the volume of legitimate travelers will increase.”⁸¹

Racial profiling and constitutional violations in the form of unreasonable searches and detentions are rampant within the 100-mile border region.⁸² Nearly 75% of the U.S. Hispanic population live within this region and face increased suspicion simply because of their race.⁸³ Countless citizens that have been the subject of interior enforcement activities complain of agents’ “violent, reckless, and threatening conduct.”⁸⁴ Reports reveal Border Patrol agents “assaulting non-threatening motorists; driving aggressively and tailgating at high speeds; wielding weapons . . . in routine traffic encounters; threatening to shoot motorists or their pets; and mocking and insulting motorists with profane and derogatory language.”⁸⁵

The authority to perform warrantless searches is extremely significant and should not be granted without careful deliberation and imposition of clearly defined limits. The framers of the Constitution were concerned with granting broad authority to state agents.⁸⁶ In 1761, James Otis gave a speech that highlighted the need to prioritize protection of an individual’s right to be free from arbitrary governmental intrusion.⁸⁷ His speech decried how “writs of assistance” were an affront to civil liberties.⁸⁸ These “general” writs granted broad authority to officers of the British Crown to search homes and vessels, in contrast to “special writs” directing specific officers and specifying specific locations to be searched.⁸⁹ Otis claimed that “[e]veryone with this [general] writ may be a tyrant,” able to “search special places” without restriction.⁹⁰

The Supreme Court echoed this perspective during the Prohibition Era, when alcohol prohibition injected a new rationale for extensive border enforcement. In *Carroll v. United States*, the Court stated that it would be “intolerable and unreasonable” if a border enforcement agent “were

80. *United States v. Venzor-Castillo*, 991 F.2d 634, 640 (10th Cir. 1993).

81. *Id.* at 639.

82. Anthony, *supra* note 8, at 402.

83. Anthony, *supra* note 8, at 399.

84. LYALL ET AL., *supra* note 14, at 6.

85. *Id.* (citations omitted).

86. Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 991–92 (2011).

87. James Otis, Speech Against Writs of Assistance (February 24, 1761) (transcript available at <https://teachingamericanhistory.org/document/speech-against-writs-of-assistance/>).

88. *Id.*

89. *Id.*

90. *Id.*

authorized to stop every automobile on the chance of finding liquor.”⁹¹ Such authority would “subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”⁹² However, the Border Patrol today views itself as a “paramilitary border security force,” operating outside “constitutional constraints” and rejecting outside scrutiny or oversight.⁹³

By stretching the conception of the border region and its authority within it, the Border Patrol’s interior operations create the conditions for arbitrary and abusive application of governmental authority over an enormous area. The agency’s interior efforts are attenuated from the physical border yet impact the daily lives of millions of Americans. The Border Patrol’s legal authority to operate throughout this area rests solely on its own, unchallenged regulation, which interpreted the vague delegation in the INA. The 100-mile border region represents a “significant encroachment into the lives” of a vast number of citizens.⁹⁴ There is nothing reasonable about it. Such an “extraordinary” imposition provides significant “reason to hesitate before concluding that Congress” intended such a delegation.⁹⁵

B. Economic Significance

The vast area encompassed by the 100-mile border region, in turn, requires the use of a vast force of law enforcement personnel and equipment. Customs and Border Protection (CBP), the agency that now houses the Border Patrol, is the federal government’s largest law-enforcement agency.⁹⁶ From 2003 to 2022, the number of Border Patrol agents almost doubled, growing from a little over 10,000 to nearly 20,000 agents.⁹⁷ The allocation of federal funds associated with such an extensive Border Patrol force is immense. From 2003 to 2024, the federal government allocated an estimated \$409 billion to agencies that carry out immigration enforcement.⁹⁸

91. *Carroll v. United States*, 267 U.S. 132, 153–54 (1925).

92. *Id.*

93. LYALL ET AL., *supra* note 14, at 18. See e.g., Byron Tau & Garance Burke, *Border Patrol Is Monitoring US Drivers and Detaining Those with ‘Suspicious’ Patterns*, AP (Nov. 20, 2025), <https://abcnews.go.com/Technology/wireStory/border-patrol-monitoring-us-drivers-detaining-suspicious-travel-127699704> (uncovering Border Patrol’s latest abuse of its extensive self-defined authority and revealing the agency’s conception that “it is legally allowed ‘to operate anywhere in the United States’”).

94. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab. & OSHA Admin.*, 142 S. Ct. 661, 665 (2022).

95. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

96. *Stats and Summaries*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats#> (last updated Sept. 17, 2025).

97. AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2 (2024).

98. *Id.*

What has this massive spending bought? The U.S. has hundreds of miles of fencing along the Southern border, “record levels of staff for ICE and CBP, as well as a fleet of drones—among other resources.”⁹⁹ The border region “has become a war zone.”¹⁰⁰ Now, it is “a transfer station for sophisticated American military technology and weapons,” where defense contractors look to border areas and border enforcement agencies “to make money.”¹⁰¹ It is “entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by.”¹⁰² On a clear day, you can sometimes hear Predator drones buzzing overhead.¹⁰³ These drones are equipped with the same kind of “man-hunting” radar technology used in Afghanistan.¹⁰⁴ By virtue of its activities throughout the 100-mile border region, the Border Patrol is commonly referred to as “part police force, part occupying army, part frontier cavalry.”¹⁰⁵

The 100-mile border region both necessitates and enables this massive outlay of funding. The economic significance of ongoing and ever-expanding spending reveals a disconnect between Congressional intent when it delegated “reasonable distance” authority to the Border Patrol and the reality today. The budget for today’s Border Patrol is “staggering by any measure.”¹⁰⁶ Under the Supreme Court’s Major Questions Doctrine, when Congress authorizes “an agency to exercise powers of ‘vast ‘economic and political significance,’” it must speak clearly.¹⁰⁷ The Justice Department seized upon the vague delegation of “reasonable distance” in the INA to create this massive border region. This “100 air mile”¹⁰⁸ interpretation of “reasonable distance from any external boundary”¹⁰⁹ has enormous economic significance and must be determined by Congress.

C. Political Significance

The 100-mile border region created by the agency’s regulation also results in federal authority encroaching on the power of states to protect their

99. *Id.*

100. Todd Miller, *War on the Border*, N.Y. TIMES (Aug. 17, 2013), <https://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html>.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Anthony, *supra* note 8, at 401.

106. Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

107. Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

108. 8 C.F.R. § 287.1(a)(2) (2025).

109. 8 U.S.C. § 1357(a)(3).

citizens and enforce their laws. While border enforcement is the purview of the federal government, there is significant potential for improper overreach of federal authority on state sovereignty when entire states are subsumed into an arbitrarily defined jurisdictional zone.¹¹⁰

As CBP interior checkpoints become further removed from the border boundary, there is increased risk that these checkpoints could evolve from an immigration focus into “general crime control and drug interdiction.”¹¹¹ For example, in Woodstock, New Hampshire—6 miles from the Canadian border, Border Patrol agents erected a temporary checkpoint that did just that.¹¹² At this checkpoint, federal Border Patrol agents and State law enforcement “worked in concert” to “circumvent the independent protections provided by the New Hampshire Constitution against dog-sniff searches in the absence of a warrant or reasonable suspicion.”¹¹³ A federal district court in Maine expressed concern with interior operations in effect “pushing the border in,” along with the agency’s extensive border enforcement powers.¹¹⁴ In New York State, the N.Y. Civil Liberties Union documented “a disturbing picture” of the Border Patrol “resorting to aggressive policing tactics in order to increase arrest rates, without regard for the costs and consequences of its practices on New Yorkers’ rights and freedoms.”¹¹⁵ In Arizona, “systemic oversight failures” of Border Patrol activities result in near impunity for agents’ “racial profiling,” conducting “unwarranted stops and searches,” employing “false canine alerts,” and inflicting other abuses far into the interior of the state.¹¹⁶ Additionally, in his dissent to the 1993 Ninth Circuit case of *United States v. Soyland*, Judge Kozinski noted that the evidence in the case suggested that “the Constitution is being routinely violated” at interior checkpoints used for “general law enforcement” activities such as searching for contraband.¹¹⁷

110. *United States v. Gabriel*, 405 F. Supp. 2d 50, 57 n.10 (D. Me. 2005) (“For some states, the 100-mile limitation has an unusually broad reach. . . . Under 8 C.F.R. § 287.1(a)(2), the entire state of Maine might be subject to Border Patrol checkpoints. What would not be covered by the limitation of 100 miles from the border would likely be included within 100 miles of the territorial sea. The same may be true of other states, like Florida.”).

111. KATHERINE HAWKINS, THE BORDER ZONE NEXT DOOR, AND ITS OUT-OF-CONTROL POLICE FORCE 17 (Julia Delacroix et al. eds., 2023).

112. *State v. McCarthy et al. (Woodstock Border Patrol Checkpoint Cases)*, ACLU N.H., <https://www.aclu-nh.org/en/cases/state-v-mccarthy-et-al-woodstock-border-patrol-checkpoint-cases> (last updated Dec. 12, 2017).

113. *Id.*

114. *Gabriel*, 405 F. Supp. 2d at 59.

115. N.Y.C.L. UNION, JUSTICE DERAILED: WHAT RAIDS ON NEW YORK’S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL’S INTERIOR ENFORCEMENT PRACTICES 1 (2011).

116. LYALL ET AL., *supra* note 14, at 7, 13.

117. 3 F.3d 1312, 1319–20 (9th Cir. 1993) (Kozinski, J., dissenting).

The Major Questions Doctrine applies in situations where an agency seeks to “intrud[e] into an area that is the particular domain of state law.”¹¹⁸ The 100-mile border region creates a dramatic imposition of federal jurisdiction on state sovereignty. This overlap cultivates the potential for constitutional abuses and improper law enforcement collusion between state and federal authorities. Additionally, the Major Questions Doctrine requires clear congressional intent where federal and state powers conflict, thus preserving the “proper balance between the States and the Federal Government.”¹¹⁹ When an agency “claims the power to regulate vast swaths of American life, it not only risks intruding on Congress’s power, it also risks intruding on powers reserved to the States.”¹²⁰ Here, the 100-mile “reasonable distance” regulation claims power over a massive land area that, in turn, places millions of state citizens under the potential for warrantless search and seizure within the place they call home.¹²¹

The reasonable distance of the border region is a Major Question that Congress must speak to directly. A vast number of Americans fall within the Border Patrol’s defined jurisdiction. Those Americans are then subject to extensive surveillance and aggressive enforcement, reminiscent of a warzone in some places. This extraordinary imposition from the vague words of “reasonable distance” surely must cause one to “raise an eyebrow.”¹²² The hundreds of billions of dollars in federal funding claimed necessary to secure this massive border region is major by any understanding.

III. THE 100-MILE “REASONABLE DISTANCE” REGULATION SHOULD BE VACATED UNDER THE MAJOR QUESTIONS DOCTRINE

Since the promulgation of the reasonable distance regulation, the Border Patrol’s enforcement activities have steadily moved further into the interior of the country.¹²³ What began as a vague delegation from Congress is now the core jurisdictional rule for the country’s largest federal law enforcement agency. The impact of the Border Patrol’s interior operations is felt “not only by those individuals arrested but by all citizens and non-citizens who live in the areas where these operations take place.”¹²⁴

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

119. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991)).

120. *Id.*

121. *100 Mile Border Zone*, ACLU, <https://www.aclu.org/know-your-rights/border-zone> (last updated Sep. 5, 2025).

122. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

123. Anthony, *supra* note 8, at 431.

124. N.Y.C.L. UNION, *supra* note 115, at 27.

Despite the increasing militarization of the border region, the 100-mile regulation “has remained static.”¹²⁵ Simultaneously, case law and U.S. border policies have failed to provide workable limits, or oversight, to the use and abuse of the Border Patrol’s authority.¹²⁶ However, the Constitution places limits on what executive agencies can properly address. Agencies cannot create “regulations as substitutes for laws passed by the people’s representatives.”¹²⁷ It is a fundamental principle of our democracy that “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society.”¹²⁸ When an agency interprets a vague delegation and the result is a rule that impacts the vast majority of citizens, there is a problem.

The Border Patrol describes its interior checkpoints as “effective and valuable” tools for securing the border.¹²⁹ However, data obtained through investigations by the American Civil Liberties Union “suggests the claimed benefits of those activities have been exaggerated.”¹³⁰ Further, even with the breadth of their self-defined authority, the Border Patrol consistently ignores it, conducting activities beyond the 100-mile limit and refusing “to acknowledge the regulation as a limitation on its operations.”¹³¹ While border enforcement is necessary and important, there are immense dangers to the rights of Americans when the exigencies of the border creep further and further into the interior. The reasonable distance regulation creates this exact reality.

The Court’s decisions rely on the governmental interest in securing the international border and “preventing the entry of unwanted persons and effects.”¹³² The Court asserts that warrantless searches and seizures “are reasonable simply by virtue of the fact that they occur at the border.”¹³³ However, the Court’s presumption concerning the limited nature of exceptions to the Fourth Amendment in the border region contrasts sharply with the documented conduct of the Border Patrol in the 100-mile border region.¹³⁴ Mere acceptance of this presumption fails to take account of the

125. Yessenia Renee Medrano-Vossler, *Sniff and Search Border Militarization*, 14 SEATTLE J. SOC. JUST. 915, 926 (2016).

126. *Id.*

127. West Virginia v. EPA, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring).

128. *Id.* (quoting Fletcher v. Peck, 6 U.S. (1 Cranch) 87, 136 (1810)).

129. *Border Patrol Checkpoints Demonstrate Effectiveness and Valuable Tool*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/local-media-release/border-patrol-checkpoints-demonstrate-effectiveness-and-valuable-tool> (Feb. 3, 2021).

130. LYALL ET AL., *supra* note 14, at 14.

131. Anthony, *supra* note 8, at 423.

132. United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

133. *Id.* at 152–53 (quoting United States v. Ramsey, 431 U.S. 606, 616 (1977)).

134. Anthony, *supra* note 8, at 423; *see, e.g.*, LYALL ET AL., *supra* note 14.

disconnect between the goals of immigration enforcement and how the Border Patrol actually uses its authority in the border region.

If presented, the Supreme Court should vacate the regulation interpreting the INA’s “reasonable distance”¹³⁵ language as “100 air miles.”¹³⁶ The definition of this distance has implications far too great for Congress to allow the agency tasked with enforcement to define it for itself. We must reconceive what a “reasonable distance” is for border enforcement. For if we do not, we must acknowledge that we already “live in a country where armed officers approach Americans engaged in no wrongdoing and ask them to produce papers to prove that they are indeed Americans.”¹³⁷ An “extraordinary grant of regulatory authority”—such as defining the “reasonable distance” for warrantless border enforcement as 100 air miles from any external boundary—cannot be valid through “modest words,” “vague terms,” or “subtle device[s].”¹³⁸ The constitutional requirements asserted by the Major Questions Doctrine protects fundamental democratic principles. The “100 air mile” regulation is an extraordinary imposition on Americans’ liberties and American values and must be invalidated.

135. 8 U.S.C. § 1357(a)(3).

136. 8 C.F.R. § 287.1(a)(2) (2025).

137. N.Y.C.L. UNION, *supra* note 115, at 21.

138. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)).