No. 23-15179

In the United States Court of Appeals for the Ninth Circuit

STATE OF NEBRASKA, et al.,

Plaintiffs-Appellants,

v.

MARTIN WALSH, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. To further those goals, CAC has studied the development and scope of the major questions doctrine along with its implications for the separation of powers. CAC accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent years, the Supreme Court has concluded in several important cases that agencies were claiming enormous new regulatory authority despite indications that Congress had not meant to grant that power. Taking stock of this case law, *West Virginia v. EPA* explicitly formulated a "major questions doctrine," explaining that "precedent teaches that there are 'extraordinary cases' that call for a different approach" from "routine statutory interpretation." 142 S. Ct. 2587, 2608-09 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). In these extraordinary cases, courts do not analyze a law's text as usual but instead require "clear congressional authorization" for agency action. *Id.* at 2609 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

[1] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Importantly, however, the "economic and political significance" of an agency's action cannot alone make a case "extraordinary" and trigger the doctrine. *Id.* at 2608 (quotation marks omitted). Instead, the agency claiming such power must be attempting to transform and expand its statutory authority "beyond what Congress could reasonably be understood to have granted." *Id.* at 2608-09 (brackets omitted). To determine if that is happening, the Supreme Court focuses primarily on whether agencies are asserting "unheralded" power by twisting the "vague language" of "ancillary" provisions to "make a radical or fundamental change to a statutory scheme." *Id.* at 2609-10 (quotation marks omitted). The agency's action must be more than "unprecedented," it must represent a "fundamental revision of the statute, changing it from one sort of scheme of . . . regulation into an entirely different kind." *Id.* at 2612 (brackets and quotation marks omitted); *accord Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

Here, however, the President has not exploited an "obscure, never-used section of the law" to assert a new type of power. *West Virginia*, 142 S. Ct. at 2602 (quotation marks omitted). Instead, he used the same broad grant of authority that "presidents of both parties" have long used "to issue orders pertaining to the compensation of contractors' employees." ER-12. That choice does not come close to triggering the major questions doctrine—even setting aside whether the

doctrine applies to presidential action or to exercises of proprietary authority. *See Mayes v. Biden*, 67 F.4th 921, 934 (9th Cir. 2023).

Applying the major questions doctrine to cases like this would not only conflict with Supreme Court precedent—it would undermine critical limits on the role of the judiciary. Unlike "the ordinary tools of statutory interpretation," *Nebraska*, 143 S. Ct. at 2375, the doctrine emphasizes factors outside of a statute's text and structure, including economic ramifications, political controversy, agency practice, and the subjective expectations of legislators. The doctrine risks subordinating a statute's best reading to these non-textual considerations, while requiring judges to make pragmatic assessments about politics and economics beyond their professional expertise. If applied too widely, the doctrine would constrain the elected branches' ability to assign broad and flexible authority to agencies by demanding heightened clarity from such legislation based on judge-made standards (and retroactively applying those standards to legislation that predated them).

Precisely because the major questions doctrine is "distinct" from "routine statutory interpretation," *West Virginia*, 142 S. Ct. at 2609, and indeed, runs counter to basic precepts of textualism, it should be confined to "extraordinary cases," *id.*, as the Supreme Court has instructed.

The major questions doctrine should also be applied sparingly because it is in tension with the original understanding of the Constitution. The doctrine presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* But Congress has tasked the executive branch with resolving major policy decisions since the Founding, and history does not suggest that Congress must speak in any particular fashion to do so.

These tensions between the major questions doctrine and textualism, original meaning, and the separation of powers provide further reason to reserve the doctrine for the most extraordinary cases. When agencies assert startling new powers that appear at odds with the relevant statutory scheme and the agency's history implementing it, then "a practical understanding of legislative intent" calls for hesitation. *Id.* at 2608-09. But when radical and dubious innovation of that sort is absent, as here, artificially limiting a statute's broad grant of authority to the executive branch would undermine, rather than vindicate, Congress's legislative prerogatives.

ARGUMENT

I. The Major Questions Doctrine Applies Only in "Extraordinary" Cases, Where an Agency Claims Breathtaking New Power that Congress Likely Did Not Intend to Give It.

What is now called the "major questions doctrine" emerged gradually in recent years, beginning as an aid to traditional statutory interpretation before

transforming into a requirement of "clear congressional authorization" in "certain extraordinary cases." *West Virginia*, 142 S. Ct. at 2609 (quotation marks omitted). Throughout this evolution, one thing has remained constant: economic and political significance alone has never been enough to trigger the doctrine. Instead, the focus is on legislative intent: The issue is not whether agencies are asserting "highly consequential power" but rather "highly consequential power *beyond what Congress could reasonably be understood to have granted*." *Id.* (emphasis added). Only when an agency seeks "a radical or fundamental change to a statutory scheme" by claiming "an unheralded power representing a transformative expansion in [its] regulatory authority," *id.* at 2609-10 (quotation marks omitted), does the major questions doctrine come into play.

The Supreme Court initially invoked the presumption that Congress speaks clearly when assigning authority over major questions only to bolster conclusions reached through ordinary statutory interpretation. The opinion with the first glimmers of the major questions doctrine rested its statutory construction on "language and structure" and "legislative history." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 641 (1980) (plurality opinion). But as further support, the opinion also said it would be unreasonable to read the statute as granting the "unprecedented power over American industry" claimed by the agency without a "clear mandate." *Id.* at 645.

After *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court also began using major questions analysis to buttress determinations that a statute's plain meaning precluded deference to agency interpretations. Instead of attempting to measure economic and political significance, however, the Court asked whether an agency was overhauling the basic nature of its authority. For example, in *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), the Court rejected an agency's claim that its power to "modify" certain statutory requirements allowed it to completely exempt a large swath of industry from those requirements. *Id.* at 223-24. Because that word "connotes moderate change" and was not intended to authorize "fundamental changes," this "subtle device" did not let the agency exclude "40% of a major sector" from obligations of "enormous importance to the statutory scheme." *Id.* at 228-31. In other words, the agency could not use this ancillary provision to effect a "fundamental revision of the statute." *Id.* at 231.

Similar concerns animated a key case in the doctrine's development, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). After claiming for decades that it lacked the authority to regulate tobacco, the FDA abruptly reversed course. *Id.* at 125. The Court concluded that the FDA could not regulate tobacco because the drug would have to be banned entirely if it fell within the agency's jurisdiction, a result inconsistent with the statutory scheme "as a whole." *Id.* at

142. Only then did the Court turn to major questions considerations while discussing why agency deference was unwarranted.

In "extraordinary cases," the Court wrote, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* at 159. The Court emphasized the novelty of the FDA's assertion of jurisdiction over an entire industry and its prior disavowal of this power. *Id.* The Court further highlighted the agency's "extremely strained understanding" of a concept "central to [its] regulatory scheme," the existence of "a distinct regulatory scheme for tobacco products," and repeated congressional actions meant to preclude agency policymaking on tobacco. *Id.* at 159-60. "Given this history and the breadth of the authority that the FDA has asserted," the Court concluded that "Congress could not have intended to delegate a decision of such economic and political significance" in "so cryptic a fashion." *Id.* at 160.

Similar reasoning appeared in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), where litigants claimed that the EPA must consider compliance costs when setting air quality standards. Disagreeing, the Court held that the statute "unambiguously bars cost considerations." *Id.* at 471. It rejected the argument that certain "modest words" in the statute authorized such considerations, because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions" or "hide elephants in

mouseholes." *Id.* at 468. Again, the focus was on preventing dubious transformations of regulatory regimes, not on the breadth of an agency's power in isolation.

Confirming that point, *Massachusetts v. EPA*, 549 U.S. 497 (2007), emphasized the doctrine's narrow reach. The EPA justified its denial of a rulemaking petition regarding vehicle greenhouse gas emissions by claiming that such limits "would have even greater economic and political repercussions than regulating tobacco." *Id.* at 512. Rebuffing this invocation of *Brown & Williamson*, the Court explained that while it was "unlikely that Congress meant to ban tobacco products," there was "nothing counterintuitive" about the EPA regulating greenhouse gas emissions. *Id.* at 530-31. In other words, absent conflict with the agency's "pre-existing mandate," the Court would not "read ambiguity into a clear statute" simply because implementing that statute would have enormous repercussions. *Id.*

In *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the Court again focused on whether an agency sought to transform its authority though a dubious "discover[y]" of an "unheralded power" in a "long-extant statute." *Id.* at 324. A recently adopted EPA interpretation would have swept millions of new emissions sources into the agency's statutory purview. Admitting that this "would overthrow" the statute's "structure and design," the EPA tried to exempt many of

these new sources by lowering the statutorily prescribed emission thresholds. *Id.* at 321-22. In short, the EPA was "seizing expansive power that it admit[ted] the statute [was] not designed to grant," rendering its interpretation "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 324.

In other major questions cases, the Court refused to defer to agency interpretations that were "beyond [the agency's] expertise and incongruous with the statutory purposes and design." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). When the Attorney General barred the provision of drugs for assisted suicide, the Court highlighted the relevant statute's "unwillingness to cede medical judgments to an executive official who lacks medical expertise," refusing to believe "that Congress gave the Attorney General such broad and unusual authority through an implicit delegation." *Id.* at 266-67. Similarly, the Court did not defer to an IRS statutory interpretation concerning health-insurance tax credits, *King v. Burwell*, 576 U.S. 473 (2015), citing their importance to the statute, their cost and scope, and the agency's lack of "expertise in crafting health insurance policy," *id.* at 486. But the Court nonetheless upheld the IRS's rule—which had vast economic and political significance—as reflecting the best reading of the statute. *Id.* at 490-98.

The Court's pandemic-era cases again underscored that more is required to implicate the major questions doctrine than economic and political significance. The Court first ruled against an eviction moratorium issued pursuant to the CDC's authority "to prevent the introduction, transmission, or spread" of diseases. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2487 (2021) (per curiam). Because the statute "illustrat[ed] the kinds of measures" it encompassed by listing examples directly tied to the spread of disease, the "far more indirect[]" eviction ban was unauthorized. *Id.* at 2488. And "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation." *Id.* at 2489. Notably, that assessment of "scope" hinged on more than cost or geographic reach: the moratorium's "unprecedented" nature and the agency's identification of virtually "no limit" to its power were essential to the Court's conclusion that Congress did not likely grant such authority. *Id.*

Likewise, when applying the doctrine to rule against a vaccination-or-testing mandate for large employers, *Nat'l Fed. of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) (per curiam), the Court relied on more than the mandate's "significant encroachment into the lives—and health—of a vast number of employees." *Id.* at 665. Other factors it cited included the conspicuous novelty of the mandate, the poor fit between OSHA's workplace "sphere of expertise" and what resembled "a general public health measure," and signs that Congress believed OSHA lacked

this power. *Id.* at 665-66. At bottom, the mandate was "simply not part of what the agency was built for." *Id.* at 665 (quotation marks omitted).

Significantly, however, the Court did not apply the major questions doctrine that same day to an HHS vaccination mandate for staff at certain medical facilities. *See Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam). Dissenting Justices highlighted the rule's economic and political significance, "put[ting] more than 10 million healthcare workers to the choice of their jobs or an irreversible medical treatment," *id.* at 660 (Alito, J., dissenting), but that was not enough for the Court. Given the agency's "longstanding practice," the mandate was not "surprising" and was like the "routinely impose[d]" funding conditions relating to healthcare workers. *Id.* at 652-53. And unlike in *NFIB*, the Court found no mismatch with agency expertise, because "addressing infection problems in Medicare and Medicaid facilities is what [the HHS Secretary] does." *Id.* at 653. The lesson: the major questions doctrine does not constrain a statute's "seemingly broad language" when agency action "fits neatly within the language of the statute." *Id.* at 652.

In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Court embraced the "major questions doctrine" by name and more extensively discussed its requirements. In "extraordinary cases," the Court wrote, both "the history and the 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." *Id.* at 2608 (emphasis added) (quotation marks omitted).

The Court described the signs that an agency has inflated its power beyond what Congress likely intended. The EPA was attempting a "transformative expansion in [its] regulatory authority" by asserting an "unheralded" power that changed the statutory scheme "into an entirely different kind." *Id.* at 2610, 2612 (quotation marks omitted). This "newfound power" was based on "the vague language of an ancillary provision[]," required technical and policy expertise not traditionally held by the EPA, and was an approach that Congress "conspicuously and repeatedly declined to enact itself." *Id.* at 2610-13 (quotation marks omitted).

The Court confirmed these standards in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), which applied the major questions doctrine to the administration's student debt relief plan. *But see id.* at 2375 (concluding that the plan was unauthorized "even when examined using the ordinary tools of statutory interpretation"). Importantly, the Court reiterated that "while the major questions label may be relatively recent, it refers to an identifiable body of law that has developed over a series of significant cases spanning decades." *Id.* at 2374 (quotation marks omitted). The doctrine thus applies when the "indicators from our previous major questions cases are present." *Id.* (quotation marks omitted).

Although these indicators include economic and political significance, *see id.* at 2373 (the debt relief plan equaled "nearly one-third of the Government's $1.7 trillion in annual discretionary spending"), they include much more. According to the Court, the "extraordinary program" in *Nebraska* was completely unlike prior exercises of the same statutory authority, which were "extremely modest and narrow," and the Education Secretary was claiming "virtually unlimited power to rewrite the Education Act" and "unilaterally define every aspect of federal student financial aid." *Id* at 2372-74. This was "a fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind." *Id.* at 2373 (quoting *West Virginia*, 142 S. Ct. at 2612).

Notably, *Nebraska* first concluded that the administration was asserting a new type of authority that Congress likely did not intend, 143 S. Ct. at 2372-73, and only then determined that this assertion had "staggering" economic and political significance, *see id.* at 2373. The Court has thus made clear that unless both criteria are met, the major questions doctrine does not apply. *Accord West Virginia*, 142 S. Ct. at 2610-14.

II. The Minimum Wage Standard for Federal Contractors Is Far from "Extraordinary."

To implicate the major questions doctrine, "the history and the breadth" of a claimed power must reveal that an agency is seeking a "transformative expansion in [its] regulatory authority" through a "radical or fundamental change to a

statutory scheme." *West Virginia*, 142 S. Ct. at 2608-10 (quotation marks omitted). The doctrine is not concerned with assertions of highly consequential power, but rather with "highly consequential power *beyond what Congress could reasonably be understood to have granted*." *Id.* at 2609 (emphasis added); *see id.* (the doctrine incorporates "a practical understanding of legislative intent").

Contrary to the States' assertion here, therefore, the doctrine does not apply whenever a policy "addresses a subject of vast economic and political significance." Appellants' Br. 12. It applies only when such policies reflect dubious attempts to transform the power that Congress meant to give an agency. *Compare Missouri*, 142 S. Ct. at 652 (refusing to apply the doctrine despite vast economic and political significance); *Massachusetts*, 549 U.S. at 530-31 (same), *with West Virginia*, 142 S. Ct. 2610-14 ("unheralded" and "transformative" use of "ancillary provision[s]" reaching beyond agency's "comparative expertise"); *Nebraska*, 143 S. Ct. at 2372-73 (use of "never previously claimed powers" to work "fundamental revision of the statute" and claim "virtually unlimited power to rewrite [it]"); *Utility Air*, 573 U.S. at 324 (claim of "unheralded" and "transformative" power that "the statute [was] not designed to grant"); *Brown & Williamson*, 529 U.S. at 126, 160 (newfound reliance on "cryptic" provisions to assert power "inconsistent with the . . . overall regulatory scheme").

In this case, however, both parts of the equation are missing: the economic and political significance of the minimum wage requirement does not approach the magnitude required by Supreme Court precedent, *see infra* Part II.A, and the wage requirement does not transform the authority Congress meant to confer in the Procurement Act, *see infra* Part II.B.

A. Economic and Political Significance

The wage requirement is estimated to raise wages by $1.7 billion annually, far below the "nearly $50 billion," *Realtors*, 141 S. Ct. at 2489, that the Supreme Court "found significant in concluding that an eviction moratorium" implicated the doctrine, *Nebraska*, 143 S. Ct. at 2373—not to mention the "staggering" impact of the student debt program, estimated to "cost taxpayers between $469 billion and $519 billion." *Id.* (quotation marks omitted).

Nor does the wage requirement resemble the "unprecedented power over American industry" reflected in the EPA's climate plan, which aimed to "decid[e] how Americans will get their energy" by unilaterally "balancing the many vital considerations of national policy implicated." *West Virginia*, 142 S. Ct. at 2612.

The wage requirement is likewise a far cry from OSHA's "broad public health measure[]" that "ordered 84 million Americans" to receive a COVID vaccine or test weekly. *NFIB*, 142 S. Ct. at 665. And as discussed, the Supreme Court did not apply the major questions doctrine to a similar HHS mandate

compelling vaccination for over ten million healthcare workers. *See Missouri*, 142 S. Ct. at 659 (Alito, J., dissenting).

Thus, a wage standard covering 1.8 million "potentially affected workers" and estimated to increase wages for only 327,300 of them—a miniscule proportion of the nation's nearly 135 million private-sector employees, 86 Fed. Reg. 67126, 67198-99 (Nov. 24, 2021)—lacks anything close to the financial impact of the "extraordinary," *Nebraska*, 143 S. Ct. at 2374, and "breathtaking," *Realtors*, 141 S. Ct. at 2489, assertions of authority in past major questions cases.

Moreover, when assessing the economic and political significance of government mandates, the Supreme Court focuses more on the range of entities newly swept into regulatory schemes, *see Brown & Williamson*, 529 U.S. at 159; *MCI*, 512 U.S. at 231, than on new costs for already-regulated entities. *E.g.*, *Utility Air*, 573 U.S. at 332 ("We are not talking about extending EPA jurisdiction over millions of previously unregulated entities" but about increasing demands for "entities already subject to its regulation"). Federal contractors have been subject to numerous contractual requirements for decades. *See infra* at 17-18.

B. Adherence to Congressional Intent

The second requirement of the major questions doctrine is that an agency's claimed power transforms its authority in a manner "very unlikely" to have been authorized by Congress. *West Virginia*, 142 S. Ct. at 2609; *see Nebraska*, 143 S.

Ct. at 2374 (rejecting the student debt plan because "Congress did not unanimously pass the HEROES Act with such power in mind"). To identify such questionable expansions of power, the Court looks to factors that include eyebrow-raising novelty, conflict with the statutory scheme, reliance on cryptic, ancillary provisions, and mismatch with the agency's traditional expertise. Those factors are absent here.

1. Assertions of unprecedented new power

The major questions doctrine is skeptical about "unprecedented" claims of "unheralded power" newly discovered in "a long-extant statute." *West Virginia,* 142 S. Ct. at 2612, 2610 (quotation marks omitted). Importantly, though, the Court considers novelty at a high level of generality. Agency actions "strikingly unlike" past efforts may implicate the doctrine, *NFIB*, 142 S. Ct. at 665, but not actions that merely go "further than what [an agency] has done in the past," *Missouri*, 142 S. Ct. at 652-53.

This case is, at most, the latter. Presidents have regulated federal contractors' interactions with their workers for many decades. President Franklin D. Roosevelt issued executive orders forbidding contractors from discriminating based on race, religion, or national origin. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941); Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 29, 1943). Since then, multiple presidents have issued nondiscrimination orders, *see AFL-CIO v.*

Kahn, 618 F.2d 784, 791 (D.C. Cir. 1979), or have used Procurement Act authority to require compliance with wage and price controls, Exec. Order No. 12092, 43 Fed. Reg. 51375 (Nov. 3, 1978), combat the employment of unauthorized workers, Exec. Order No. 12989, 61 Fed. Reg. 6091 (Feb. 15, 1996); Exec. Order No. 13465, 73 Fed. Reg. 33285 (June 11, 2008), compel disclosures of labor rights, Exec. Order No. 13201, 66 Fed. Reg. 11221 (Feb. 22, 2001); Exec. Order No. 13496, 74 Fed. Reg. 6107 (Feb. 4, 2009), and require paid sick leave, Exec. Order No. 13706, 80 Fed. Reg. 54697 (Sept. 10, 2015). In light of this "established practice," *West Virginia*, 142 S. Ct. at 2610 (quotation marks omitted), setting minimum wage standards is not the type of wholly unprecedented action with which the major questions doctrine is concerned.

2. Incongruence with statutory scheme

When an agency asserts authority that fits poorly within a statute's overall regulatory structure, it signals a "fundamental revision of the statute" that supports applying the major questions doctrine. *West Virginia*, 142 S. Ct. at 2612 (quotation marks omitted); *see Brown & Williamson*, 529 U.S. at 134-35. But the wage requirement does not transform the executive branch's Procurement Act authority "into an entirely different kind," *Nebraska*, 143 S. Ct. at 2373 (quotation marks omitted), or plausibly "render the statute unrecognizable to the Congress that designed it," *Utility Air*, 573 U.S. at 324 (quotation marks omitted).

The Procurement Act gives the President broad authority to "prescribe policies and directives that [he] considers necessary to carry out" the Act, 40 U.S.C. § 121, which was enacted to promote "an economical and efficient system" for procuring and supplying property and services, *id.* § 101. The minimum wage requirement furthers those ends by "bolster[ing] economy and efficiency in Federal procurement." Exec. Order No. 14026, 86 Fed. Reg. 22835 (Apr. 30, 2021); *see id.* ("Raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs.").

Particularly given "the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch," *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940), the wage standard is a "straightforward and predictable example" of the President's authority to set terms for government contracts, *Missouri*, 142 S. Ct. at 653.

3. Reliance on obscure or ancillary provisions

The Supreme Court has been especially wary of claimed authority that rests on "'subtle device[s]'" or "cryptic" delegations. *Brown & Williamson*, 529 U.S. at 160 (quoting *MCI*, 512 U.S. at 231). *West Virginia,* for instance, stressed that the EPA was using an "obscure," "ancillary," "little-used backwater" for its wide-reaching new policy. 142 S. Ct. at 2602, 2610, 2613 (quotation marks omitted).

Here, the President did not resort to a "little-used backwater" to issue these standards. And there is nothing cryptic about the broad mandate conferred in 40 U.S.C. § 121. Invoking that provision, the President relied on his longstanding authority to require those wishing to be federal contractors to adhere to certain employment policies set by the executive branch. This use of the Procurement Act's central authority, which "presidents of both parties" have used "to issue orders pertaining to the compensation of contractors' employees," ER-12, provides no reason for skepticism.

4. Mismatch between asserted power and agency expertise

The scope of an agency's expertise can shed light on whether it is claiming a new type of power that Congress is unlikely to have intended. *See West Virginia*, 142 S. Ct. at 2612-13 ("when [an] agency has no comparative expertise in making certain policy judgments . . . Congress presumably would not task it with doing so" (quotation marks omitted)); *King*, 576 U.S. at 486 (Congress was "especially unlikely" to grant the IRS authority over health insurance decisions because the IRS "has no expertise in crafting health insurance policy").

Significantly, then, it does not "raise[] an eyebrow," *West Virginia*, 142 S. Ct. at 2613, that Presidents would be tasked with determining what terms to include in federal contracts to promote economy and efficiency. This is not akin to an official "who lacks medical expertise" making "medical judgments." *Gonzales*, 546 U.S.

at 266. Instead, the President acted "in an area—general administrative control of the Executive Branch—over which he also enjoys inherent powers." ER-16.

5. Legislative activity implying lack of authorization

The Supreme Court has sometimes considered congressional activity occurring after a statute's enactment, such as failed bills addressing related topics, as part of its major questions analysis. *E.g.*, *West Virginia*, 142 S. Ct. at 2614 (failure of legislation adopting cap-and-trade program suggested EPA's similar approach was not authorized by existing legislation). But other major questions cases have downplayed such evidence. *E.g.*, *Brown & Williamson*, 529 U.S. at 155-56 (disclaiming reliance "on Congress' failure to act" and instead highlighting conflict between agency interpretation and enacted statutes addressing tobacco).

The Court's usual guidance is that "subsequent history is a hazardous basis for inferring the intent of an earlier Congress," *Pension Benefit Gaur. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990), and that failed bills are "a particularly dangerous ground" for doing so, *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2449 n.9 (2021), because "several equally tenable inferences may be drawn from such inaction," *United States v. Craft*, 535 U.S. 274, 287 (2002) (quotation marks omitted).

In any event, here there is no evidence of "Congress' consistent judgment to deny [the President] this power." *Brown & Williamson*, 529 U.S. at 160. On the

contrary, Congress recodified the Procurement Act after decades of presidents using the Act to set employment standards for federal contractors. *See* Appellees' Br. 17.

III. Extending the Major Questions Doctrine to Cases Like This Would Undermine Traditional Statutory Interpretation and Constitutional Principles.

As shown above, the Supreme Court has limited the major questions doctrine to "extraordinary" cases in which a rigorous two-part standard is met. Following that precedent is important not only because it is binding but because the doctrine is in tension with basic principles of statutory interpretation, the Constitution's original meaning, and the separation of powers. Confining the doctrine to the narrow bounds prescribed by the Supreme Court ameliorates those tensions; enlarging the doctrine as the States advocate here would exacerbate them.

A. Textualism

"The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020). Courts should therefore "interpret the words consistent with their ordinary meaning . . . at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quotation marks omitted). And when statutes confer broad authority on the executive branch, "imposing limits on an agency's discretion"

based on extratextual considerations is to "alter, rather than to interpret," the statute. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

Devoted textualists go even further, discounting legislative history, pragmatic concerns, and Congress's perceived general purposes in favor of text and structure alone. *See, e.g.*, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 22-23, 29-30 (1997).

Departing from these principles, however, the major questions doctrine considers economic consequences, political controversies, legislators' perceived expectations, agency practice, and other factors outside of a statute's text—many of them post-dating its enactment and therefore incapable of affecting its original meaning. By sifting through various non-textual considerations with undetermined relative weights, the doctrine resembles the type of multi-factor balancing test that textualists typically disparage. *E.g.*, *Wooden v. United States*, 142 S. Ct. 1063, 1080 (2022) (Gorsuch, J., concurring in the judgment); *Gamble v. United States*, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring).

Accordingly, Justices across the ideological spectrum have recognized that the major questions doctrine poses problems for textualists. *See Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) ("[S]ome articulations of the major questions doctrine on offer . . . should give a textualist pause."); *West Virginia,* 142 S. Ct. at 2641 (Kagan, J., dissenting) (calling the doctrine a "get-out-of-text free card[]").

The Court itself has acknowledged that the doctrine is "distinct" from "routine statutory interpretation." *Id.* at 2609.

Illustrating how an overly broad use of the major questions doctrine undermines textualism and ordinary statutory interpretation, the States urge this Court to constrict the Procurement Act's broad language because the policy they are challenging is, in their view, costly, politically controversial, and different from previous applications of the statute. *See* Appellants' Br. 36-37. But broad statutory language should not be artificially constrained due to "undesirable policy consequences," *Bostock*, 140 S. Ct. at 1753, or because it "goes further than what the [agency] has done in the past," *Missouri*, 142 S. Ct. at 653.

Precisely because it departs from "the ordinary tools of statutory interpretation," *Nebraska*, 143 S. Ct. at 2375, the major questions doctrine is reserved for "extraordinary" cases in which an agency tries to transform a statute "'from [one sort of] scheme of . . . regulation into an entirely different kind,'" *id.* at 2373-74 (quoting *West Virginia*, 142 S. Ct. at 2612). Expanding the doctrine beyond that limited sphere would put it on a collision course with textualism and basic principles of statutory interpretation.

B. Original Meaning

Imposing a heightened clarity requirement on Congress when it wants to authorize economically and politically significant agency actions is also in tension

with the Constitution's original meaning.

No detailed justification for the major questions doctrine has won a majority of the Supreme Court, which has only gestured at "separation of powers principles and a practical understanding of legislative intent." *West Virginia*, 142 S. Ct. at 2609.[2] But the Court has referenced a presumption that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.*

As originally understood, however, the Constitution embodies no skepticism toward agency resolution of major policy decisions. Indeed, the earliest Congresses repeatedly used broad language to grant the executive branch vast discretion over some of the era's most pressing economic and political issues. In short, the Founders had no qualms about legislation authorizing the executive branch to resolve critically important policy questions, and they did not require Congress to speak in any particular manner to confer such authority.

Recent scholarship has cataloged these early assignments of authority. For example, because trade with Indian tribes was financially vital but politically fraught at the Founding, the First Congress required a license for such trading. But

[2] The Justices who have offered more detailed explanations for the doctrine disagree about its basis. *Compare West Virginia*, 142 S. Ct. at 2616-18 (Gorsuch, J., concurring) (arguing that the doctrine enforces a constitutional prohibition on delegations concerning important subjects), *with Nebraska*, 143 S. Ct. at 237-38 (Barrett, J., concurring) (rejecting that argument, but defending the doctrine as "an interpretive tool reflecting common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude" (quotation marks omitted)).

far from making the major policy decisions itself, Congress gave the President total discretion over the licensing scheme's "rules, regulations, and restrictions." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137. President Washington used this authority to unilaterally specify who could trade, what items could be traded, and where. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 341 (2021).

The First Congress granted similarly broad authority to address "arguably the greatest problem facing our fledgling Republic: a potentially insurmountable national debt." Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81, 81 (2021). To that end, Congress authorized the president to borrow about $1.3 trillion in new loans (in today's dollars) and to make other contracts to refinance the debt "as shall be found for the interest of the [United] States." Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 139; *see* Chabot, *supra*, at 123-24. The statute left the implementation of this broad mandate largely to the president's discretion. *See id.*; Mortenson & Bagley, *supra*, at 344-45.

These statutes were not unusual. To cite just three more examples, Congress granted the Treasury Secretary "authority to effectively rewrite the statutory penalties for customs violations," Kevin Arlyck, *Delegation, Administration, and Improvisation*, 96 Notre Dame L. Rev. 243, 306 (2021); *see* Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23, which Joseph Story called "one of the most

important and extensive powers" of the government, *The Margaretta*, 16 F. Cas. 719, 721 (C.C.D. Mass. 1815). Congress authorized an executive board to grant exclusive patents if it deemed inventions or discoveries "sufficiently useful and important," denying other Americans the "right and liberty" of offering the same product. Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110. And Congress gave federal commissioners nearly unguided power over the politically charged question of how to appraise property values across the nation for the first direct tax. *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1391-1401 (2021).

Nothing in the Constitution's text or history precludes the assignment of major policy questions to agencies, *see, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2127 (2004), which helps explain why the first Congresses so readily made such assignments. *Cf. Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (early legislation is "contemporaneous and weighty evidence of the Constitution's meaning" (quotation marks omitted)). Simply put, the premise underlying the major questions doctrine was not shared by the Founders, providing yet another reason to reserve the doctrine for "extraordinary" cases in which

agencies exercise authority "beyond what Congress could reasonably be understood to have granted." *West Virginia*, 142 S. Ct. at 2609.

C. Separation of Powers

The major questions doctrine is meant to promote "separation of powers principles." *West Virginia*, 142 S. Ct. at 2609. But an aggressively applied doctrine would raise its own separation-of-powers concerns, becoming "a license for judicial aggrandizement" that shifts authority from the elected branches to the courts. Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 175, 200 (2022). The more widely the doctrine is applied, the more it impinges on legislative authority, "direct[ing] how Congress must draft statutes," Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 276 (2022), and frustrating its attempts give agencies flexible authority capable of addressing unforeseen challenges.

Here, for instance, the States ask this Court to impose extratextual limitations on the Procurement Act's broad language because it does not specifically refer to minimum wages. Appellants' Br. 34, 38. But "[w]hen courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2120 (2016) (book review). And distorting a statute's plain meaning because of political controversies or other

developments that arise after its enactment risks "amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quotation marks omitted).

This potential for encroachment on congressional power underscores the need to employ the doctrine only in truly extraordinary cases, not whenever an agency makes a costly or controversial decision. If the judiciary "starts to reject Congress's legislation on important matters precisely because it is important," this may erode the courts' status as non-political arbiters of the law. Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. Envtl. L.J. 379, 391 (2021).

These concerns are heightened because Congress could not have anticipated when enacting the Procurement Act that courts would later require a "clear statement," Appellants' Br. 38, for specific regulatory actions that future generations deem significant. From a separation-of-powers perspective, it is "unfair to Congress" to use newly crafted judicial rules to displace the ordinary meaning of the text Congress used in "earlier-enacted legislation." Sohoni, *supra*, at 286.

Furthermore, far from reflecting "a practical understanding of legislative intent," *West Virginia*, 142 S. Ct. 2609, applying the doctrine too broadly would be at odds with Congress's demonstrated intent to allow agencies to make decisions

with significant economic consequences. Under the Congressional Review Act, agencies must identify "major" rules (defined by economic impact, *see* 5 U.S.C. § 804) when reporting their new regulations to Congress, but these major rules "shall take effect" unless Congress acts to disapprove them, *id.* § 801. Applying the major questions doctrine to all economically and politically significant actions would invert this statute, making those actions presumptively invalid instead of presumptively valid as Congress decreed. *See* Chad Squitieri, *Major Problems with Major Questions*, Law & Liberty (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions/.

These concerns are not alleviated by Congress's ability to pass new legislation correcting a judicial decision. "For a court to say that Congress can fix a statute if it does not like the result is *not* a neutral principle in our separation of powers scheme because it is very difficult for Congress to correct a mistaken statutory decision." Kavanaugh, *supra*, at 2133-34.

In sum, the major questions doctrine does not apply whenever an agency acts on a matter of vast economic and political significance, but only when additional factors reveal that the agency is seeking a "transformative expansion" of the power Congress intended to assign it. *West Virginia*, 142 S. Ct. at 2610. Stretching the doctrine beyond those extraordinary cases would not serve, but instead would severely undermine, the separation of powers.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

Dated: August 28, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2023, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: August 28, 2023

/s/ Elizabeth B. Wydra
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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