No. 23-40671

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF MISSISSIPPI; STATE OF LOUISIANA,

Plaintiffs-Appellees,

v.

PRESIDENT JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF LABOR; JULIE A. SU, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR, IN HER OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF LABOR; JESSICA LOOMAN, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES DEPARTMENT OF LABOR, WAGE & HOUR DIVISION,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

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

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Jess Zalph
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: January 29, 2024

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

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.

TABLE OF CONTENTS

	Page
SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	6
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	6
II. The Minimum Wage Standard for Federal Contractors Is Far from "Extraordinary"	13
A. Economic and Political Significance	15
B. Adherence to Congressional Intent	17
III. Extending the Major Questions Doctrine to Cases Like This Would Undermine Traditional Statutory Interpretation and Constitutional Principles	22
A. Textualism	22
B. Original Meaning	24
C. Separation of Powers	27
CONCLUSION	30
CERTIFICATE OF SERVICE	1A
CERTIFICATE OF COMPLIANCE	2A

TABLE OF AUTHORITIES

Page(s)

CASES

AFL-CIO v. Kahn,
618 F.2d 784 (D.C. Cir. 1979) 18

Ala. Ass'n of Realtors v. HHS,
141 S. Ct. 2485 (2021) 3, 11, 15

Biden v. Missouri,
595 U.S. 87 (2022) .... *passim*

Biden v. Nebraska,
143 S. Ct. 2355 (2023) .... *passim*

Bostock v. Clayton Cnty.,
140 S. Ct. 1731 (2020) 22, 24

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 7

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

Gamble v. United States,
139 S. Ct. 1960 (2019) 23

Gonzales v. Oregon,
546 U.S. 243 (2006) 10, 21

Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.,
448 U.S. 607 (1980) 7

King v. Burwell,
576 U.S. 473 (2015) 10, 20

Little Sisters of the Poor v. Pennsylvania,
140 S. Ct. 2367 (2020) 24

TABLE OF AUTHORITIES – cont'd

Page(s)

The Margaretta,
16 F. Cas. 719 (C.C.D. Mass. 1815) 26

Massachusetts v. EPA,
549 U.S. 497 (2007) 9, 14

MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.,
512 U.S. 218 (1994) 7, 8, 16, 20

Nat'l Fed'n of Indep. Bus. v. OSHA,
595 U.S. 109 (2022) 11, 16, 17, 21

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019) 28

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 21

Perkins v. Lukens Steel Co.,
310 U.S. 113 (1940) 19

Utility Air Regul. Grp. v. EPA,
573 U.S. 302 (2014) .... *passim*

West Virginia v. EPA,
597 U.S. 697 (2022) .... *passim*

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 9

Wisconsin Cent. Ltd. v. United States,
138 S. Ct. 2067 (2018) 22

Yellen v. Confederated Tribes of Chehalis Rsrv.,
141 S. Ct. 2434 (2021) 21

TABLE OF AUTHORITIES – cont'd

Page(s)

STATUTES

Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 27

Act of May 26, 1790, ch. 12, 1 Stat. 122 26

Act of July 22, 1790, ch. 33, 1 Stat. 137 25

Act of Aug. 4, 1790, ch. 34, 1 Stat. 138 26

5 U.S.C. § 801 29

5 U.S.C. § 804 29

40 U.S.C. § 101 19

40 U.S.C. § 121 .... 19, 20

EXECUTIVE MATERIALS

Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941) 18

Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 29, 1943) 18

Exec. Order No. 12092, 43 Fed. Reg. 51375 (Nov. 3, 1978) 18

Exec. Order No. 12989, 61 Fed. Reg. 6091 (Feb. 5, 1996) 18

Exec. Order No. 13201, 66 Fed. Reg. 11221 (Feb. 22, 2001) 18

Exec. Order No. 13465, 73 Fed. Reg. 33285 (June 11, 2008) 18

Exec. Order No. 13496, 74 Fed. Reg. 6107 (Feb. 4, 2009) 18

Exec. Order No. 13706, 80 Fed. Reg. 54697 (Sept. 10, 2015) 18

TABLE OF AUTHORITIES – cont'd

Page(s)

Exec. Order No. 14026, 86 Fed. Reg. 22835 (Apr. 30, 2021)............... 19

Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126 (Nov. 24, 2021) 16

BOOKS, ARTICLES, AND OTHER AUTHORITIES

Kevin Arlyck, *Delegation, Administration, and Improvisation*, 96 Notre Dame L. Rev. 243 (2021) 26

Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81 (2021).. 26

Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. Env't L.J. 379 (2021) 28

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016) 28

Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097 (2004) 27

Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021).. 25, 26

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 (2021) 27

Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174 (2022)...... 28

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) 22

TABLE OF AUTHORITIES – cont'd

Page(s)

Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022) 28, 29

Chad Squitieri, *Major Problems with Major Questions*, Law & Liberty (Sept. 6, 2022) 29

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 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

According to the decision below, courts should apply the major questions doctrine and require Congress to speak with heightened clarity whenever the executive branch takes action with "vast economic and political significance." ROA.771. That capacious view of the doctrine flatly contradicts the Supreme Court's precedent, and this Court should reject it. The Supreme Court has made clear that the major questions doctrine applies only rarely—when agencies advance startling new claims of "breathtaking," "staggering," or "extraordinary" regulatory power, and—on top of that—when numerous factors indicate that Congress never meant to grant such power. Expanding the doctrine beyond that limited sphere would not only defy precedent but would also be at odds with textualism, the original understanding of the Constitution, and the separation of powers.

[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.

In recent decades, the Supreme Court concluded in a number of prominent cases that agencies were claiming enormous new regulatory authority despite indications that Congress did not mean to grant that authority. Taking stock of this case law, *West Virginia v. EPA* explicitly recognized a "major questions doctrine," explaining that "precedent teaches that there are 'extraordinary cases' that call for a different approach" from "routine statutory interpretation." 597 U.S. 697, 721-24 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

In these "extraordinary" cases, courts take an extraordinary approach. Rather than simply determine the original public meaning of a statute's text, courts instead weigh various factors outside of the text—including legislative history, political controversy, economic implications, and prior agency interpretations—to help decide whether a "major question" is implicated. If so, courts require "clear congressional authorization." *Id.* at 723 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The major questions doctrine thus differs sharply from "the ordinary tools of statutory interpretation." *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023). Accordingly, the Supreme Court has limited its application to truly "extraordinary" claims of authority, *id.* at 2374, that amount to a "fundamental revision of the statute," *id.* at 2373 (quoting *West Virginia*, 597 U.S. at 728).

In other words, the doctrine has two separate and highly demanding requirements. First, an agency must be claiming "breathtaking" new powers, *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam), with "staggering" economic and political significance, *Nebraska*, 143 S. Ct. at 2373. Second, the agency's claim must represent a "transformative expansion in [its] regulatory authority," *West Virginia*, 597 U.S. at 724 (quoting *Utility Air*, 573 U.S. at 324), that stretches "beyond what Congress could reasonably be understood to have granted," *id.*

The latter requirement is satisfied when agencies assert "unheralded" power by twisting the "vague language" of "ancillary" provisions to "make a radical or fundamental change to a statutory scheme," *id.* at 723-24 (quotation marks omitted), particularly where the agency "has no comparative expertise" in the area it seeks to regulate, *id.* at 729 (quotation marks omitted), and where Congress has "conspicuously and repeatedly declined" to confer that same power on the agency, *id.* at 724. The agency's action must be more than "unprecedented," it must transform the statute "from one sort of scheme of . . . regulation into an entirely different kind." *Id.* at 728 (brackets and quotation marks omitted); *accord Nebraska*, 143 S. Ct. at 2373.

Here, however, the President has not exploited an "obscure, never-used section of the law" to assert a new type of power outside his "comparative

expertise." *West Virginia*, 597 U.S. at 711, 729 (quotation marks omitted). Instead, he used the same broad grant of authority that presidents of both political parties have long used to adjust the compensation of contractors' employees. *See infra* at 18.

Applying the major questions doctrine to cases like this would conflict not only with precedent, but also with textualism. 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 the subjective expectations of the legislators who passed it and the practical ramifications of an agency's action. *See id.* at 2372-75. Some of these factors require judges to venture beyond their expertise by making non-legal appraisals about politics or economics, and many factors have no bearing on a statute's original public meaning because they focus on events occurring after its enactment. Precisely because the major questions doctrine is "distinct" from "routine statutory interpretation," *West Virginia*, 597 U.S. at 724, it is reserved for extraordinary cases in which the Supreme Court's rigorous standards are indisputably satisfied.

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.* (quotation marks omitted). But Congress has

tasked the executive branch with resolving major policy decisions since the Founding, when it routinely granted the executive vast discretion over some of the nation's most pressing economic and political challenges. Nothing in the Constitution forecloses that choice, and history does not suggest that Congress must speak in any particularly clear manner to exercise it. Indeed, the major questions doctrine is the modern innovation, having originated more than two centuries after the Founding.

Finally, an overly permissive use of the major questions doctrine would erode critical limits on the role of the judiciary. The doctrine aims to promote "separation of powers principles" by preventing agencies from exceeding Congress's intent. *Id.* at 723. But in the process, the doctrine also constrains Congress, blocking it from authorizing agency action whenever the courts decide that a major question is implicated, unless Congress used language that courts deem sufficiently clear. The doctrine thus tells Congress how it must draft certain types of laws, based on concepts recently devised by the one branch of government not directly accountable to the people. And the risk of judicial aggrandizement this entails is exacerbated by the subjective and political nature of some of the factors that determine whether the doctrine applies.

These tensions between the major questions doctrine and textualism, original meaning, and the separation of powers provide further reason to heed the Supreme

Court's guidance by confining the doctrine to the most extraordinary cases. When an agency claims stunning new powers that appear incongruous with the relevant statutory scheme, the history of its implementation, the agency's own expertise, and Congress's conspicuous withholding of such power from the agency, then "a practical understanding of legislative intent" may call for hesitation. *Id.* But when radical and dubious innovation of that sort is absent, as here, artificially limiting the broad meaning of a statute's text would undermine—not vindicate—Congress's legislative authority.

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 decades, beginning as a general rule of thumb used in traditional statutory interpretation before transforming into a requirement of "clear congressional authorization" in "certain extraordinary cases." *West Virginia*, 507 U.S. at 723 (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 ultimate 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.* at 724 (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 723-24 (quotation marks omitted), does the doctrine come into play.

When the Supreme Court initially invoked a presumption that Congress "speak[s] clearly" when assigning authority over major questions, it did so only to bolster conclusions reached through ordinary statutory interpretation. The opinion with the first glimmers of the major questions doctrine relied on the ordinary tools of statutory construction to reach its conclusion before observing that it would be unreasonable to read the statute as implicitly granting the "unprecedented power over American industry" claimed by the agency. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion).

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 agency deference. 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. In other words, the agency could not use an 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.* After claiming for decades that it lacked the authority to regulate tobacco, the FDA abruptly reversed course. 529 U.S. at 125. The Court concluded that the FDA could not regulate tobacco because the implications of that decision were 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 despite its prior disavowals. *Id.* The Court further highlighted the agency's implausible interpretation of a "central" concept in the statute, the existence of "a distinct regulatory scheme for tobacco products," and 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 the Court held that a statute "unambiguously" barred the EPA from considering compliance costs when setting air quality standards. *Id.* at 471. Certain "modest words" in the statute did not authorize such considerations, because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *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.

The Court confirmed that point in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The EPA sought to avoid regulating vehicle greenhouse gas emissions by claiming that such action "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. 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*, 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." 573 U.S. at 324. The EPA adopted a novel statutory interpretation that, if fully implemented, would concededly "overthrow" the statute's "structure and design." *Id.* at 321-22. In short, the agency 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." *Id.* at 324.

In other major questions cases, the Court has 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." *Id.* at 266. Similarly, the Court relied on the IRS's lack of "expertise in crafting health insurance policy" in refusing to defer to its statutory interpretation concerning health-insurance tax credits. *King v. Burwell*, 576 U.S. 473, 485-86 (2015). 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 a CDC eviction moratorium because the relevant

statute signaled a focus on measures more directly tied to the spread of disease. *Realtors*, 141 S. Ct. 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" emphasized the moratorium's "unprecedented" nature and the agency's identification of virtually "no limit" to its power. *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*, 595 U.S. 109 (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 117. Other factors it cited included the conspicuous novelty of the mandate, the poor fit between OSHA's workplace "sphere of expertise" and the mandate's resemblance to "a general public health measure," and signs that Congress believed OSHA lacked this power. *Id.* at 118-19. At bottom, the mandate was "simply not part of what the agency was built for." *Id.* at 119 (quotation marks omitted).

Significantly, however, that same day the Court did not apply the major questions doctrine to an HHS vaccination mandate for staff at certain medical facilities. *See Biden v. Missouri*, 595 U.S. 87 (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 108 (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 94. 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 95. 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 93-94.

In *West Virginia*, the Court embraced the "major questions doctrine" by name and discussed its parameters. Because the economic and political significance of the EPA's action was self-evident, the Court focused on the doctrine's second requirement: 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." 597 U.S. at 724, 728 (quotation marks omitted). This "newfound power" was based on "the vague language of an ancillary provision[]," required expertise not traditionally held by the EPA, and was an approach that Congress "conspicuously and repeatedly declined to enact itself." *Id.* at 725 (quotation marks omitted).

The Court confirmed these standards in *Biden v. Nebraska*. Reiterating that the "major questions" label "refers to an identifiable body of law that has developed over a series of significant cases," the Court explained that the doctrine applies only when the "indicators from our previous major questions cases are present." 143 S. Ct. at 2374 (quotation marks omitted). And "economic and political significance" is only one part of this equation. Notably, the Court *first* concluded that the administration was asserting a new type of authority that Congress likely did not intend: The program was completely unlike prior exercises of the same statutory authority, and the agency was claiming "virtually unlimited power to rewrite the Education Act" and "unilaterally define every aspect of federal student financial aid." *Id.* at 2372-73. 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*, 597 U.S. at 728).

Only *after* reaching that conclusion did the Court address the program's "staggering" economic and political significance. *Id.* The Court has thus made clear that unless both criteria are met, the major questions doctrine does not apply.

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

As explained above, application of the major questions doctrine requires a "radical or fundamental change to a statutory scheme" that, however plausible its

textual basis, goes beyond "what Congress could reasonably be understood to have granted." *West Virginia*, 597 U.S. at 723 (quotation marks omitted).

Thus, the doctrine does not apply whenever an agency's policy has vast economic and political significance. *See Missouri*, 595 U.S. at 93 (refusing to apply the doctrine despite vast economic and political significance); *Massachusetts*, 549 U.S. at 530-31 (same). Instead, it applies only when such policies reflect dubious attempts to transform the power that Congress meant to confer on an agency. *See West Virginia*, 597 U.S. at 724-29 ("unheralded" and "transformative" use of "ancillary provision[s]" reaching beyond an 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").

Here, 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, and the wage requirement does

not transform the authority Congress meant to confer in the Federal Property and Administrative Services Act ("Procurement Act").

A. Economic and Political Significance

Much of what the executive branch routinely does has vast economic and political significance. To implicate the major questions doctrine, an agency's action must go much further: its impact must be "staggering," *Nebraska*, 143 S. Ct. at 2373, "[e]xtraordinary," *West Virginia*, 597 U.S. at 723, and "breathtaking," *Realtors*, 141 S. Ct. at 2489.

The wage requirement is estimated to raise wages by $1.7 billion per year over ten years, far below the "nearly $50 billion," *id.*, 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 immense 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*, 597 U.S. at 729.

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*, 595 U.S. at 117. 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*, 595 U.S. at 105 (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 in past major questions cases.[2]

Moreover, when assessing economic and political significance, 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

---

[2] The district court called into question this estimate of financial impact, noting possible "spillover effects," ROA.775, but any such effects would be the result of voluntary actions on the part of employers; these effects are not a necessary result of complying with the President's order. Moreover, even if those effects were relevant to the major questions analysis, their impact would not come anywhere close to the financial impact of the regulations at issue in other major questions cases. *See* 86 Fed. Reg. 67126, 67210-11 (Nov. 24, 2021).

regulation.”). Federal contractors have been subject to numerous contractual requirements for decades. *See infra* at 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 way that Congress is “very unlikely” to have intended. *West Virginia*, 597 U.S. at 723; *e.g.*, *Nebraska*, 143 S. Ct. at 2374 (“Congress did not unanimously pass the HEROES Act with such power in mind”). To identify these dubious transformations, the Court looks for eyebrow-raising novelty, conflict with the statutory scheme, reliance on cryptic or ancillary provisions, and mismatch with the agency’s expertise. Those factors are absent here.

1. Assertions of unprecedented new power

The major questions doctrine is skeptical of “unprecedented” claims of “unheralded power” newly discovered in “a long-extant statute.” *West Virginia,* 597 U.S. at 728, 724 (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*, 595 U.S. at 118, but not actions that merely go “further than what [an agency] has done in the past,” *Missouri*, 595 U.S. at 95.

This case is, at most, the latter. Presidents have regulated federal contractors' interactions with their workers for decades. President Franklin 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), or require paid sick leave, Exec. Order No. 13706, 80 Fed. Reg. 54697 (Sept. 10, 2015). In light of this "established practice," *West Virginia*, 597 U.S. 725 (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 doctrine. *West Virginia*, 597 U.S. at 728 (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," in part because it "enhances worker productivity and generates higher-quality work." Exec. Order No. 14026, 86 Fed. Reg. 22835 (Apr. 30, 2021).

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*, 595 U.S. at 95.

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. 597 U.S. at 711, 724, 730 (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, which has long been understood as authorizing the President to require those wishing to be federal contractors to adhere to employment policies set by the executive branch.

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*, 597 U.S. at 729 ("when [an] agency has no comparative expertise in making certain policy judgments . . . Congress presumably would not task it with doing so" (quotation marks omitted)); *accord King*, 576 U.S. at 486.

Significantly, then, it does not "raise[] an eyebrow," *West Virginia*, 597 U.S. at 730, 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, or an agency with only a workplace "sphere of expertise" trying to "address[] public health more generally," *NFIB*, 595 U.S. at 118.

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*, 597 U.S. at 731-32 (failure of legislation adopting cap-and-trade program suggested EPA's similar approach was not authorized by existing legislation). But other cases have downplayed such evidence. *E.g.*, *Brown & Williamson*, 529 U.S. at 155-56 (disclaiming reliance "on Congress' failure to act" and instead analyzing enacted statutes). The Court's usual guidance is that "subsequent history is a hazardous basis for inferring the intent of an earlier Congress," *Pension Benefit Guar. 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).

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. To the contrary, Congress recodified the Procurement Act after decades of presidents

using the Act to set employment standards for federal contractors. *See* Appellants' Br. 16.

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 also because the doctrine is in tension with textualism, 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; doing otherwise 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." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quotation marks omitted); *cf.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 22-23, 29-30 (1997) (discounting

legislative history, pragmatic concerns, and Congress's perceived goals in favor of text and structure alone).

Departing from these principles, however, the major questions doctrine emphasizes factors outside of a statute's text and structure, including economic consequences, political controversy, legislators' subjective expectations, and prior agency actions. Many of these factors necessarily post-date the statute's enactment and are therefore incapable of affecting its original public meaning. And by sifting through various extratextual considerations with undetermined relative weights, the doctrine resembles the type of multi-factor balancing test that textualists typically disparage. *E.g.*, *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,* 597 U.S. at 751 (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 724.

Constricting the Procurement Act's broad language because the minimum wage policy is, in its opponents' view, costly and different from previous

applications of the statute would be at odds with textualism and ordinary statutory interpretation. Expansive 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*, 595 U.S. at 95. When statutes confer broadly worded authority, relying on extratextual considerations to "impos[e] limits on an agency's discretion" is to "alter, rather than to interpret," the statute. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

Precisely because the major questions doctrine departs from "the ordinary tools of statutory interpretation," *Nebraska*, 143 S. Ct. at 2375, the doctrine is reserved for "extraordinary" cases in which an agency tries to transform one kind of statute "into an entirely different kind," *id.* at 2373-74 (quoting *West Virginia*, 597 U.S. at 728).

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*, 597 U.S. at

723.[3] But the Court has referenced a presumption that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.*

Contrary to this presumption, the Constitution as originally understood 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. 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.

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 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; *see* Julian Davis

[3] The Justices who have offered more detailed explanations for the doctrine disagree about its basis. *Compare West Virginia*, 597 U.S. at 735-39 (Gorsuch, J., concurring) (arguing 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)).

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). Legislation 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. Simply put, the premise underlying the major questions doctrine was not shared by the Founders—yet another reason to reserve the doctrine for "extraordinary" cases in which agencies claim stunning new authority going "beyond what Congress could reasonably be understood to have granted." *West Virginia*, 597 U.S. at 724.

C. Separation of Powers

The major questions doctrine is meant to promote "separation of powers principles." *West Virginia*, 597 U.S. at 723. 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), and "directs how Congress must draft statutes," Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 276 (2022).

Here, for instance, the decision below effectively imposes extratextual limitations on the Procurement Act's broad language because it found the minimum wage program to be costly. ROA.772-776. 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). And distorting a statute's original public meaning because of cost, political controversy, or other post-enactment developments 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. Env't 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 "clear congressional authorization" 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.

Indeed, far from reflecting "a practical understanding of legislative intent," *West Virginia*, 597 U.S. at 723, applying the doctrine too broadly would be at odds with Congress's express choice 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 new regulations to Congress, and 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. *See* Chad Squitieri, *Major Problems with Major Questions*, Law & Liberty (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions/.

In sum, stretching the major questions doctrine beyond "extraordinary" cases where an agency is seeking a "transformative expansion" of the power

Congress assigned it, *West Virginia*, 597 U.S. at 724, would not serve the separation of powers but instead would severely undermine it.

CONCLUSION

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

Respectfully submitted,

Dated: January 29, 2024

/s/ Brianne J. Gorod
Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Jess Zalph
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on 29th day of January, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 29th day of January, 2024.

/s/ Brianne J. Gorod
Brianne J. Gorod
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Executed this 29th day of January, 2024.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae