No. 24-1179 (and consolidated cases)

In the United States Court of Appeals for the Eighth Circuit

MINNESOTA TELECOM ALLIANCE, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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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 (CAC) 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

Petitioners claim that the major questions doctrine supports their challenge to the Federal Communications Commission's rules preventing discrimination in broadband access. In the wake of *West Virginia v. EPA*, 597 U.S. 697 (2022), such claims now appear whenever agencies take any remotely significant actions to fulfill their missions. But the Supreme Court has made clear that the major questions doctrine applies only rarely—when agencies belatedly assert "breathtaking," "staggering," or "extraordinary" regulatory power and, on top of that, a slew of factors reveal that Congress did not intend to grant such startling authority. Stretching the major questions doctrine beyond that limited scenario would not only defy precedent but would also be at odds with textualism, the original understanding of the Constitution, and the separation of powers.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief.

The Supreme Court has concluded in several prominent cases that agencies were claiming enormous and surprising 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 "there are 'extraordinary cases' that call for a different approach" from "routine statutory interpretation." 597 U.S. at 721-24 (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" for the agency's action. *Id.* at 724 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The major questions doctrine thus differs from "the ordinary tools of statutory interpretation." *Biden v. Nebraska*, 600 U.S. 477, 506 (2023). Accordingly, the Supreme Court has limited its application to truly "extraordinary" claims of authority, *id.* at 503, that amount to a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind," *id.* at 502 (quoting *West Virginia*, 597 U.S. at 728).

In other words, the major questions doctrine has two separate and highly demanding requirements. First, an agency must be claiming "breathtaking" new powers, *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam), with "staggering" economic and political significance, *Nebraska*, 600 U.S. at 502. 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), reaching "beyond what Congress could reasonably be understood to have granted," *id*.

It is not enough, therefore, that an agency's action has broad economic and political significance. Nor that it "goes further than what [the agency] has done in the past." *Biden v. Missouri*, 595 U.S. 87, 95 (2022) (per curiam) (upholding agency regulation). The question is whether this expansive and newly claimed power appears to exceed the authority that Congress "meant to confer," *West Virginia*, 597 U.S. at 725, despite its "plausible textual basis," *id.* at 723.

To answer that question, the Supreme Court focuses on whether agencies are asserting "unheralded" new 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 748 (quotation marks

omitted), and where Congress has "conspicuously and repeatedly declined" to confer that same power on the agency, *id.* at 724.

In *West Virginia*, for instance, the Court concluded that the Environmental Protection Agency had relied on an "obscure, never-used section of the law" to "restructure the American energy market" despite having "little reason to think Congress assigned such decisions to the Agency." *Id.* at 711, 724, 729. Its new plan required "technical and policy expertise *not* traditionally needed in EPA regulatory development," *id.* at 729 (quotation marks omitted), and Congress had "consistently rejected proposals" to give the EPA this power, *id.* at 731.

In short, the agency's action must be more than "unprecedented." *Id.* at 728. It must transform the statute "from one sort of scheme of . . . regulation into an entirely different kind." *Id.* (brackets and quotation marks omitted); *accord Nebraska*, 600 U.S. at 502.

Extending the major questions doctrine beyond such truly extraordinary cases would not only conflict with Supreme Court precedent but would also undermine textualism. Unlike "the ordinary tools of statutory interpretation," *id.* at 506, 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 agency action. *See id.* at 500-06. Some of these factors require judges to venture beyond their expertise into non-legal evaluations of

politics or economics, and many of these factors have no bearing on a statute's original public meaning because they focus on events occurring after its enactment. The major questions doctrine risks subordinating a statute's best reading to these non-textual considerations, as Justices across the ideological spectrum have recognized. Precisely because the doctrine is "distinct" from "routine statutory interpretation," *West Virginia*, 597 U.S. at 724, it is reserved for the most extraordinary claims of agency authority.

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.* at 723 (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 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. On the contrary, the major questions doctrine is the modern innovation, having first emerged more than two centuries after the Founding.

Finally, an overly permissive use of the major questions doctrine would erode critical limits on the judiciary's role. 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 constrains Congress too—blocking it from authorizing agency action whenever 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 newly minted concepts devised by the one branch of government not directly accountable to the people. And this risk of aggrandizing the judiciary over the elected branches is exacerbated by the subjective and political nature of several factors that trigger the doctrine.

These tensions between the major questions doctrine and textualism, original meaning, and the separation of powers make clear why the Supreme Court has confined 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, artificially narrowing the meaning of a statute's text would undermine, not vindicate, Congress's authority.

ARGUMENT

I. The Major Questions Doctrine Is Reserved for "Extraordinary" Cases Involving Breathtaking New Claims of Power that Congress Did Not Intend.

"[W]hile 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.'" *Nebraska*, 600 U.S. at 504-05 (quoting *West Virginia*, 597 U.S. at 724). Under that body of law, a major question arises only when agencies try to achieve "a radical or fundamental change to a statutory scheme" by claiming "an unheralded power representing a transformative expansion in [their] regulatory authority." *West Virginia*, 597 U.S. at 724 (quotation marks omitted). The issue is not whether agencies are asserting "highly consequential power," but rather whether they are asserting "highly consequential power *beyond what Congress could reasonably be understood to have granted*." *Id.* (emphasis added).

Two independent requirements must therefore be met. First, an agency must be claiming an "[e]xtraordinary grant[] of regulatory authority" by asserting "extravagant statutory power over the national economy." *Id.* at 723-24 (quotation marks omitted).

Second, the agency's claim must reflect "a fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind." *Nebraska*, 600 U.S. at 502 (quoting *West Virginia*, 597 U.S. at

728). To identify these departures from congressional intent, the Supreme Court looks to factors such as eyebrow-raising novelty, conflict with the overall statutory scheme, reliance on cryptic, ancillary provisions, and mismatch between the claimed authority and the agency's expertise.

Importantly, the economic and political significance of an agency action, no matter how great, cannot alone trigger the major questions doctrine so long as the action "fits neatly within the language of the statute" and aligns with the agency's established role. *Missouri*, 595 U.S. at 93-94. In *Biden v. Missouri*, for example, the Court refused to apply the doctrine to a vaccination mandate that allegedly "put more than 10 million healthcare workers to the choice of their jobs or an irreversible medical treatment." *Id.* at 108 (Alito, J., dissenting). The Court explained that the mandate, despite its wide-ranging impact, was not "surprising" because "addressing infection problems in Medicare and Medicaid facilities is what [the Health and Human Services Secretary] does." *Id.* at 95 (majority opinion). Likewise, the Court identified no major question in *Massachusetts v. EPA*, 549 U.S. 497 (2007), despite the immense stakes of the EPA's decision to regulate greenhouse gas emissions, because there was "nothing counterintuitive" about the agency carrying out such regulation and no departure from its "pre-existing mandate." *Id.* at 530-31.

Only when *both* requirements of the major questions doctrine converge does the doctrine come into play. *Compare Missouri*, 595 U.S. at 93 (declining to apply the doctrine despite vast economic and political significance), *and Massachusetts*, 549 U.S. at 530-31 (same), *with West Virginia*, 597 U.S. at 724-29 ("unheralded" and "transformative" use of "ancillary provision[s]" reaching beyond the agency's "comparative expertise"); *Nebraska*, 600 U.S. at 501-03 (use of "never previously claimed powers" to work a "fundamental revision of the statute" and claim "virtually unlimited power to rewrite [it]"); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 112, 118 (2022) (per curiam) ("*NFIB*") (a type of mandate "never before imposed" that regulated beyond the agency's "sphere of expertise" despite Congress's choice to deny the agency this power); *Utility Air*, 573 U.S. at 324 ("unheralded" and "transformative" power that "the statute [was] not designed to grant"); *Brown & Williamson*, 529 U.S. at 126, 160 (new reliance on "cryptic" provisions to assert power "inconsistent with the . . . overall regulatory scheme").

In short, the major questions doctrine is triggered only when both "the history and the breadth of the authority that [the agency] has asserted, *and* the economic and political significance of that assertion" together "provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia*, 597 U.S. at 721 (emphasis added) (quotation marks omitted).

In *West Virginia*, for example, the Court described the EPA's attempt to "substantially restructure the American energy market" through the Clean Power Plan as giving the agency "'unprecedented power over American industry.'" *Id.* at 724, 728 (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion)). But the plan was not merely significant in its scope—in the Court's view, it changed the entire "paradigm" of the EPA's regulatory role, effecting a "transformative expansion" based on an "unheralded" power that converted the statutory scheme "into an entirely different kind." *Id.* at 724, 728 (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 "repeatedly declined to enact itself." *Id.* at 724 (quotation marks omitted).

Biden v. Nebraska confirmed these demanding standards in the course of applying the major questions doctrine to a student debt relief plan. The plan satisfied the doctrine's "economic and political significance" requirement because it affected "[p]ractically every student borrower" in the nation and amounted to "nearly one-third of the Government's $1.7 trillion in annual discretionary spending." 600 U.S. at 502-03 (quotation marks omitted). This "extraordinary program," moreover, was judged to be completely unlike prior exercises of the same statutory authority, which were "extremely modest and narrow." *Id.* at 503,

501. Indeed, the executive branch was claiming "virtually unlimited power to rewrite the Education Act" and "unilaterally define every aspect of federal student financial aid." *Id.* at 502. This was "a fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind." *Id.* (quoting *West Virginia*, 597 U.S. at 728).

Notably, *Nebraska* first concluded that the administration was asserting a new type of authority that Congress likely did not intend, *id.* at 500-02, and only then determined that this assertion had "staggering" economic and political significance, *id.* at 502. The Court thus underscored that unless both criteria are met, the major questions doctrine does not apply. *Accord West Virginia*, 597 U.S. at 724-32.

As discussed below, the Supreme Court's cases applying the major questions doctrine offer guidance on how to determine when the doctrine's two requirements are satisfied.

A. Economic and Political Significance

The Supreme Court has set an extremely high bar for this component of the major questions doctrine. After all, much of what agencies routinely do has vast economic and political significance. And that is what Congress expects. *See infra* at 25 (discussing the Congressional Review Act). To qualify for the distinct interpretive rules that apply under the major questions doctrine, an agency's

assertion of authority must go much further: its impact must be "staggering," *Nebraska*, 600 U.S. at 502, "[e]xtraordinary," *West Virginia*, 597 U.S. at 723, and "breathtaking," *Realtors*, 594 U.S. at 764.

For instance, in *NFIB*, which struck down a national workplace vaccination mandate, the Court underscored: "This is no everyday exercise of federal power. It is instead a significant encroachment into the lives—and health—of a vast number of employees." 595 U.S. at 117 (citation and quotation marks omitted); *see id.* at 116-17 (roughly 84 million workers were covered by the mandate, which was enforced with penalties including removal from the workplace and "hefty fines").

Other cases applying the doctrine involve agency actions with similarly monumental effects. *West Virginia* emphasized 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." 597 U.S. at 729. *Nebraska* described the economic and political significance of the student debt plan, which would cost taxpayers "between $469 billion and $519 billion," as "staggering by any measure." 600 U.S. at 502 (quotation marks omitted). *Realtors* struck down a nationwide eviction moratorium that had an economic impact of "nearly $50 billion" and that also "intrude[d] into an area that is the particular domain of state law." 594 U.S. at 764. *Brown & Williamson* stressed that the Food and Drug

Administration had reversed its policy of nearly a century by attempting to regulate an industry with a "unique place in American history and society." 529 U.S. at 159.

In sum, the threshold requirement of the major questions doctrine—vast economic and political significance—is cleared only when agencies claim truly "[e]xtraordinary grants of regulatory authority." *West Virginia*, 597 U.S. at 723.

B. Departure from Congressional Intent

The second requirement of the major questions doctrine is that an agency's newly claimed power, despite its textual plausibility, would transform and expand the agency's authority in a way that Congress is "very unlikely" to have intended. *West Virginia*, 597 U.S. at 723; *see Nebraska*, 600 U.S. at 504 (rejecting the student debt plan because "Congress did not unanimously pass the HEROES Act with such power in mind"). To identify such dubious transformations, the Supreme Court looks to several factors developed in its prior opinions—applying the doctrine only when these "indicators from our previous major questions cases are present." *Id.* (quotation marks omitted).

1. Belated assertion of novel authority

The major questions doctrine is skeptical about "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; *compare NFIB*, 595 U.S. at 113, 119 ("OSHA has never before imposed such a mandate," which "takes on the character of a general public health measure, rather than an occupational safety or health standard" (quotation marks omitted)), *with Missouri*, 595 U.S. at 94-95 (comparing HHS's mandate to the type of funding preconditions that the agency "routinely imposes," albeit never before to deal with "an infection problem of this scale and scope").

2. Incongruence with statutory scheme

When an agency claims authority that fits poorly within a statute's overall regulatory structure, this supports applying the major questions doctrine. But the incongruence must be so severe that it distorts the statute beyond recognition. *See, e.g.*, *West Virginia*, 597 U.S. at 728 (the agency's interpretation amounts to a "fundamental revision of the statute" (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994)); *Nebraska*, 600 U.S. at 502 (the agency's interpretation transforms the agency's authority "into an entirely different kind" (quotation marks omitted)); *Utility Air*, 573 U.S. at 324 (the agency's interpretation would "render the statute unrecognizable to the Congress that designed it" (quotation marks

omitted)); *Brown & Williamson*, 529 U.S. at 134-37 (the agency's interpretation would require a result—outlawing tobacco—that is foreclosed by other statutes).

3. Reliance on obscure and ancillary provisions

The Supreme Court has been wary of newly claimed authority that rests on an outsized use of "'subtle device[s]'" or "cryptic" delegations. *Brown & Williamson*, 529 U.S. at 160 (quoting *MCI*, 512 U.S. at 231). *West Virginia*, for instance, emphasized that the EPA was using an "obscure," "ancillary," "little-used backwater" of the statute for its far-reaching new policy. 597 U.S. at 711, 724, 730 (quotation marks omitted). And *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), held that certain "vague terms" in the statute could not "alter the fundamental details of a regulatory scheme" by permitting a result that was otherwise "unambiguously" foreclosed. *Id.* at 468, 471.

4. Mismatch between asserted power and agency expertise

The scope of an agency's expertise sheds significant 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)).

Thus, in *King v. Burwell*, 576 U.S. 473 (2015), the Court concluded that Congress was "especially unlikely" to have granted the IRS special interpretive

authority over health insurance matters because the IRS "has no expertise in crafting health insurance policy." *Id.* at 486. And in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Court was unpersuaded that the relevant statute "cede[d] medical judgments to an executive official who lacks medical expertise." *Id.* at 266. The mismatch between an agency's expertise and its claimed authority is a persistent theme in major questions cases. *E.g.*, *NFIB*, 595 U.S. at 118 (citing the disparity between OSHA's workplace "sphere of expertise" and its attempt to "address[] public health more generally"); *West Virginia*, 597 U.S. at 729 (emphasizing that the EPA's plan "required technical and policy expertise *not* traditionally needed in EPA regulatory development" (quotation marks omitted)).

Conversely, however, it militates against applying the doctrine when an agency's claimed authority is in line with its traditional expertise. *E.g.*, *Missouri*, 595 U.S. at 95 ("addressing infection problems in Medicare and Medicaid facilities is what [the HHS Secretary] does"); *Massachusetts*, 549 U.S. at 530-31 (absent conflict with an agency's "pre-existing mandate," the Court would not "read ambiguity into a clear statute").

5. Subsequent legislative activity

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); *Nebraska*, 600 U.S. at 503-04 (similar).

But other major questions cases have downplayed such evidence. *E.g.*, *Brown & Williamson*, 529 U.S. at 155-56 (disclaiming reliance on Congress's "failure to act" and instead highlighting conflict between agency interpretation and other statutes). That approach is consistent with the Supreme Court's usual guidance 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.*, 594 U.S. 338, 362 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).

II. Stretching the Major Questions Doctrine Beyond the Most Extraordinary Cases Would Undermine 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 helps ameliorate serious tensions between the doctrine and textualism, the Constitution's original meaning, and the separation of powers.

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 County*, 594 U.S. 644, 674 (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*, 585 U.S. 274, 277 (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 fallout, political controversy, legislators' subjective expectations, and how an agency has previously implemented the statute. Many of these factors necessarily post-date the statute's enactment and are therefore incapable of affecting its original public meaning. And because the doctrine requires sifting through various extratextual considerations with undetermined relative weights, it resembles the type of multi-factor balancing test that textualists typically disparage. *E.g.*, *Gamble v. United States*, 587 U.S. 678, 724 (2019) (Thomas, J., concurring).

Accordingly, Justices across the ideological spectrum have recognized that the major questions doctrine poses problems for textualists. *See Nebraska*, 600 U.S. at 507-08 (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 (majority opinion).

After all, when the text of a statute gives agencies broadly worded authority, "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*, 591 U.S. 657, 677 (2020). Statutory language should not be artificially constrained due to "undesirable policy consequences," *Bostock*, 590 U.S. at 680, or because a policy "goes further than what the [agency] has done in the past," *Missouri*, 595 U.S. at 95.

Precisely because the major questions doctrine departs from "the ordinary tools of statutory interpretation," *Nebraska*, 600 U.S. at 506, 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 503-04 (quoting *West Virginia*, 597 U.S. at 728). Expanding the doctrine beyond that limited role 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*, 597 U.S. at 723.[2] 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 embodied 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 choices. The Founders had no qualms about legislation authorizing

[2] 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*, 600 U.S. at 511 (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)).

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 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 all other Americans the "right and liberty" of offering the same products. 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 prohibits legislation that assigns specific 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 Congress tasked the executive branch with resolving major policy questions from the start. *Cf. CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 432 (2024) (early legislation "provides 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—yet another reason to reserve the doctrine for "extraordinary" cases in which stunning new claims of authority go "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, shifting authority from the elected branches to the courts. Because the doctrine is a judicial creation that "directs how Congress must draft statutes," Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 276 (2022), it risks becoming "a license for judicial aggrandizement," Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 175, 200 (2022).

At bottom, the major questions doctrine disallows plausible readings of a statute's text based on concerns about the real-world implications of an agency's reading and how the legislators who enacted the statute might have regarded that reading. *E.g.*, *Nebraska*, 600 U.S. at 504 ("Congress did not unanimously pass the HEROES Act with such power in mind"). But 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*, 586 U.S. 105, 113 (2019) (quotation marks omitted). In other words, "[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).

This potential for encroachment on congressional authority 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," it risks eroding 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).

Adding to those concerns, when Congress enacted most of the statutes on the books, it could not have anticipated that courts would later require "clear congressional authorization" for specific regulatory actions that future generations might 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 explicit 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 such 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/.

These concerns are not alleviated by Congress's ability to pass new legislation in response to an errant 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, stretching the major questions doctrine beyond "extraordinary" cases in which an agency seeks a "transformative expansion" of the power

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

CONCLUSION

For the foregoing reasons, this Court should hold that the major questions doctrine does not apply in this case.

Respectfully submitted,

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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 5,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* 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 Microsoft Word 14-point Times New Roman font.

Executed this 5th day of July, 2024.

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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 July 5, 2024.

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