No. 23-50724

In the United States Court of Appeals for the Fifth Circuit

ROBERT MAYFIELD; R.U.M. ENTERPRISES, INCORPORATED,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; MARTIN WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

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

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

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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: March 28, 2024

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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 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

The major questions doctrine does not apply to the rule challenged in this case. Nor does it apply to the Department of Labor's decades-old method of using salaries to help distinguish employees who are exempt from the wage and overtime protections of the Fair Labor Standards Act from those who are not.

The Supreme Court has made clear that the major question 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,

[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.

but would also be at odds with textualism, the original understanding of the Constitution, and the separation of powers.

The Supreme Court has 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 "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 *Util. 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 *Util. Air*, 573 U.S. at 324), stretching "beyond what Congress could reasonably be understood to have granted," *id.*

The second 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," particularly where the agency "has no comparative expertise" in the area it seeks to regulate, and where Congress has "conspicuously and repeatedly declined" to confer that same power on the agency. *Id.* at 723-24, 729 (quotation marks omitted). 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 Department of Labor ("DOL") has not exploited an "obscure, never-used section of the law" to assert a new type of power outside its "comparative expertise." *West Virginia*, 597 U.S. at 711, 729 (quotation marks omitted). Instead, the agency used the same explicit grant of authority it has long used in order to address an issue squarely within its area of expertise: the scope of the statutory exemption from wage and overtime obligations. Indeed, the agency has used a salary-level test to help define that exemption since 1938.

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 agency action. *See id.* at 2372-75. Some of these factors require judges to venture beyond their expertise into 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 the most extraordinary cases.

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 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 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, it also constrains Congress, 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 concepts recently devised by the one branch of government not directly accountable to the people. This risk of judicial aggrandizement 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 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, as here, artificially limiting the 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" began as a general rule of thumb used in traditional statutory interpretation before recently becoming a requirement of "clear congressional authorization" in "certain extraordinary cases." *West Virginia*, 597 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 apply.

When the Supreme Court first invoked the presumption that Congress "speak[s] clearly" when assigning major questions to agencies, it did so only to bolster conclusions reached through ordinary statutory interpretation. The opinion with the earliest glimmers of the doctrine relied on normal statutory construction before observing that the statute should not be read as implicitly granting an "unprecedented power over American industry." *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 nature of its authority. For example, in *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 223-24 (1994), the Court rejected an agency's claim that its power to "modify" certain statutory requirements allowed it to waive them entirely for a large swath of industry. The

agency could not use an ancillary provision to effect such 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. In "extraordinary cases," it 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, 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," in sum, "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, 471 (2001), where the Court held that a statute "unambiguously" barred the EPA from considering compliance costs when setting air quality

standards. Certain "modest words" in the statute did not authorize that broad result, 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. But 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 "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," making 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 statute's "unwillingness to cede medical judgments to an executive official who lacks medical expertise." *Id.* at 266. Similarly, the Court cited the IRS's lack of "expertise in crafting health insurance policy" in refusing to defer to its interpretation of 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 statute's best reading. *Id.* at 490-98.

The Court's pandemic-era cases again underscored that more is required for a major question than economic and political significance. The Court first ruled against an eviction moratorium because the relevant statute focused 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 a vaccination-or-testing mandate for large employers, the Court relied on more than the mandate's "significant encroachment into the lives—and health—of a vast number of employees." *Nat'l Fed. of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022) (per curiam). It also cited the conspicuous novelty of the mandate, the poor fit between OSHA's workplace expertise and its effort to promulgate "a general public health measure," and signs that Congress believed OSHA lacked this power. *Id.* at 118-19. The mandate was "simply not part of what the agency was built for." *Id.* at 119 (quotation marks omitted).

Significantly, however, the Court did not apply the major questions doctrine to an HHS vaccination mandate at certain medical facilities. *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. 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. There was 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 explicitly adopted the "major questions doctrine" 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. In the Court's view, 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). According to the Court, 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).

Biden v. Nebraska confirmed these standards. 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 part of this equation. Notably, the Court *first* concluded that the administration was asserting a new authority that Congress likely did not intend: The debt relief program was, the Court said, completely unlike prior uses of the statute, and the agency was claiming "virtually unlimited power to rewrite the Education Act." *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 Salary-Level Test for FLSA-Exempt Workers Is Far from "Extraordinary."

As explained above, the major questions doctrine requires a "radical or fundamental change to a statutory scheme" going beyond "what Congress could reasonably be understood to have granted." *West Virginia*, 597 U.S. at 723 (quotation marks omitted). It does not apply whenever an agency's policy is important. *Compare Missouri*, 595 U.S. at 93 (refusing 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 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"), *Util. Air*, 573 U.S. at 324 (claim of "unheralded" and "transformative" power that "the statute [was] not designed to grant"), *and 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. Neither the DOL's 2019 Rule, nor the use of a salary-level test in general, has the magnitude of economic and political significance required by precedent. Nor does either transform the authority Congress meant to confer in the Fair Labor Standards Act ("FLSA").

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 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.

Tacitly conceding that neither the 2019 Rule nor the agency's longstanding methodology qualifies, Appellants argue that instead of assessing the economic and political impact of that Rule or the agency's methodology, this Court should instead attempt to predict the impact if the agency deployed "extreme rules," such as a salary level so high that it essentially eliminated the statutory exemption for

executive, administrative, and professional ("EAP") employees. Appellants' Br. 29-30. The DOL, however, is not asserting such authority, and courts cannot measure the economic and political significance of rules that do not exist. The proper focus, therefore, is on the 2019 Rule's update to wage data, or, at most, the methodology used in that Rule.

Neither the 2019 Rule nor the DOL's general approach to the salary-level test resembles the "unprecedented power over American industry" reflected in the EPA's climate plan, which attempted to unilaterally "decid[e] how Americans will get their energy." *West Virginia*, 597 U.S. at 729. The salary-level test simply helps screen out employees who should not be exempt, but who nevertheless might be wrongly categorized as such by other approaches, while also helping resolve borderline cases. Harry Weiss, U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 8-9 (June 30, 1949).

The DOL's action here 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 that might exclude 1.2 million workers from the EAP exemption—a miniscule proportion of the 140 million workers subject to the FLSA, ROA.962—lacks anything close to the economic impact in past major questions cases. Further, the estimated costs of 2019 Rule, *see* 84 Fed. Reg. 51230, 51254-55 (Sept. 29, 2019) (direct employer costs of $173.3 million per year, and increased employee wages of $298.8 million per year, over the first ten years), are far below the "nearly $50 billion" in costs imposed by the eviction moratorium, *Realtors*, 141 S. Ct. at 2489, not to mention the much higher expense ("between $469 billion and $519 billion") of the student debt program, *Nebraska*, 143 S. Ct. at 2373 (quotation marks omitted).

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.*, *Util. Air*, 573 U.S. at 332 ("We are not talking about extending EPA jurisdiction," but about increasing demands for "entities already subject to its regulation."). But the 2019 Rule regulates the same employers in the same way that DOL has regulated for decades—it simply updates earnings data, reflecting recent changes in wages. 84 Fed. Reg. at 51231.

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 pass the statute "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 agency 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). Actions "strikingly unlike" past efforts may implicate the doctrine, *NFIB*, 595 U.S. at 118, although not actions that merely go "further than what [an agency] has done in the past," *Missouri*, 595 U.S. at 95.

The 2019 Rule is neither. A salary-level test has been a central part of the EAP exemption since the first regulations were issued in 1938. *See* 3 Fed. Reg. 2518, 2518 (Oct. 20, 1938) (setting a $30 per week minimum threshold). And the 2019 Rule uses the same formula as the 2004 Rule, *see* 84 Fed. Reg. at 51231.

What's more, in 1938 there was already precedent for a salary-level test. Many states had adopted wage-and-hour laws that used salary level to help identify exempt employees, *see* Harold Stein, U.S. Dep't of Labor, *"Executive, Administrative, Professional . . . Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* 19-20 (Oct. 10, 1940) ("Stein Report"), and "fair competition" codes adopted by industries pursuant to a 1933 statute included these requirements as well, *id.* at 20-21, 42.

In light of this "established practice," *West Virginia*, 597 U.S. 725 (quotation marks omitted), going back 90 years, neither the DOL's salary-level approach nor its latest earnings update is the type of unprecedented action with which the major questions doctrine is concerned.

2. Incongruence with statutory scheme

An assertion of authority that fits poorly within a statute's overall regulatory structure signals a "fundamental revision of the statute" that supports applying the doctrine. *West Virginia*, 597 U.S. at 728 (quotation marks omitted). But the use of a salary-level test does not transform the DOL's 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," *Util. Air*, 573 U.S. at 324 (quotation marks omitted).

The FLSA instructs the Secretary of Labor to "define[] and delimit[]" the terms "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). While the DOL's longstanding definition emphasizes the duties performed by an employee, it also requires that exempt workers be paid a salary over a certain threshold. 84 Fed. Reg. at 54230. This test is a critical part of determining whether workers are indeed employed in a bona fide EAP capacity.

When the FLSA was passed, there was "wide agreement" that salary level was a relevant factor in assessing the "bona fide" character of exempt employment. Stein Report at 19; *see also id.* at 19, 26, 34 ("the best single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them"). The test therefore helps in "drawing the line beyond which the exemption is not applicable." *Id.* at 2.

Particularly because unwarranted exemptions "would tend to defeat [the FLSA's] purpose," *Fleming v. Hawkeye Pearl Button Co.*, 113 F.2d 52, 56 (8th Cir. 1940), using a salary-level test to avoid such wrongful exemptions fits comfortably within the statute's structure and design. Accordingly, the 2019 Rule is a "straightforward and predictable example" of the DOL's long-recognized authority in this area. *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 DOL did not resort to a "little-used backwater" to issue these standards, but rather applied the explicit mandate conferred in 29 U.S.C. § 213(a)(1), which orders the DOL to set the limits of the EAP exemption and to adjust these limits "from time to time." 29 U.S.C. 213(a)(1).

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 the Secretary of Labor would be tasked with determining which employees should be exempt from overtime rules under federal labor law. *Cf. Gonzales*, 546 U.S. at 266 (an official "who lacks medical expertise" making

"medical judgments"); *NFIB*, 595 U.S. at 118 (an agency with only a workplace "sphere of expertise" trying to "address[] public health more generally").

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).

In any event, here there is no evidence of "Congress' consistent judgment to deny [the DOL] this power." *Brown & Williamson*, 529 U.S. at 160. Congress has repeatedly reexamined and amended the FLSA since the salary-level test was first established in 1938, and not only has the use of this test remained untouched, Congress has explicitly incorporated it into another employment statute. *See* Appellees' Br. 23-24.

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 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*, 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 (majority opinion).

All of this is well illustrated here. Appellants claim that "the proper analysis" when interpreting the FLSA's text is to consider the real-world "consequences" of the agency's action. Appellants' Br. 29. But statutory language should not be artificially constrained due to "undesirable policy consequences," *Bostock*, 140 S. Ct. at 1753, or because a policy "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).

Appellants even claim the district court erred by ignoring "the political firestorm that would arise" if the agency adopted "more extreme rules" in the future. Appellants' Br. 29-30. That is not how courts determine what the law means. It should go without saying that judges should not distort statutory text based on speculation about the political reaction to imaginary future policies.

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). That is not remotely the case here.

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 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

[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*, 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, Appellants ask this Court to impose new, extratextual limitations on the FLSA's broad language—which Congress has left in place for generations—because the DOL's exercise of this power *could* become politically controversial or economically significant if the agency adopts a more extreme view of its authority in the future. Appellants' Br. 29-31. 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—not to mention speculation about policies an agency might someday adopt—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 FLSA 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 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,

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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 28th day of March, 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 28th day of March, 2024.

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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 6,458 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 28th day of March, 2024.

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