No. 24-1522 & consolidated cases Nos. 24-1624, 24-1626, 24-1627, 24-1628, 24-1631, 24-1634, 24-1685, & 24-2173

In the United States Court of Appeals for the Eighth Circuit

STATE OF IOWA, ET AL.,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent,

DISTRICT OF COLUMBIA, ET AL.,

Intervenors.

On Petitions for Review of an Order of the Securities and Exchange Commission

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

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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 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 Securities and Exchange Commission's rule requiring companies to file climate-related disclosures. The Supreme Court has made clear that this doctrine applies extremely 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 context would not only defy precedent but would also be at odds with textualism, the original understanding of the Constitution, and the separation of powers.

In a series of cases beginning in the late twentieth century, the Supreme Court concluded that agencies were claiming enormous and surprising new

[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.

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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" for the agency's action. *Id.* at 723 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

The 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 "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 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*, 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), reaching "beyond what Congress could reasonably be understood to have granted," *id*.

The second requirement is satisfied when agencies assert "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. 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*, 143 S. Ct. at 2373.

Here, however, the Securities and Exchange Commission ("SEC") 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). The SEC's new rule is a routine exercise of one of its core authorities—requiring companies to disclose information as "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1); *id.* § 78*l*(b)(1). The SEC's exercise of this authority serves the statutory goal of ensuring "full and fair disclosure of the character of securities sold in interstate and foreign commerce." Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74. In short, the new rule reflects no "change to [the] statutory scheme" at all, much less a "radical or fundamental change." *West Virginia*, 597 U.S. at 723.

Extending the major questions doctrine to cases like this would not only conflict with Supreme Court precedent, it would also undermine textualism. Unlike "the ordinary tools of statutory interpretation," *Nebraska*, 143 S. Ct. at 2375, the major questions 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 2372-76. 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. 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 circumstances.

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.

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 new concepts devised by the one branch of government not

directly accountable to the people. And this risk judicial aggrandizement is further exacerbated by the subjective and political nature of several of the factors that trigger the doctrine.

These tensions 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 Power that Congress Did Not Intend to Give.

What is now called the "major questions doctrine" began as a general rule of thumb in traditional statutory interpretation before becoming a requirement of "clear congressional authorization" in "certain extraordinary cases." *West Virginia*, 597 U.S. at 723 (quotation marks omitted). Throughout this evolution, economic and political significance alone has never been enough to trigger the doctrine. Instead, the ultimate focus is legislative intent. The issue is not whether

agencies are asserting "highly consequential power," but rather whether it is "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 idea that Congress "speak[s] clearly" when assigning major questions to agencies, it did so only to bolster conclusions reached through ordinary statutory interpretation. *Id.* at 716. 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 began using major questions analysis to buttress determinations that a statute's plain meaning precluded agency deference. Essentially, the Court began asking whether an agency was overhauling the nature of its authority. For example, in *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 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 authority to regulate tobacco, the FDA reversed course. 529 U.S. at 125. The Court concluded that the FDA could not regulate tobacco because doing so would be 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 implausibility of the agency's interpretation, 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.

The same focus on congressional intent 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 while it was "unlikely that Congress meant to ban tobacco products," the Court explained, 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*, 594 U.S. at 764. 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.* Notably, that

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assessment of "scope" emphasized the moratorium's "unprecedented" nature and the agency's identification of virtually "no limit" to its power. *Id.* at 765.

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 a different vaccination requirement falling more squarely within the agency's mandate. *Biden v. Missouri*, 595 U.S. 87 (2022) (per curiam) (upholding HHS rule governing medical facilities). 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 94-95. 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. In particular, the Court focused on the doctrine's second requirement—departure from congressional intent. 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 724 (quotation marks omitted).

Biden v. Nebraska confirmed this focus on congressional intent. Reiterating that the "major questions" label "refers to an identifiable body of law that has developed over a series of significant cases," 143 S. Ct. at 2374 (quotation marks omitted), the Court explained that the doctrine applies only when the "indicators from our previous major questions cases are present," *id.* (quotation marks omitted). And "economic and political significance" is only part of this equation.

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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 2373. 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). 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 SEC's Climate Disclosure Rule 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 723-24 (quotation marks omitted), in cases with vast "economic and political significance," *id.* at 721. Here, however, both parts of that equation are missing. The climate disclosure rule does not approach the magnitude of economic and political significance required by Supreme Court precedent. Nor does it transform the authority Congress conferred on the SEC when it passed the Securities Act and the Securities Exchange Act.

A. Economic and Political Significance

Much executive branch action is economically and politically significant. To implicate the major questions doctrine, the scope of an agency's claimed authority must be "staggering," *Nebraska*, 143 S. Ct. at 2373, "[e]xtraordinary," *West Virginia*, 597 U.S. at 723, or "breathtaking," *Realtors*, 594 U.S. at 764.

While State Petitioners ("Petitioners") argue that the costs of complying with the new disclosure requirements will total in the "billions," Pet. Br. 15; *see also* State Pet. Emergency Mot. for Stay 4 (Apr. 3, 2024) (suggesting cost of more than two billion dollars annually); *see also* Pet. Br. 36-37, the precise costs are difficult to calculate. As the SEC has noted, the costs for different entities may vary considerably. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668, 21,875 (Mar. 28, 2024); *id.* (estimate of the annual average costs on each entity over the first 10 years ranging from less than $197,000 to over $739,000). Regardless, Petitioners have not established that the costs are comparable to the level of economic impact at issue in the Supreme Court's major questions cases—the "nearly $50 billion," in costs imposed by the eviction moratorium, *Realtors*, 594 U.S. at 764, or the much higher price ("between $469 billion and $519 billion") of the student debt program, *Nebraska*, 143 S. Ct. at 2373 (quotation marks omitted).

The SEC's new disclosure requirements are likewise a far cry from the "unprecedented power over American industry" reflected in the EPA's climate plan, which, according to the Court, attempted to unilaterally "decid[e] how Americans will get their energy," *West Virginia*, 597 U.S. at 729, and 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.

Notably, too, 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."). There is no newly regulated entity here. The SEC was created to regulate the securities markets, and the new disclosure requirements do not change the universe of institutions subject to the SEC's oversight. They simply require many of these institutions to include additional information with the disclosures they are already required to file. This lacks anything close to the economic and political impact of the "extraordinary," *Nebraska*, 143 S. Ct. at 2374, and "breathtaking," *Realtors*, 594 U.S. at 764, assertions of authority in past cases.

B. Adherence to Congressional Intent

The major questions doctrine does not look for elephants—it looks for elephants hidden in mouseholes. *See Whitman*, 531 U.S. at 468. No matter how great the economic and political significance of an agency action, it does not trigger the doctrine unless it transforms the agency's 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 such dubious transformations, the Supreme Court looks for eyebrow-raising novelty, conflict with the statutory scheme, reliance on cryptic or ancillary provisions, mismatch with agency expertise, and congressional activity suggesting the agency lacks the authority it asserts. Those telltale signs are absent here.

1. Belated Assertion of Novel Authority

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). It is not enough, however, that agency actions merely go "further than what [the agency] has done in the past." *Missouri*, 595 U.S. at 95 (declining to apply the doctrine). Because the Court considers novelty at a high level of generality, the agency's newly claimed authority must be "strikingly unlike" its past efforts. *NFIB*, 595 U.S. at 118.

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That is not the case here. Under the new rule, the SEC is exercising the same power it has always exercised under the Securities Act and the Securities Exchange Act—the power to require publicly traded companies to disclose information important to the public interest and the protection of investors. *See, e.g.*, 15 U.S.C. § 77g(a)(1); *id.* § 78*l*(b)(1); *id.* § 78m(a). Indeed, "[t]he Commission has amended its disclosure requirements dozens of times over the last 90 years based on the determination that the required information would be important to investment and voting decisions." 89 Fed. Reg. at 21,683-84; *see also* SEC Br. 34-35. And the nature and subject of these disclosure requirements has varied widely over time. *See, e.g.*, 17 C.F.R. § 229.407(c)(2)(vi) (requiring registrants to disclose information about corporate governance, including information about the director nomination process and whether and how they consider diversity as part of it); Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380, 11,423 (Mar. 16 1982) (requiring disclosure of factors that make a security offer high risk); Securities and Exchange Commission, *CF Disclosure Guidance, Topic No. 2: Cybersecurity* (Oct. 13, 2011), www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm (clarifying that rules mandating the disclosure of material risks often require the disclosure of cyber security risks); *see also* SEC Br. 47-48.

Indeed, the subject of the disclosure requirements at issue here is hardly novel, let alone "strikingly unlike the agency's past efforts," *NFIB*, 595 U.S. at 118. In the 1970s, the SEC required companies to disclose the costs of complying with environmental laws, and also clarified that other general requirements to disclose material information included environmental information. *Environmental Disclosure*, Interpretive Release No. 33–6130 (Sept. 27, 1979) [44 Fed. Reg. 56,924 (Oct. 3, 1979)]; *see also* SEC Br. 9-10. Similarly, in 2010, the SEC issued guidance about the relationship between the risks of climate change and existing SEC disclosure requirements, noting that companies may already be required to report on potential physical effects of climate change as part of a broader requirement of disclosing "risk factors." Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290, 6,294, 6,296-97 (Feb. 8, 2010).

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 climate disclosure rule does not transform the SEC's regulatory authority "into an entirely different kind," *Nebraska*, 143 S. Ct. at 2373 (quotation marks omitted), or

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plausibly "render the statute unrecognizable to the Congress that designed it," *Util. Air*, 573 U.S. at 324 (quotation marks omitted).

Congress gave the SEC flexible authority to require disclosures that are "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1); *id.* § 78*l* (b)(1). The point of this framework is to give the SEC the discretion to identify information that may meet these statutory criteria—like information about climate risks—that had not previously been identified as such. In promulgating this rule, the SEC relied on evidence that "climate-related risks can affect a company's business and its financial performance and position in a number of ways," 89 Fed. Reg. at 21,685, making disclosure about such risks "necessary or appropriate in the public interest or for the protection of investors," 15 U.S.C. § 77g(a)(1).

Thus, the climate disclosure rule is a "straightforward and predictable example" of the SEC's authority to require disclosures about information material to investors. *Missouri*, 595 U.S. at 95.

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

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backwater" of the statute for its far-reaching new policy. 597 U.S. at 711, 724, 730 (quotation marks omitted).

Here, the SEC did not resort to a "little-used backwater" to claim a sweeping new power, but rather applied one of its core authorities under its governing statutes: to require disclosure as "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1); *id.* § 78*l*(b)(1); *id.* § 78m(a).

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)); *accord King*, 576 U.S. at 486.

Determining what information might affect the financial health of a company or otherwise be material to its potential investors is squarely within the SEC's expertise. Simply put, this "is what [SEC] does." *Missouri*, 595 U.S. at 95. It thus does not "raise[] an eyebrow," *West Virginia*, 597 U.S. at 730, that the SEC would require disclosures important to investors concerned about the financial effects of climate change and climate policy. *Cf. Gonzales*, 546 U.S. at 266 (an official "who lacks medical expertise" making "medical judgments").

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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). But other cases have downplayed such evidence. *E.g.*, *Brown & Williamson*, 529 U.S. at 155-56 (disclaiming reliance "on Congress' failure to act").

The Court's usual guidance is that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," *Pension Benefit Gaur. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quotation marks omitted), 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).

In any event, Petitioners have shown no evidence of "Congress' consistent judgment to deny [the SEC] this power." *Brown & Williamson*, 529 U.S. at 160. The failed legislation Petitioners cite "differ[s] in key respects from the Rules," SEC Br. 56-57, and legislative efforts that would have *limited* the SEC's authority to require disclosure of climate risks have also failed, *see, e.g.*, H.R. 8589, 117th

Cong. (2022); H.R. Res. 1028, 117th Cong. (2022), underscoring that the failed bills Petitioner cites shed little insight into what today's Congressmembers think about the scope of the SEC's existing authority. More importantly, Petitioners identify no action Congress has actually taken to limit the SEC's ability to require climate disclosures. *Cf. NFIB*, 595 U.S. at 119 (citing "a majority vote of the Senate disapproving the regulation").

III. 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*, 590 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).

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*, 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[]"). And 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

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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*, 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 (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 been endorsed by 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

[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), *with Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

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"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 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, 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).

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Nothing in the Constitution's text or history prohibits Congress from using its "legislative Powers," U.S. Const. art. I, § 1, to assign specific policy questions to agencies, 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 agencies 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 raises 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

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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*, 143 S. Ct. at 2374 ("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).

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Far from reflecting "a practical understanding of legislative intent," *West Virginia*, 597 U.S. at 723, applying the doctrine too broadly would also 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 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, does not serve the separation of powers but instead severely undermines it.

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CONCLUSION

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

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) because it contains 6,495 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 Microsoft Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

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

Dated: August 15, 2023

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