No. 23-11097

IN THE
United States Court of Appeals for the Fifth Circuit

STATE OF UTAH, *et al.*,
Plaintiffs-Appellants,

v.

JULIE A. SU, Acting Secretary of the U.S. Department of Labor, and, U.S. DEPARTMENT OF LABOR,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
No. 2:23-CV-016-Z, Hon. Matthew J. Kacsmaryk

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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DISCLOSURE STATEMENT

The Institute for Policy Integrity (Policy Integrity) is a nonpartisan, not-for-profit organization at New York University School of Law.[1] No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

DATED: March 26, 2024

Respectfully submitted,

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[1] This brief does not purport to represent the views, if any, of New York University School of Law.

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INTEREST OF *AMICUS CURIAE* & AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law (Policy Integrity) is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.[1] All parties consent to this brief's filing.

Policy Integrity's staff have published scholarship on administrative law, including on the major questions doctrine. *See, e.g.*, Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 Wm. & Mary Env't L. & Pol'y Rev. 47 (2022); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 Admin. L. Rev. 317 (2022); *see also* Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 35 Geo. Env't L. Rev. (forthcoming 2024). Policy Integrity and its staff have also filed *amicus curiae* briefs in litigation involving the major questions doctrine. *See* Br. of the Inst. for Pol'y Integrity as *Amicus Curiae* in Supp. of Neither Party,

[1] Per Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief wholly or partly, and no person contributed money intended to fund its preparation or submission.

Sweet v. Cardona, No. 23-15049 (9th Cir. May 10, 2023); Br. of the Inst. for Pol'y Integrity as *Amicus Curiae* in Supp. of Resp's, *Texas v. EPA*, No. 22-1031 (D.C. Cir. Mar. 3, 2023).

Any statement on the major questions doctrine from this Court could have far-reaching implications for administrative law. Policy Integrity therefore submits this brief to aid the Court by ensuring it has a complete and accurate understanding of the doctrine.

SUMMARY OF ARGUMENT

This case is part of a growing trend: Parties often invoke the major questions doctrine when they oppose an agency's action without closely following the analysis in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), or the Supreme Court's other recent cases applying the doctrine. Parties increasingly treat the doctrine as an incantation—something they hope will ensure a favorable ruling if uttered enough times.

Here, for example, Plaintiffs-Appellants argue that the major questions doctrine applies to the Department of Labor's 2022 Investment Duties Rule (Rule), but they offer sparse analysis. They essentially argue that the Rule is economically significant because it applies to Americans' retirement savings and that it is politically significant because members

of Congress have unsuccessfully tried to pass bills on similar subject matter and also unsuccessfully tried to repeal the Rule. Those two points together, they contend, trigger the doctrine. Yet such thin reasoning turning on economic and political significance does not align with the Supreme Court's major questions precedents. And it would turn a doctrine meant to apply only in "extraordinary" cases into one with much broader and indeterminate application.

I. True, economic and political significance may be necessary conditions for triggering the major questions doctrine. But they have never been sufficient. Rather, *West Virginia* explains that cases "extraordinary" enough to trigger the doctrine have been ones "in which the 'history *and* the breadth of the authority that [the agency] has asserted,' *and* the 'economic and political significance' of that assertion, provide a reason to hesitate." 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159–60 (2000)) (emphasis added). The Supreme Court repeated the same formulation last year in *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023).

Both opinions also followed the same order of analysis—addressing first the history, then the breadth, and only then the economic and

political significance of the action at issue. Both opinions indicate that these three factors are conjunctive requirements—each necessary but none alone sufficient to trigger the doctrine.

What is more, the economic or political significance of an agency's action has never been the sole or primary basis for triggering the major questions doctrine under the Supreme Court's precedents. That fact is unsurprising given that many agency actions have arguably large economic effects, but the doctrine applies only in "extraordinary" cases. Take this case: Under Plaintiffs-Appellants' reasoning, any agency rule under the Employee Retirement Income Security Act (ERISA) that affects Americans' retirement savings triggers the doctrine. That reasoning would apply the doctrine in many ordinary cases rather than only extraordinary ones.

The same goes for political significance. Under Plaintiffs-Appellants' reasoning, any agency action touching on the same subject matter as the thousands of legislative proposals that Congress declines to enact—over 16,000 in the 117th Congress alone—qualifies as politically significant. Their more specific argument about the

unsuccessful use of the Congressional Review Act (CRA) to repeal this Rule tries to turn a failed use of that statute into a successful one.

II. The District Court (Kacsmaryk, J.) understood all of this, correctly reasoning that the major questions doctrine does not apply to the Rule for the simple reason that it is analogous to past exercises of DOL's authority. Stated differently, history alone means the major questions doctrine does not apply to the Rule, even if one could arguably describe it as economically or politically significant. The District Court's reasoning fully aligns with recent, binding Supreme Court precedent.

Plaintiffs-Appellants try to evade the District Court's ruling by citing (a) concurring rather than majority opinions from the Supreme Court and (b) a single, decades-old decision that provided the initial seed for the major questions doctrine rather than the more recent decisions supplying the doctrine's content. These efforts fail because the Supreme Court's recent majority opinions expressly invoking the doctrine bind this Court. The District Court correctly applied those majority opinions in rejecting the doctrine's application here.

Accordingly, this Court should affirm the District Court's ruling, including its refusal to apply the major questions doctrine in this case.

ARGUMENT

I. Only "Extraordinary Cases" Trigger The Major Questions Doctrine.

In *West Virginia*, the Supreme Court stressed that only "extraordinary cases" call for application of the major questions doctrine—"cases in which the 'history *and* the breadth of the authority that [the agency] has asserted,' *and* the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60) (emphasis added). The Supreme Court reiterated the formulation—emphasizing the same factors—in *Nebraska*. 143 S. Ct. at 2372 (citing *West Virginia*, 142 S. Ct. at 2608). Both opinions indicate that all three factors—history, *and* breadth, *and* significance—must be present for a case to trigger the major questions doctrine.

Instead of following the Supreme Court's analysis in *West Virginia* and *Nebraska*, however, many litigants (and courts) have misapplied the doctrine by placing undue emphasis on the economic or political significance of the action at issue. As the following sections explain, such arguments overlook *West Virginia*'s and *Nebraska*'s directives to consider

(1) history, (2) breadth, and (3) economic and political significance to ensure the doctrine applies only in extraordinary cases.

Such arguments also find little support in recent cases predating *West Virginia*. Although the major questions doctrine traces its roots to two earlier cases—*MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 229 (1994), and *Brown & Williamson*—the Supreme Court did not invoke the doctrine or articulate a test for it until *West Virginia*. *See* Brunstein & Goodson, *supra*, at 51–52. That said, many scholars often group together three other opinions decided just before *West Virginia* in their discussions of the doctrine. *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 262 (2022) (discussing *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.* (*Alabama Realtors*), 141 S. Ct. 2485, 2487 (2021) (per curiam); *Nat'l Fed. of Ind. Businesses v. Dep't of Lab.*, 142 S. Ct. 661, 665, 666 (2022) (per curiam)); and *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam)). Accordingly, this brief also references those three opinions in addition to *West Virginia* and *Nebraska*—the two most recent decisions and the only ones that expressly apply the major questions doctrine.

A. History and breadth must indicate a case is extraordinary.

Although the Supreme Court often references economic and political significance in its major questions precedents, its application of the doctrine has placed far greater emphasis on the history and the breadth of the authority that the agency has asserted.

Consider *West Virginia*, the Supreme Court's most thorough discussion of the major questions doctrine to date (and, as noted, the first to expressly invoke the doctrine). That case involved Section 111(d) of the Clean Air Act, which requires States to set performance standards for power plants' and other sources' emissions of certain air pollutants, including greenhouse gases. 42 U.S.C. § 7411(d). But the Environmental Protection Agency (EPA) "retains the primary regulatory role in Section 111(d)," *West Virginia*, 142 S. Ct. at 2601, because the standard the States set "must reflect the 'best system of emission reduction' that [EPA] has determined to be 'adequately demonstrated' for the" source, *id.* at 2599 (quoting 42 U.S.C. §§ 7411(a)(1), (b)(1), (d)). The question in *West Virginia* was whether Section 111(d) authorized EPA to issue the Clean Power Plan, which, among other things, identified purposeful

"generation shifting" as a component of the best system of emission reduction for power plants. *Id.* at 2603–05.[2]

The Supreme Court explained that *West Virginia* presented "a major questions case" because EPA had "'claim[ed] to discover in a long-extant statute an [1] unheralded power' [2] representing a 'transformative expansion in [its] regulatory authority.'" *Id.* at 2610 (quoting *Util. Air Resource Grp. v. EPA*, 573 U.S. 302, 324 (2014)). After introducing these two factors, which echo references to "history and . . . breadth" earlier in the opinion, *id.* at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60), the Supreme Court divided the bulk of its legal analysis of the doctrine's triggers into two segments. The Supreme Court first addressed why the Clean Power Plan was "unheralded," *id.* at 2610–12; it next addressed why the Clean Power Plan also represented a "transformative" change in EPA's authority, *id.* at 2612–14. Similarly, in *Nebraska*, after quoting *West Virginia*, the Supreme Court also first addressed history before turning to breadth in its analysis of the major

[2] "Generation shifting" describes "a shift in electricity production from higher-emitting to lower-emitting producers." *West Virginia*, 142 S. Ct. at 2593.

questions doctrine. 143 S. Ct. at 2372–73. This brief thus discusses the two factors in turn.

1. Supreme Court precedent emphasizes regulatory history.

Starting with history, the first five paragraphs of *West Virginia*'s legal analysis of the triggers for the major questions doctrine address the history of EPA's comparable exercises of authority. 142 S. Ct. at 2610–12. The Supreme Court explained that regulatory history is especially relevant to determining whether an agency's action is extraordinary because, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Id.* at 2610 (quoting *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)).

Before the Clean Power Plan, the Supreme Court concluded, EPA "had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly." *Id.* By contrast, in the Clean Power Plan, EPA departed from "prior Section 111 rules" by setting emissions limits based in part on purposeful generation shifting from

coal-fired plants to natural gas and renewable sources. *Id.* at 2610–11. For this reason, the Supreme Court determined that the Clean Power Plan was "unheralded" (i.e., "unprecedented"). *Id.* at 2612.[3]

Nebraska and the cases decided just before *West Virginia* similarly focus on the unprecedented nature of the agency's action. For example, in *Nebraska*, which involved a roughly $430 billion student debt-relief program, the Supreme Court first stressed in its discussion of the major questions doctrine that the "Secretary [of Education] has never previously claimed powers of this magnitude under" the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 143 S. Ct. a 2372. Rather, past exercises of the Secretary's authority under the HEROES Act to "waive or modify" applicable statutory provisions "have been extremely modest and narrow in scope" and none had fully released "borrowers from their obligations to repay" hundreds of billions of dollars in student loans. *Id.*

[3] As used in *West Virginia*, "unheralded" means unlike anything the agency has done before. Of course, the agency need not identify an identical regulatory precedent, because new regulations will rarely, if ever, be identical to previous ones—as they would then be unnecessary. Rather, *West Virginia*'s analysis suggests that the relevant regulatory precedent must be an analogous exercise of authority.

In *Alabama Realtors*, the Supreme Court also highlighted that the "expansive authority" that the Centers for Disease Control and Prevention (CDC) asserted in that case was "unprecedented." 141 S. Ct. at 2489. And in *NFIB*, the Supreme Court similarly explained that the "lack of historical precedent, coupled with the breadth of authority that the [Occupational Safety and Health Administration (OSHA)] now claims, is a telling indication that [OSHA's action] extends beyond the agency's legitimate reach." 142 S. Ct. at 666 (citation and quotation marks omitted). The Supreme Court further noted that "OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace." *Id.*

In contrast, the Supreme Court rejected a similar major questions-based challenge to a vaccine mandate from Health and Human Services (HHS) for certain healthcare workers because HHS "routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers." *Missouri*, 142 S. Ct. at 653. Past practice thus showed the HHS vaccine mandate was not an extraordinary action.

2. Supreme Court precedent also emphasizes the breadth of the agency's asserted authority.

The Supreme Court's recent major questions cases demonstrate that, even if an agency's action is unlike anything it has done before, such "unheralded" novelty is not sufficient to trigger the doctrine—the breadth of the asserted authority must also demonstrate a transformative expansion of the agency's power.

For example, in *West Virginia*, after the Supreme Court examined EPA's prior regulations under Section 111(d) and concluded that the Clean Power Plan was "unheralded," it next discussed how the Clean Power Plan also represented a "transformative expansion [of EPA's] regulatory authority." 142 S. Ct. at 2610. In other words, after concluding that EPA's asserted authority in the Clean Power Plan "was . . . unprecedented," the Supreme Court went on to determine whether "it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind." *Id.* at 2612 (citation omitted).

Similarly, in *Nebraska*, the Supreme Court concluded that the challenged debt-relief plan was of such breadth that it would permit the Secretary of Education to "unilaterally define every aspect of federal

student financial aid, provided he determines that recipients have 'suffered direct economic hardship as a direct result of a . . . national emergency.'" 143 S. Ct. at 2373 (quoting 20 U.S.C. § 1098ee(2)(D)).

Several potential indicators may be relevant to determining whether an agency's assertion of authority is of sufficient breadth to warrant skepticism. For example, one key indicator is the agency's comparative expertise: As the Supreme Court noted in *West Virginia*, "[w]hen [an] agency has no comparative expertise' in making certain policy judgments," one "presume[s]" that Congress did not "task it with doing so." *West Virginia*, 142 S. Ct. at 2612–13; *see also, e.g.*, *NFIB*, 142 S. Ct. at 665 (finding that public health standards fell "outside of OSHA's sphere of expertise").

Another potential indicator that an action represents a transformative change in the agency's authority is when the agency relies on statutory language that is "vague," "ancillary," or "modest" to do something unlike anything it has done before. *See West Virginia*, 142 S. Ct. at 2609–10 ("ancillary" provision); *Nebraska*, 143 S. Ct. at 2369 ("modest" provision).

The indicators referenced above were not dispositive in *West Virginia* (or other recent cases). Rather, they provided evidence of a transformative change in the agency's authority. But that evidence of breadth was just one factor in the Supreme Court's analysis of the major questions doctrine; as noted, the Supreme Court also emphasized history. *See supra* Part I.A.1.

B. The major questions doctrine does not turn on economic or political significance.

1. Economic and political significance have not been the sole bases for triggering the doctrine.

Although the Supreme Court often references economic and political significance in its major questions precedents, indicators of significance have never sufficed to trigger the doctrine.

In fact, although the Supreme Court referenced the cost of the Clean Power Plan in *West Virginia*'s factual background, 142 S. Ct. at 2604, it omitted express references to indicators of economic significance from the opinion's legal analysis, *id.* at 2610–16. The most the Supreme Court said about economic significance in *West Virginia*'s legal analysis is a passing reference to the Clean Power Plan as representing "unprecedented power over American industry." *Id.* at 2612 (quoting

Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980)).

And while the size of the $430 billion student-loan cancellation program played a role in *Nebraska*, the Supreme Court's analysis of the major questions doctrine did not rest on that fact alone. 143 S. Ct. at 2372, 2374. Rather, the Supreme Court first addressed history and breadth before turning to the program's economic effects. *Id.* at 2372–73. None of that additional analysis would have been necessary if economic significance alone triggered the major questions doctrine.

Likewise, although litigants emphasizing economic significance often point to *Alabama Realtors*, indicators of economic significance were just one part of that opinion's analysis. The opinion also notes that the CDC's "claim of expansive authority . . . [was] unprecedented." 141 S. Ct. at 2489. "Since that provision's enactment in 1944," the opinion explains, "no regulation premised on it has even begun to approach the size or scope of the eviction moratorium" that the CDC adopted. *Id.* To the contrary, "[r]egulations under this authority have generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease." *Id.* at 2487. *Alabama Realtors* thus

does not rest solely or even primarily on indicators of economic significance either.

The same was true in *NFIB*, which states that the agency action at issue (a testing or vaccination mandate) would apply to "84 million" workers. 142 S. Ct. at 665. As explained above, however, *NFIB*'s legal analysis does not rest on indicators of economic significance alone; it also emphasizes regulatory history and the transformative nature of the asserted authority. *See supra* pp. 12, 14.

All the above points apply with equal force to political significance. The Supreme Court often references political significance in its cases on the major questions doctrine. *See, e.g.*, *West Virginia*, 142 S. Ct. at 2614 (discussing proposals Congress "declined to enact" and nationwide debate); *Nebraska*, 143 S. Ct. at 2373–74 (same). But history and breadth have played a greater analytical role. *See supra* pp. 10–11, 13–14. In fact, the Supreme Court appended political significance as an afterthought at the very end of its major questions analysis in *West Virginia*—after pages discussing history and breadth. 142 S. Ct. at 2614. And in *Nebraska*, the Supreme Court similarly reached political significance only after a discussion of history and breadth. 143 S. Ct. at 2373–74.

2. The doctrine would be arbitrarily expansive if economic and political significance were dispositive in the analysis.

The Supreme Court's focus on history and breadth in addition to economic and political significance makes sense given its explanation that the major questions doctrine applies only in "extraordinary cases." Numerous agency actions can be described as economically or politically significant; far fewer are unlike anything the agency has done before or represent a drastic change in the agency's authority. The Supreme Court's emphasis on history and breadth thus helps ensure the doctrine remains confined to extraordinary cases.

To give a rough sense of the numbers, agencies promulgate upwards of 3,000 rules a year, with roughly 40 to 120 designated annually as "major rules" under the CRA—namely, rules with an annual effect on the economy of $100 million or more. 5 U.S.C. § 801. *See* Cong. Rsch. Serv., R43056, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* 6–9 (2019), https://perma.cc/67GG-FFVH. In contrast to these hundreds of arguably economically significant agency actions, the Supreme Court has identified only a handful of "extraordinary cases" potentially implicating

the major questions doctrine over 30 years. *See* Brunstein & Goodson, *supra*, at 51–70.

In addition, the large scope of many government programs means that agency actions under those programs inevitably involve billions of dollars in government spending or costs to regulated entities and affect tens or hundreds of millions of Americans. But the Supreme Court has never suggested that all cases under sizable government programs trigger the major questions doctrine. That includes cases involving gargantuan programs like Medicare; even in recent years, opinions addressing such programs have not invoked the major questions doctrine (regardless of whether the Supreme Court upheld or invalidated the agency action at issue). *See, e.g.*, *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022); *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019).

This point is especially salient here. Plaintiffs-Appellants primarily argue that the major questions doctrine applies because the Rule affects Americans' retirement savings. But that would be true of numerous rules issued under ERISA. The Government Accountability Office's CRA

database,[4] which collects all agency rules submitted to Congress since the CRA's enactment in 1996, includes at least 24 rules with "ERISA" or "Employee Retirement Income Security Act" in the name of the rule.[5] That figure may include some rules focused on health plans rather than retirement savings,[6] but Plaintiffs-Appellants' reasoning would apply the major questions doctrine to all of them because they affect millions of Americans and implicate billions if not trillions of dollars. That cannot be right, as it would expand the doctrine far beyond the "extraordinary" case.

And although the Supreme Court has sometimes pointed to proposals that Congress "declined to enact" as an indicator of political significance, *e.g.*, *West Virginia*, 142 S. Ct. at 2614, resting the major questions doctrine on this indicator alone would be enormously expansive given the sheer number of proposals that each Congress declines to enact.

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[4] *See* https://www.gao.gov/legal/other-legal-work/congressional-review-act.

[5] *See, e.g.*, Civil Penalties Under ERISA Section 502(C)(8), 75 Fed. Reg. 8796 (2010); Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974, 71 Fed. Reg. 20262 (2006); Fiduciary Responsibility under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor, 69 Fed. Reg. 58018 (2004); Employee Retirement Income Security Act of 1974; Rules and Regulations for Administration and Enforcement; Claims Procedure, 65 Fed. Reg. 70246 (2000).

[6] ERISA provides "comprehensive regulation of employee welfare and benefit plans," not just retirement plans. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 650 (1995).

The most recently completed Congress (the 117th) saw over 16,000 legislative proposals fail, either because they affirmatively failed a vote or because no further action was taken on them after they were introduced or reported by committee; and each Congress since the early 1970s has seen anywhere from 6,000 to 23,000 proposals reach a similar fate.[7] These proposals undoubtedly cover important topics of concern to members of Congress and perhaps that fact alone makes them politically significant. But the Supreme Court presumably does not intend the major questions doctrine to apply to every agency action covering the same subject matter as these thousands of legislative proposals that Congress declines to enact. (And imagine the incentives that would create—any of the 535 members of Congress dissatisfied with an agency's action could introduce a bill covering similar subject matter to provide evidence of political significance to use in litigation.)

Similarly, the failure to overturn an agency rule using the CRA should not factor into the analysis either. The CRA provides an efficient mechanism to repeal an agency rule. *See, e.g.*, Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, Am. U. L. Rev. 387,

[7] *See* https://www.govtrack.us/congress/bills/statistics.

394–95 (2020). But if that procedure fails, the CRA provides that the rule takes effect, regardless of how politically significant the rule is. *See* 5 U.S.C. § 801(a)(3). As one textualist scholar has pointed out, the CRA demonstrates that Congress understands agencies will often issue rules having significant effects on American society and it presumes those rules will take effect *unless* repealed under the CRA. *See* Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J. of Law & Pub. Pol'y 463, 466, 491–95 (2021). Plaintiffs-Appellants' reasoning effectively rewrites the CRA to reverse this presumption, giving legal consequences to failed uses of the CRA.

* * *

In short, under binding Supreme Court precedent, history, *and* breadth, *and* significance must favor application of the major questions doctrine. If one is absent, the doctrine does not apply.

II. The District Court Correctly Applied The Supreme Court's Precedents, And Plaintiffs-Appellants Efforts To Evade The District Court's Ruling Fail.

Relying on *West Virginia*, the District Court correctly rejected Plaintiffs-Appellants' invocation of the major questions doctrine because history demonstrated this was not an extraordinary case. *Utah v. Walsh*,

No. 23-cv-16, 2023 WL 6205926, at *4 n.3 (N.D. Tex. Sept. 21, 2023). Plaintiffs-Appellants appear to recognize that history poses an obstacle for their argument—they devote much of their brief to arguing why history does not matter in the analysis of the major questions doctrine. Opening Br. 36–41. As thoroughly explained above, however, under the Supreme Court's recent cases, history does matter. *See supra* Part I. All Plaintiffs-Appellants can muster in response to this recent binding precedent are two concurring opinions and a 30-year-old majority opinion. Opening Br. 39–41.

After acknowledging that *West Virginia* points to history, breadth, and economic and political significance (in that order), Plaintiffs-Appellants cite a concurring opinion for the proposition that the "doctrine is not an on-off switch that flips when a critical mass of factors is present." Opening Br. 40 (quoting *Nebraska*, 143 S. Ct. at 2384 (Barrett, J., concurring)). They similarly invoke a different concurring opinion for a related proposition. Opening Br. 41 (citing *West Virginia*, 142 S. Ct. at 2620–22 (Gorsuch, J., concurring)). As one of those concurring authors recently reminded us, however, we should not look to separate writings that "layer their own gloss" on majority opinions. *Nat'l Pork Producers*

Council v. Ross, 598 U.S. 356, 389 n.4 (2023) (Gorsuch, J.). Rather, the majority opinions control.

And Plaintiffs-Appellants cannot dispute that history was central to the analysis in the *West Virginia* and *Nebraska* majority opinions. The Supreme Court did not just rely heavily on history in both opinions, it was the very first factor addressed in the discussion of the major questions doctrine. *See supra* pp. 6, 8–11, 17. If something else sufficed—say, the $430 billion student-loan program in *Nebraska*—the Supreme Court could have said as much and saved pages of analysis. That the Supreme Court took the effort—and repeated the same formulation of *history*, breadth, and economic and political significance—indicates a majority of the Supreme Court views history as critically important to determining whether a case is truly "extraordinary."

Reaching further back, Plaintiffs-Appellants contend that the 30-year-old decision in *MCI Telecommunications Corp.* supports their position. Opening Br. 41. This maneuver also effectively concedes that the other more recent Supreme Court precedents cut the other way. And they do. *See supra* Part I.

True, scholars often treat *MCI* as the initial seed for the major questions doctrine. *See, e.g.*, Brunstein & Goodson, *supra*, at 52 & n. 17 (collecting sources). But that seed did not sprout until decades later, and it did not even flower as a full-grown doctrine until the Supreme Court expressly invoked it in *West Virginia*, which provides the most thorough discussion of the doctrine to date. *See, e.g.*, *id.* at 48–51. *West Virginia* thus supplies the binding precedent for this Court on the doctrine's contours, particularly given that the Supreme Court repeated the same analysis the following year in *Nebraska*.

CONCLUSION

For the foregoing reasons, the Court should affirm.

March 26, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 29(a) and 32(a), the foregoing brief contains 4,788 words, as counted by counsel's word processing system. 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 this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: March 26, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2024, a true and correct copy of the foregoing Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of Defendants-Appellees was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: March 26, 2024

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