Nos. 23-15049, 23-15050, 23-15051 (consolidated)

IN THE
United States Court of Appeals for the Ninth Circuit

THERESA SWEET, *et al.*,
Plaintiffs-Appellees,

&

EVERGLADES COLLEGE, INC., LINCOLN EDUCATIONAL SERVICES CORP., and AMERICAN NATIONAL UNIVERSITY,
Intervenors-Appellants,

v.

MIGUEL CARDONA, Secretary of the U.S. Department of Education, and, U.S. DEPARTMENT OF EDUCATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:19-cv-3674, Hon. William H. Alsup

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Donald L. R. Goodson
Max Sarinsky
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, 3d Floor
New York, NY 10012
(212) 992-8932
max.sarinsky@.nyu.edu

Counsel for Amicus Curiae
Institute for Policy Integrity

May 10, 2023

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: May 10, 2023

Respectfully submitted,

/s/ Max Sarinsky
Max Sarinsky

Counsel for Amicus Curiae
Institute for Policy Integrity

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

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]

Policy Integrity's staff have published extensive 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). Policy Integrity and its staff have also filed *amicus curiae* briefs in other litigation involving the major questions doctrine. *See* Br. of *Amicus Curiae* Richard L. Revesz in Supp. of Resp'ts, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530); Br. of the Inst. for

[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.

Policy Integrity as *Amicus Curiae* in Supp. of Resp's, *Texas v. EPA*, No. 22-1031 (D.C. Cir. Mar. 3, 2023).

Policy Integrity's *amicus curiae* brief here takes no position on the parties' dispute. It addresses only the proper application of the major questions doctrine, which Intervenors-Appellants invoke in support of their statutory authority arguments. Regardless of how the Court resolves the parties' dispute, any statement on the doctrine from this Court could have far-reaching implications for administrative law beyond this case. 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

Increased interest in the major questions doctrine has led more and more parties to invoke it in a wide range of challenges to agency actions. Too often, lower courts, including some in this Circuit, have adopted these arguments with cursory analyses. *See, e.g.*, *Kaweah Delta Health Care Dist. v. Becerra*, No. 20-cv-6564, 2022 WL 18278175, at *8 (C.D. Cal. Dec. 22, 2022) (applying doctrine to adjustment of wage-index values for Medicare-participating hospitals because court concluded, with little analysis, that the adjustment was a "major policy decision[]"). Such thin

analyses risk applying the doctrine in the mine run of cases even though the Supreme Court has stressed that it applies only in "extraordinary" ones. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608, 2609 (2022).

One of the main reasons for such thin analyses is that litigants and courts often misunderstand the major questions doctrine as turning solely on whether a case can be described as one of "economic and political significance." *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). The confusion is, to some degree, understandable—as the quotation just provided shows, the Supreme Court often uses that phrase in its major questions precedents and others often use the phrase as a shorthand for the doctrine itself. Here, for example, Intervenors-Appellants argue primarily that the doctrine applies because they contend the agency's action is economically significant. *See* Intervenors-Appellants Opening Br. 26. Regardless of whether the Court ultimately agrees with Intervenors-Appellants that the agency's action here is economically significant, and regardless of how the Court ultimately resolves the parties' dispute, it should not rest its analysis of the major questions doctrine solely on economic significance.

I. To begin with, although the Supreme Court's major questions precedents often reference the economic significance of an agency's action, none of the Court's precedents, including *West Virginia*, turns on this factor. Rather, *West Virginia* explains that, to be extraordinary enough to trigger the doctrine, the agency's action must, at a minimum, also be "unheralded" and represent a "transformative" change in its authority. *West Virginia*'s legal analysis also closely tracks these two factors, examining whether the agency could point to relevant regulatory precedents and whether the agency's claimed authority would effect a fundamental change in its regulatory role. Other major questions precedents similarly emphasize these two factors.

What is more, the economic significance of an agency's action, including the dollar figures involved and number of persons affected, has never been the sole or even 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.

II. This brief takes no position on whether the major questions doctrine ultimately applies to this case. It provides only the framework

the Court should apply if it reaches the major questions doctrine. And in terms of framework, the District Court (Alsup, J.), for the most part, asked the correct questions when addressing the doctrine. The District Court correctly noted that indicators of economic significance are not dispositive under the major questions doctrine. And it appropriately focused on the other more salient considerations in the Supreme Court's precedents—namely regulatory history and the transformative nature of the asserted authority. Although some of the District Court's language could have been more precise, the framework of its analysis largely aligns with Supreme Court precedent.

Accordingly, if this Court addresses the major questions doctrine when deciding this case, it should hold that economic significance is not dispositive and that other factors—namely regulatory history and the transformative nature of the asserted authority—are the more apt considerations when deciding whether an agency action triggers the doctrine.

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 Court then devoted the bulk of its legal analysis of the doctrine's triggers to examining whether the agency at issue had "'claim[ed] to discover in a long-extant statute [1] an unheralded power' [2] representing a 'transformative expansion in [its] regulatory authority.'" *Id.* at 2610 (quoting *Util. Air Regul. Grp. v. EPA* (*UARG*), 573 U.S. 302, 324 (2014)). In other words, when it analyzed whether the case before it was extraordinary enough to trigger the doctrine, the Supreme Court focused on (1) regulatory history and (2) the transformative nature of the agency's asserted authority, not the economic (or political)

significance of the agency's action. *Id.*; *see also* Brunstein & Goodson, *supra*, at 75. This Court's recent decision in *Mayes v. Biden* similarly emphasizes these two factors. --- F. 4th ---, No. 22-15518, 2023 WL 2997037, at *10 (9th Cir. Apr. 19, 2023).[2]

Instead of following the Supreme Court's analysis in *West Virginia*, many litigants and courts have misapplied the doctrine by placing undue emphasis on the economic significance of the agency action at issue. As the following sections explain, such arguments overlook *West Virginia*'s directive to consider primarily (1) regulatory history and (2) the transformative nature of the authority asserted to ensure the doctrine applies only in extraordinary cases. Such arguments also find little support in the cases predating *West Virginia*.[3]

---

[2] *Mayes* collapses the two factors into a single overarching inquiry examining whether the action at issue represents a "transformative expansion" of the relevant federal actor's authority. *See, e.g.*, 2023 WL 2997037, at *13 ("As this history demonstrates, ... [i]t is not a 'transformative expansion' of [the President's] authority" under the Procurement Act "to require federal contractors . . . to take vaccination-related steps . . . .").

[3] This brief relies on the Supreme Court's own list of relevant precedents. *See West Virginia*, 142 S. Ct. at 2608–09 (citing *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *Brown & Williamson*, 529 U.S. at 133; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *UARG*, 573 U.S. at 310,

A. An agency's action must be "unheralded" and "transformative" to be "extraordinary."

Although the Supreme Court has referenced economic significance in its major questions precedents, its application of the doctrine has placed far greater emphasis on regulatory history and the transformative nature of the authority that the agency has asserted.

Take *West Virginia*, the Court's most thorough discussion of the major questions doctrine to date (and the first to expressly invoke the doctrine). That case involved Section 111(d) of the Clean Air Act, which authorizes the Environmental Protection Agency (EPA) to set a "standard of performance" for power plants' emissions of certain air pollutants including greenhouse gases. *West Virginia*, 142 S. Ct. at 2599 (quoting 42 U.S.C. § 7411(a)(1)). "That standard must . . . reflect the 'best system of emission reduction' that [EPA] has determined to be 'adequately demonstrated' for the particular category" of power plant. *Id.* (quoting §§ 7411(a)(1), (b)(1), (d)). The question in *West Virginia* was

---

324; *King v. Burwell*, 576 U.S. 473, 486 (2015); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.* (*Alabama Realtors*), 141 S. Ct. 2485, 2487 (2021) (per curiam); *Nat'l Fed. of Indep. Bus. v. Occupational Safety & Health Admin.* (*NFIB*), 142 S. Ct. 661, 665, 666 (2022) (per curiam)).

whether Section 111(d) authorized EPA to issue the Clean Power Plan, which, among other things, used a purposeful "generation shifting" approach to determine the best system of emission reduction. *Id.* at 2603–05.[4]

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 *UARG*, 573 U.S. at 324). After introducing these two factors, which echo references to "history and . . . breadth" earlier in the opinion, the Supreme Court divided the rest of its legal analysis of the doctrine's triggers into two segments. *West Virginia* first addresses why the Clean Power Plan was "unheralded," *id.* at 2610–12; it next addresses why the Clean Power Plan also represented a "transformative" change in EPA's authority, *id.* at 2612–14; *cf. also Mayes*, 2023 WL 2997037, at *10–*14. Accordingly, this brief outlines the two factors in turn.

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

1. Supreme Court precedent emphasizes regulatory history.

Starting with the "unheralded" factor, 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. *West Virginia* explains that regulatory history is 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 found, 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 this "unbroken list of 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. In

other words, the *West Virginia* Court determined that the Clean Power Plan was "unheralded" (i.e., "unprecedented"). *Id.* at 2612.[5]

The cases cited in *West Virginia* similarly focus on the unprecedented nature of the agency's action. For example, *UARG* notes that EPA's newfound statutory interpretation would have "swept" many sources under the agency's control that it had "not previously regulated." 573 U.S. at 310. It then observes that, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [the Supreme Court] typically greet[s] its announcement with a measure of skepticism." *Id.* at 324 (citation and quotation marks omitted).

Alabama Association of Realtors v. Department of Health and Human Services (*Alabama Realtors*) also highlights that the "expansive authority" that the Centers for Disease Control and Prevention (CDC) asserted was "unprecedented." 141 S. Ct. 2485, 2489 (2021) (per curiam).

---

[5] 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.

And *National Federation of Independent Business v. Occupational Safety & Health Administration* (*NFIB*) likewise explains 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. 661, 666 (2022) (per curiam) (citation and quotation marks omitted). *NFIB* goes on to note 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 challenge to a vaccine mandate from Health and Human Services (HHS) for certain healthcare workers because "the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers." *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022) (per curiam).

2. Supreme Court precedent also emphasizes the transformative nature of the authority the agency has asserted.

After the *West Virginia* Court examined the history of EPA's exercises of statutory authority and concluded that the Clean Power Plan

was "unheralded," it went on to discuss how the Clean Power Plan also represented a "transformative expansion [of EPA's] regulatory authority." *West Virginia*, 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). In discussing this second factor, the Supreme Court focused on whether the challenged action transformed the role of the regulator (i.e., EPA), not the regulated sector. *See id.*; *see also Mayes*, 2023 WL 2997037, at *10 (focusing not on whether the relevant federal actor sought "to regulate a significant portion of the American economy," but on whether its action "*represent[ed]* an 'enormous and transformative expansion in [its] regulatory authority'" (quoting *UARG*, 573 U.S. at 324)).

More specifically, the Supreme Court found that the Clean Power Plan represented a "paradigm" shift in EPA's authority, changing the agency's "role" from "ensuring the efficient pollution performance of each individual regulated source" to "a very different kind of policy judgment:

that it would be 'best' if coal made up a much smaller share of national electricity generation." *West Virginia*, 142 S. Ct. at 2612.

Other major questions cases cited in *West Virginia* contain similar analyses of whether the agency action represented a transformative change in the agency's authority. *See, e.g.*, *UARG*, 573 U.S. at 312, 325 (noting that EPA's action "would radically expand" the programs at issue, "making them both unadministrable and 'unrecognizable to the Congress that designed' them" (citation omitted)); *MCI Telecom. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225, 229, 234 (1994) (finding that the agency action had effected a "basic and fundamental" change that went to the "heart" of the statute and constituted "effectively the introduction of a whole new regime of regulation").

Under *West Virginia*, several potential indicators may be relevant to determining whether an agency's action represents a transformative change in its authority, but none is dispositive in the analysis. For example, one key indicator is the agency's comparative expertise. *See West Virginia*, 142 S. Ct. at 2612–13 (observing that, "'[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"); *see also, e.g.*,

Gonzales v. Oregon, 546 U.S. 243, 266 (2006) (holding that the Attorney General lacked the authority to revoke the licenses of physicians who prescribed drugs for assisted suicide partly because he was "an executive official who lacks medical expertise"); *King v. Burwell*, 576 U.S. 473, 486 (2015) (concluding that "[i]t is especially unlikely that Congress would have delegated this decision to the [Internal Revenue Service], which has no expertise in crafting health insurance policy"); *NFIB*, 142 S. Ct. at 665 (finding that public health standards fell "outside of OSHA's sphere of expertise").

Another potential indicator that an agency action represents a transformative change in its authority is when it relies on statutory language that is "vague," "cryptic," "ancillary," or "modest" to do something unlike anything it has done before. *See West Virginia*, 142 S. Ct. at 2610 (criticizing EPA for "locat[ing] . . . newfound power in the vague language of an 'ancillary provision'. . . that was designed to function as a gap filler and had rarely been used in the preceding decades"); *see also, e.g.*, *MCI*, 512 U.S. at 231 (noting the agency had relied on a "subtle device"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (observing "Congress . . . does not alter the

fundamental details of a regulatory scheme in vague terms or ancillary provisions"); *King*, 523 U.S. at 497 (expressing hesitation that "Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code").

As noted, neither of the indicators referenced above was dispositive in *West Virginia* (or even in prior cases). Rather, they provided potential evidence of a transformative change in the agency's authority, which the Supreme Court elsewhere explained is one of the two key factors for determining whether a case is extraordinary enough to trigger the doctrine. *West Virginia*, 142 S. Ct. at 2610 (quoting *UARG*, 573 U.S. at 324).

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

1. Economic significance has not been the sole or even primary basis for triggering the doctrine.

As also noted, although the Supreme Court often references economic significance in its major questions precedents, indicators of economic significance have never sufficed to trigger the doctrine or even been at the forefront of the Court's analysis.

Most notably, *West Virginia*'s legal analysis of the triggers for the major questions doctrine omits any references to economic significance, such as regulatory costs or number of persons or entities affected. *See generally* Brunstein & Goodson, *supra*, at 88–93. Although the Supreme Court referenced the cost of the Clean Power Plan in the factual background section of its opinion, *West Virginia*, 142 S. Ct. at 2604, references to indicators of economic significance were conspicuously absent from the opinion's legal analysis, *id.* at 2610–16. The closest *West Virginia* comes to discussing economic significance in its 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)).

Economic significance did not drive the analysis in other major questions doctrine cases, either. In fact, many of these precedents do not discuss indicators of economic significance, like costs, at all. *See, e.g.*, *Gonzales*, 546 U.S. at 265–68; *MCI*, 512 U.S. at 231; *Whitman*, 531 U.S. at 468.

True, the short *per curiam* opinion in *Alabama Realtors* contains a passage discussing economic significance, including the number of people affected by and approximate economic impact of the agency's action—an emergency order from the CDC imposing a nationwide eviction moratorium in certain circumstances. 141 S. Ct. at 2489. But these indicators of economic significance were just one part of the analysis. The opinion elsewhere highlights that the CDC's "claim of expansive authority under [the statutory provision] at issue [was] unprecedented." *Id.* "Since that provision's enactment in 1944," the opinion explains, "no regulation premised on it has ever begun to approach the size or scope of the eviction moratorium" that the CDC adopted. *Id.* This observation mirrors similar points from the background section of the opinion, which explains that the provision the CDC relied on "has rarely been invoked [since passage in 1944]—and never before to justify an eviction moratorium." *Id.* at 2487. 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. Alabama Realtors* thus does not rest solely or even primarily on indicators of economic significance; it rests primarily on

regulatory history and the transformative nature of the CDC's claimed authority.

The same was true in other major questions cases that reference indicators of economic significance. For example, *UARG* references large increases in compliance costs ($147 billion) and administrative costs ($1.5 and $21 billion). 573 U.S. at 322. And *NFIB* 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, neither case's legal analysis rests on these indicators of economic significance; they rest primarily on regulatory history and the transformative nature of the asserted authority. *See supra* pp. 6–16.

2. Resting the doctrine on economic significance would be arbitrary and expansive.

The Supreme Court's focus on regulatory history and the transformative nature of the agency's asserted authority makes sense given its explanation that the major questions doctrine applies only in "extraordinary cases." Numerous agency actions can be described generally as economically significant; far fewer are unlike anything the agency has done before or represent a drastic change in the agency's authority.

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 Congressional Review Act, 5 U.S.C. §§801–808. *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. That does not even begin to capture countless other arguably economically significant agency actions, like adjudications or even the type of settlement here. In contrast to these hundreds if not thousands of arguably economically significant agency actions a year, the Supreme Court has identified only a handful of "extraordinary cases" implicating the major questions doctrine over 30 years. *See supra* note 3.

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 of millions of Americans. But the Supreme Court has never treated all cases under sizable government programs as automatically triggering the major questions doctrine. That includes cases involving gargantuan programs like Medicare. *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). It also includes cases involving myriad other agency actions implicating the energy, utility, and telecommunications industries, to name just a few. *See, e.g.*, *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *New York v. FERC*, 535 U.S. 1 (2002).

* * *

In short, under *West Virginia* (and other Supreme Court precedents) the major questions doctrine turns primarily on whether the agency action at issue is unheralded and represents a transformative change in the agency's authority, not on the economic significance of the agency action (like costs or number of affected persons).

II. The District Court Here Largely Applied The Correct Framework For The Major Questions Doctrine.

To be clear, this brief takes no position on whether the major questions doctrine, properly understood, applies to this case. It provides only the framework the Court should apply if it reaches the major questions doctrine. And in terms of framework, unlike some other recent district court decisions in this Circuit, the District Court here largely

applied the correct framework for the doctrine under *West Virginia* and the Supreme Court's other major questions cases. Specifically, the District Court correctly explained that economic significance does not drive the analysis under the major questions doctrine, and it rightly focused its analysis instead on whether the agency action was unheralded and represented a transformative change in the agency's authority.

The District Court first aptly remarked that "*West Virginia* ma[kes] clear that determining whether a case contains a major question is not merely an exercise in checking the bottom line." *Sweet v. Cardona*, No. 19-cv-3674, 2022 WL 16966513, at *6 (N.D. Cal. Nov. 16, 2022).

The District Court then noted that *West Virginia* instead focuses on the agency's regulatory history, noting that the "representative decisions cited in *West Virginia* considered 'unusual' and 'unheralded' applications of agency authority." *Id.* (quoting *West Virginia*, 142 S. Ct. at 2608–09). Adhering to this precedent, the District Court examined whether "[t]he Secretary has [previously] exercised the authority utilized in [the] settlement here." *Id.*

The District Court also examined whether the settlement represented a transformative change in the Secretary's authority, but it occasionally used imprecise language in that analysis. Most notably, in distinguishing the present case from *West Virginia*, the District Court observed that the settlement "will not fundamentally transform a domestic industry, nor will it have any national ripple effect[,] . . . [as t]he relief will remain limited to class members in a litigated case." *Id*. This observation misstates the relevant inquiry from *West Virginia*.

As explained, *West Virginia* focuses on whether the agency action represented a transformative change in the *agency's authority*, not on whether the action would transform a domestic industry or lead to national ripple effects. *See Mayes*, 2023 WL 2997037, at *10 (noting *West Virginia* focuses on whether the agency's action "'*represent[ed]* a transformative expansion in [its] regulatory authority,'" and does not hold "that restructuring a sector or seeking to regulate a significant portion of the American economy is sufficient by itself to trigger the Major Questions Doctrine" (quoting *West Virginia*, 142 S. Ct. at 2610)).

The distinction is subtle but important. Many actions well within an agency's statutory authority may lead to national ripple effects or

transform domestic industries (as that is often Congress's intent when giving an agency regulatory authority over an industry or part of the economy). *Cf. id.* Skepticism may be warranted, however, when the agency's action represents a transformative change in its authority (as it is unlikely Congress would give an agency the power to reinvent itself). *See West Virginia*, 142 S. Ct. at 2609 ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" (quoting Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 Cardozo L. Rev. 989, 1011 (1999))).

In short, the District Court's framework for the major questions doctrine largely aligns with *West Virginia*. But if this Court addresses the doctrine, it should clarify that the relevant inquiry under the "transformative" factor centers on whether the challenged action would transform the role of the regulator, not on whether the challenged action would transform the regulated sector or have national ripple effects.

CONCLUSION

Regardless of how the Court resolves the parties' dispute, any discussion of the major questions doctrine in a precedential opinion could

have far-reaching ramifications for administrative law outside the confines of this case. The Court should therefore carefully adhere to the analysis in *West Virginia*. More specifically, the Court should avoid cursory analyses or the related error often made by some litigants and courts of placing undue emphasis on economic significance, which has never sufficed to trigger the major questions doctrine. Rather, the agency action at issue must, at a minimum, also be unheralded and represent a transformative change in the agency's authority.

May 10, 2023

Respectfully submitted,

/s/ Max Sarinsky

Donald L. R. Goodson
Max Sarinsky
INSTITUTE FOR POLICY INTEGRITY
139 MacDougal Street, 3d Floor
New York, NY 10012
(212) 992-8932
max.sarinsky@.nyu.edu

Counsel for Amicus Curiae
Institute for Policy Integrity

RULE 28-2.6 STATEMENT OF RELATED CASES

9th Cir. Case Number(s) 23-15049, 23-15050, 23-15051.

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.
[X] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

DATED: May 10, 2023

Respectfully submitted,

/s/ Max Sarinsky
Max Sarinsky

Counsel for Amicus Curiae
Institute for Policy Integrity

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 23-15049, 23-15050, 23-15051.

I am the attorney or self-represented party.

This brief contains 4,751 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and Fed. R. App. P 32(a)(6).

I certify that this brief (*select only one*):

[ ] complies with the word limit of Cir. R. 32-1.
[ ] is a **cross-appeal** brief and complies with Cir. R. 28.1-1.
[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
[ ] is for a **death penalty** case and complies with Cir. R. 32-4.
[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  [ ] it is a joint brief submitted by separately represented parties;
  [ ] a party or parties are filing a single brief in response to multiple briefs; or
  [ ] a party or parties are filing a single brief in response to a longer joint brief.
[ ] complies with the length limit designated by court order dated _____.
[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

DATED: May 10, 2023

Respectfully submitted,

/s/ Max Sarinsky
Max Sarinsky

Counsel for Amicus Curiae
Institute for Policy Integrity

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2023, 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 Neither Party was filed with the Clerk of the United States Court of Appeals for the Ninth 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: May 10, 2023

Respectfully submitted,

/s/ Max Sarinsky
Max Sarinsky

Counsel for Amicus Curiae
Institute for Policy Integrity