No. 24-13102

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff-Appellee,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant.

On Appeal from the U.S. District Court for the Middle District of Florida (5:24-cv-316-TJC-PRL)

BRIEF OF PROFESSORS WILLIAM ARAIZA, JEFFREY LUBBERS, AND PETER M. SHANE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT FEDERAL TRADE COMMISSION

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No. 24-13102

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, undersigned counsel for *amici curiae* certifies that, to the best of his knowledge, other than those persons and parties identified in Certificates of Interested Persons in earlier-filed briefs, no person or party has an interest in the outcome of this matter.

/s/ Mark B. Samburg
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CORPORATE DISCLOSURE STATEMENT

Amici curiae are not corporations, have no parent corporations, and do not issue stock.

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INTERESTS OF AMICI CURIAE[1]

Amici are law professors who teach and write in the fields of administrative law and statutory interpretation. *Amicus* William Araiza is the Stanley A. August Professor of Law at Brooklyn Law School. *Amicus* Jeffrey Lubbers is Professor of Practice in Administrative Law at American University, Washington College of Law. *Amicus* Peter M. Shane is the Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus at Ohio State University, Moritz College of Law.

As leading administrative law scholars, *amici* have a strong interest in the sound development of administrative law in the federal courts, and are submitting this brief because of the importance of the administrative law and statutory interpretation issues raised by the Middle District of Florida's interpretation and application of the major questions doctrine. *Amici* are well-positioned to provide expert insights that may assist the Court in evaluating the district court's interpretation of the doctrine and the parties' arguments regarding its applicability in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As contemplated by Congress in the Federal Trade Commission Act, the

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund this brief, and no person other than amici curiae, their members, and their counsel contributed money to fund this brief. All parties have consented to the filing of this brief.

Federal Trade Commission ("Commission") has taken an important step to foster and protect competition. By largely prohibiting worker non-compete clauses, the Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912) ("the Rule") would facilitate the mobility of American workers and, as a result, would incentivize employers to offer competitive compensation. While the Rule and its impacts would be life-changing for individual workers and their families, the Rule is decidedly not a transformative or unheralded exercise of the Commission's authority. To the contrary, the Rule is of a piece with long-established Commission authorities—it therefore cannot and does not implicate the major questions doctrine. In determining otherwise, the district court applied the major questions doctrine incorrectly.

ARGUMENT

The major questions doctrine, most fully articulated by the Supreme Court of the United States in *West Virginia v. EPA*, 597 U.S. 697 (2022), is best understood as standing for the proposition that Congress does not delegate extraordinary powers to administrative agencies without speaking clearly.[2] The doctrine applies *only* where an agency (1) exercises "unprecedented"[3] authority to "make a 'radical or

[2] *West Virginia*, 597 U.S. at 723 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'") (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).
[3] *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 765 (2021).

fundamental change' to a statutory scheme"[4] (2) generally after claiming "to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority . . . in the vague language of an ancillary provision . . . [that] allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"[5] in an area where the agency "'has no comparative expertise' in making certain policy judgments,"[6] (3) *and* uses that authority to take an action of "vast economic and political significance."[7] This is no such case.[8]

In articulating the doctrine in *West Virginia*, the Court explained that the relevant precedents involve situations where *both* "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

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[4] *West Virginia*, 597 U.S. at 723 (internal citation omitted)
[5] *Id.* at 724 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Whitman*, 531 U.S. at 468 (citing cases)) (internal quotation marks omitted).
[6] *Id.* at 729 (quoting *Kisor v. Wilkie*, 588 U.S. 558, 578 (2019)).
[7] *Id.* at 716 (quoting Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32523, 32529 (July 8, 2019)).
[8] Even in such cases, the major questions doctrine poses no bar to agency action if the agency can "point to 'clear congressional authorization' for the power it claims." *Id.* at 723 (quoting *Util. Air*, 573 U.S. at 324).

Congress' meant to confer such authority."[9] This articulation could not be more clear: to implicate the major questions doctrine, an agency must claim unprecedented, expansive authority *and* the economic and political consequences of that claim must be significant.[10] Neither an unprecedented claim of authority nor significant economic and political consequences, standing alone, can create a major question.[11]

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[9] *Id.* at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159-160 (2000)) (emphasis added). "The word 'and'. . . means . . . well, and. 'And' . . . means 'along with or together with.'" *Pulsifer v. U.S.*, 601 U.S. 124, 133 (2024) (quoting Webster's Third New International Dictionary 80 (1993) (second ellipsis in original).

[10] *See Nebraska v. Su*, No. 23-15179, 2024 WL 4675411 at *10 (9th Cir., Nov. 5, 2024). "The Supreme Court has adopted a two-prong framework to analyze the major questions doctrine. First, we ask whether the agency action is 'unheralded' and represents a 'transformative expansion' in the agency's authority in the vague language of a long-extant, but rarely used, statute. Second, we ask if the regulation is of 'vast economic and political significance' and 'extraordinary' enough to trigger the doctrine. If *both* prongs are met, the major questions doctrine applies…" (emphasis added) (internal citations omitted). *Id.* Applying that framework, the Ninth Circuit determined, without considering political or economic impact, that a federally mandated minimum wage for federal contractors did not implicate the doctrine because it did not constitute a transformative expansion of authority. *Id.*

[11] The Supreme Court has not yet clarified whether the major questions doctrine endures following its recent decision overruling so-called *Chevron* deference, rooted in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *West Virginia*, 597 U.S. at 724, the Court cited as precedent for its formulation of the major questions doctrine its earlier decision in *King v. Burwell*, 576 U.S. 473 (2015). That decision had focused on the proper construction of the Affordable Care Act regarding what the Court called "a question of deep 'economic and political significance.'" *Id*. at 486 (quoting *Util. Air*, 573 U.S. at 324). *King v. Burwell* presented its approach to statutory interpretation in

I. The Rule is consistent with prior FTC actions and makes no change to a statutory scheme.

The Rule lacks several of the core characteristics required to constitute a major question—it is neither unheralded, nor unprecedented, nor transformative. Instead, it is of a piece with longstanding and ordinary Commission practice, and does not approach the "extraordinary" nature required for an action to constitute a major question.

"extraordinary" cases as an exception to *Chevron*. 576 U.S. at 485. Now that the Court has overruled the *Chevron* framework, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), the major questions doctrine may well no longer persist as a distinct element of statutory interpretation—that is, it may no longer play a meaningful role as an "exception," *id.* at 2309 (Kagan, J., dissenting), to ordinary judicial statutory interpretation. On its face, *Loper Bright*'s requirement that courts reviewing agency action must "determine the best reading," *id.* at 2266, of a statute seemingly leaves no role for the major questions doctrine. If the best reading of a statute allows an agency action, the action is lawful, even if a live major questions doctrine would have prohibited it. Even before *Loper Bright*, Justice Barrett rejected the idea that the doctrine is a "strong-form substantive canon" that enforces a clear statement rule, such that it could compel a departure from the best reading of a statute. *Biden v. Nebraska*, 143 S. Ct. at 2377 (Barrett, J., concurring). In Justice Barrett's view, "the major questions doctrine is a tool for discerning . . . text's most natural interpretation." *Id.* at 2376. That approach would mean that a question's "majorness," *id.* at 2381, is simply one factor in determining Congress's intent, and would result in agency claims to broad authority being viewed with "at least some 'measure of skepticism,'" *id.* (quoting *Util. Air*, 573 U.S. at 324), even if not categorically prohibited. In any event, even if the major questions doctrine persists, the Rule does not implicate it.

a. The major questions doctrine applies only to extraordinary cases of agencies making novel claims to authority well beyond their contemplated substantive scope.

Despite the wide-ranging invocation of the major questions doctrine by litigants since the doctrine was first announced in 2022,[12] the doctrine properly applies only in "extraordinary cases."[13] A review of the cases in which the Supreme Court and this Circuit have applied the major questions doctrine, as well as those cases described as extraordinary in *West Virginia* itself, reveals that to implicate the major questions doctrine, an agency's claim of authority must be especially novel and transformative. As the Supreme Court has made clear, the doctrine applies only in instances where the agency purports to regulate, for the first time, a subject beyond what Congress has laid out as the agency's substantive scope of authority.

Specifically, the doctrine applies only in a narrow set of circumstances where an agency has attempted a novel regulatory action that would transformatively expand its statutory authorities. In *West Virginia* itself, the Court applied the major questions doctrine to the Environmental Protection Agency's effort to shift energy production from dirtier sources to cleaner sources under authority to limit emissions

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[12] *See* Donald L. R. Goodson, *Judge Kacsmaryk Shuts Down Frivolous Use of the Major Questions Doctrine* (Oct. 10, 2023), https://tinyurl.com/53chcz5s ("[M]any challengers view the major questions doctrine as akin to an incantation—something that if uttered enough times will ensure a favorable ruling.").

[13] *West Virginia*, 597 U.S. at 723 (quoting *Brown & Williamson*, 529 U.S. at 159-60).

levels.[14] And in *Biden v. Nebraska*, the Court determined that the doctrine was implicated by the Department of Education's decision to offer unprecedented cancellations of student debt under statutory authority to waive or modify provisions concerning federal student loans in connection with a national emergency.[15] This Circuit reached the same conclusion regarding a vaccine mandate for federal contractors under procurement authority.[16]

This limited application of the doctrine—to unprecedented claims of authority well outside the traditional bounds of the authorizing statute—is consistent with the relevant precedents that predate *West Virginia*'s naming of the doctrine. In *West Virginia*, the Supreme Court described as prior major questions:[17] the FDA's effort to regulate tobacco for the first time;[18] a first-ever national

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[14] *West Virginia*, 597 U.S. at 725.
[15] *Biden v. Nebraska*, 143 S. Ct. at 2374.
[16] *Georgia v. Biden*, 46 F.4th 1283 (11th Cir. 2022). Though this Circuit did not refer to the doctrine by name in *Georgia*, it relied on *Alabama Association of Realtors* and *West Virginia* to invalidate the agency action for the same reasoning underpinning the major questions doctrine. *See id.* at 1295-1296.
[17] *West Virginia*, 597 U.S. at 721-23. The prior cases discussed in *West Virginia* did not use the term "major questions doctrine," but the *West Virginia* Court cited them as earlier instances of the not-yet-named doctrine's application. *Id*. at 724 ("As for the major questions doctrine 'label[],' it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.").
[18] *Brown & Williamson*, 529 U.S. at 126. The Court also considered both the FDA's "long-held position that it lacks jurisdiction under the FDCA to regulate

eviction moratorium under a statutory provision concerning public health measures to target communicable diseases;[19] the EPA's self-described "unprecedented"[20] effort to newly subject tens of thousands of facilities to emissions and licensing standards;[21] a first-of-its-kind interpretive rule prohibiting use of controlled substances for a specific purpose despite express state law authorization of that purpose;[22] and an unprecedented economy-wide vaccine mandate issued under authority to ensure workplace safety.[23] In reviewing each of these administrative actions, the Supreme Court had determined that an agency had attempted to break entirely new ground in its substantive authority, pursuing a "radical or fundamental change"[24] to the underlying statutory scheme.

In contrast, on the same day that the Supreme Court invoked the major questions doctrine to invalidate the vaccine mandate enacted under workplace

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tobacco products" and that Congress had "effectively ratified" that view. *Id*. at 144.

[19] *Ala. Ass'n of Realtors*, 594 U.S. at 761.

[20] *Util. Air*, 573 U.S. at 310.

[21] *Id.* Those standards had previously only been applied to several hundred large industrial plants and similar sources of pollution, whereas the proposed change, the "single largest expansion in the scope of the [Clean Air Act] in its history," *id*., would have covered tens of thousands of "smaller industrial sources, large office and residential buildings, hotels, large retail establishments, and similar facilities. *Id*. (internal citations omitted).

[22] *Gonzalez v. Oregon*, 546 U.S. 243 (2006).

[23] *Nat'l Fed'n of Indep. Bus. v. DOL*, 595 U.S. 109 (2022).

[24] *West Virginia*, 597 U.S. at 723 (quoting *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co*., 512 U.S. 218, 229 (1994)).

safety authority, it upheld such a mandate for staff of healthcare facilities that participate in Medicare or Medicaid.[25] Holding that the mandate was within the statutory authority of the Secretary of Health and Human Services, the Court noted that "the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers . . . [and] has always justified these sorts of requirements by citing"[26] the same statutory authority invoked to issue the mandate. In stark contrast to those agency actions invalidated in the Supreme Court's major questions cases and the "extraordinary" cases discussed in *West Virginia*, the Medicare/Medicaid facilities mandate was another application of an agency's long-standing, plainly established, and often-exercised authority—as is the Rule at issue here.

b. The Rule is consistent with the Commission's long history of addressing non-compete agreements as unfair anti-competitive practices and fits easily within its expertise.

Non-compete agreements fall squarely within the Commission's statutory authority over "unfair methods of competition."[27] Non-compete clauses and their historical antecedents had long been considered anticompetitive under the common law: "Restrictive covenants, including employee covenants not to compete, have a

[25] *Biden v. Missouri*, 595 U.S. 87 (2022).
[26] *Id*. at 94.
[27] 15 U.S.C. § 45(a)(1).

long history in the common law with the first known agreements of this kind dating back to the 1400s in England. From that time on, they have been recognized as anticompetitive by design[.]"[28] And the Commission's "unfair methods of competition" authority is even broader than the common law understanding of "unfair competition," [29] reinforcing the Commission's authority over non-compete agreements.

The Commission has taken numerous enforcement actions[30] concerning non-compete agreements,[31] and the Rule is a straightforward application of the standard

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[28] Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 Lewis & Clark L. Rev. 497, 504 (2016).

[29] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532 (1935) ("Debate apparently convinced the sponsors of the [FTC Act] that the words 'unfair competition,' in the light of their meaning at common law, were too narrow. We have said that the substituted phrase [unfair methods of competition] has a broader meaning.").

[30] FTC, Press Release, *FTC Approves Final Orders Requiring Two Glass Container Manufacturers to Drop Noncompete Restrictions That They Imposed on Workers* (Feb. 23, 2023), https://tinyurl.com/2vveuzb7; FTC, Press Release, *FTC Approves Final Order Requiring Anchor Glass Container Corp. to Drop Noncompete Restrictions That It Imposed on Workers* (June 2, 2023), https://tinyurl.com/349mv65t; FTC, Press Release, *FTC Approves Final Order Requiring Michigan-Based Security Companies to Drop Noncompete Restrictions That They Imposed on Workers* (Mar. 8, 2023), https://tinyurl.com/2k3w4xd2.

[31] Additionally, the Commission has exercised authority over exclusivity contracts as unfair methods of competition for seven decades. *See, e.g.*, *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 395 (1953) (upholding Commission order limiting exclusive contracts for advertisements in movie theaters to one year because such contracts are "an unfair method of competition within the meaning of [§] 5(a)") (internal quotation marks omitted). And since at least 2000, the Commission has exercised authority to partially prohibit employers from enforcing

developed through these individual enforcement actions broadly, putting regulated entities on notice and providing greater clarity for compliance. The Commission further recognized that "existing case-by-case and State-by-State approaches to non-competes have proven insufficient to address the tendency of non-competes to harm competitive conditions in labor, product, and service markets."[32] On the basis of its "experience and expertise,"[33] including the expertise specifically acquired through enforcement actions,[34] the Commission analyzed the impacts of the Rule, concluding that it would improve earnings or earnings growth,[35] innovation,[36] and consumer prices.[37]

Courts are most likely to invoke the major questions doctrine when an agency "regulates outside its wheelhouse,"[38] suggesting that "'Congress presumably would not' task it with doing so."[39] In other words, the major questions doctrine is more likely to apply where "there is a mismatch between an agency's challenged action and its congressionally assigned mission and

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non-compete agreements in the context of mergers. *See In re Tyco Int'l Ltd.*, No. C-3985, 2000 WL 1779005 (F.T.C. Dec. 1, 2000).

[32] 89 Fed. Reg. at 38343.

[33] *Id.* at 38346.

[34] *Id.* at 38354.

[35] *Id.* at 38474.

[36] *Id.* at 38476.

[37] *Id.* at 38478.

[38] *Biden v. Nebraska*, 143 S. Ct. at 2382 (Barrett, J., concurring).

[39] *West Virginia*, 597 U.S. at 729 (quoting *Kisor*, 588 U.S. at 578).

expertise."[40] No such mismatch could plausibly exist here: Congress has vested the Commission with broad powers over unfair methods of competition, and no government agency could reasonably be expected to have greater expertise than the Commission concerning non-compete agreements or unfair methods of competition generally. Even the district court acknowledged that non-compete agreements, as unfair methods of competition, fall within the Commission's "wheelhouse."[41]

Invalidating non-compete agreements has been an ordinary Commission activity for over twenty years. And where an agency is engaged in its ordinary business, even if a regulatory action "goes further than what the [agency] has done in the past to" conduct that business, "there can be no doubt that [the action] is what [the agency] does."[42] Such agency actions—like the Rule—cannot be said to

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[40] *Id.* at 748 (Gorsuch, J., concurring).

[41] Dkt. No. 59, at 21. (District court documents are cited as "Dkt. No. #, at #," where the page number refers to the CM/ECF pagination of the district court.) Congress also plainly recognized the Commission's expertise in the area. In writing the FTC Act, the drafting committee "gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972) (quoting S. Rep. No. 597, at 13 (1914)). Recognizing "that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others," *id.*, Congress purposefully left the job of identifying unfair practices to the Commission.

[42] *Missouri*, 595 U.S. at 87, 95 ("[A]ddressing infection problems in Medicare and Medicaid facilities is what [the agency] does.").

be novel or transformative claims of authority, and thus, cannot constitute major questions.

II. The district court's misapplication of the major questions doctrine was inconsistent with clear precedent from the Supreme Court of the United States and this Circuit.

The district court disregarded the Supreme Court's plain instruction that agency action must satisfy each of several conditions to implicate the major questions doctrine, instead mischaracterizing the doctrine as triggered any time an agency takes action of great economic or political significance.[43] The district court went on to consider the political and economic significance of the Rule at length,[44] before concluding it was substantially likely that "given the sweep and breadth of the final rule . . . it presents a major question as defined by the Supreme Court."[45]

This approach omitted the required consideration of the *nature* of the authority claimed in favor of an inappropriately shortened inquiry into only its effect. Critically, the district court failed to consider whether the Rule constitutes a

[43] Dkt. No. 59, at 17. ("The principle is this: When an agency claims to have the power to issue rules of extraordinary . . . economic and political significance, it must point to clear congressional authorization for the power it claims.") (internal quotation marks omitted).
[44] Dkt. No. 59, at 17-21. *Amici* take no position on whether the Rule's political and economic consequences are sufficient to satisfy the major questions doctrine's "significance" requirement.
[45] Dkt. No. 59, at 21.

transformative expansion in the Commission's authority.[46] This reasoning runs contrary to the Supreme Court's articulation and application of the doctrine,[47] and to this Circuit's own precedent. In *Florida v. HHS*, 19 F.4th 1271 (11th Cir. 2021), this Circuit declined to invalidate a vaccine mandate for staff of facilities participating in Medicare or Medicaid. Even though the *Florida* court recognized that such vaccines had become "an issue of economic and political significance,"[48] it nevertheless concluded that the mandate did not implicate the major questions doctrine because it did not 'bring about an enormous and transformative expansion in . . . regulatory authority without clear congressional authorization."[49] The *Florida* court correctly understood that, as the Supreme Court explained in *West Virginia* and its progeny, the major questions doctrine can only apply where an agency's action has significant effect *and* the agency has made a transformative claim of authority.

The district court further observed that the major questions doctrine is "more likely to be implicated" when agency action constitutes a transformative expansion

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[46] The district court did summarily note that the rule "[o]f course . . . is a hugely *consequential* expansion of regulatory authority." Dkt. No. 59, at 21. (emphasis added). Based on its use of "consequential," its conclusory nature, and the lengthy discussion the district court dedicated to the consequences of the Rule, this determination seems to be based entirely on the Rule's practical effect, *not* the nature of the regulatory authority the Commission claimed.
[47] *See* FNs 2-11, *supra*, and accompanying text.
[48] *Florida v. HHS*, 19 F.4th 1271, 1288 (11th Cir. 2021).
[49] *Id*. at 1287 (quoting *Util. Air*, 573 U.S. at 324).

of regulatory authority than when it constitutes a transformative expansion of procurement authority.[50] *Amici* agree that the Rule is an *exercise* of the Commission's regulatory authority, but that fact casts no light on whether it represents an *expansion* of that authority, let alone a transformative or unheralded one. It does not.[51]

Nor did the district court meaningfully consider whether the Commission sought to claim authority it had "discovered" in a vague or ancillary statutory provision. If it had, the district court would have had to conclude that there is nothing vague or ancillary about 15 U.S.C. § 46(g)'s provision that the FTC has power "to make rules and regulations for the purpose of carrying out the provisions

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[50] Dkt. No. 59, at 21. The district court referred to the Tenth Circuit as having characterized the doctrine in this way. *Amici* are aware of only a single Tenth Circuit case to consider the major questions doctrine, *Bradford v. DOL*, 101 F.4th 707 (10th Cir. 2024). In *Bradford*, the Tenth Circuit declined to apply the major questions doctrine to a rule setting a minimum wage for federal contractors. The Tenth Circuit identified four separate reasons that the rule did not implicate the doctrine, even assuming *arguendo* that the challenged rule was of adequate political and economic significance. While one of those four reasons concededly rested on the distinction between regulatory and procurement authority, the other three independent bases for its conclusion did not—and all three apply to the Rule here. The Tenth Circuit concluded that *Bradford*: (1) was "not a case in which the executive branch seeks to locate expansive authority in 'modest words,' 'vague terms, or ancillary provisions.'" *Bradford*, 101 F.4th at 725 (quoting *Whitman*, 531 U.S. at 468); (2) was not a case "where an 'agency claim[ed] to discover' regulatory authority for the first time 'in a long-extant statute.'" *Id*. at 726 (quoting *Util. Air*, 573 U.S. at 324); and (3) was "not a case in which the agency issuing the . . . rule lacks 'expertise' in the relevant area of policymaking." *Id.* at 728.

[51] *See* Part I, *supra*.

of this subchapter." And the district court's observation that the Commission had not previously used its authority under this section to promulgate a rule "of this magnitude"[52] is no obstacle to the Commission's authority to do so now. Such logic would subject the exercise of *any* idle statutory authority—or *any* newly expansive exercise of statutory authority—to the major questions doctrine, regardless of how clear the authority is on the face of the statute. Doing so would force administrative agencies into a meaningless and wasteful formality of exercising all of their authorities solely for the purpose of preserving them.

To be sure, the vast political and economic significance of an agency action is an important prerequisite for the application of the major questions doctrine—and it is a useful screening mechanism to *exclude* obviously inappropriate invocations of the doctrine against rules of minor consequence. But allowing political and economic significance to subsume the whole major questions test is not only contrary to law, but would expand the doctrine's scope well beyond "extraordinary cases" to encompass any rule with a sizeable economic or political impact regardless of how closely aligned the rule is with the agency's core authorities.

[52] Dkt. No. 59, at 22.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Mark B. Samburg
Mark B. Samburg

Date: November 12, 2024

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2024, I filed the foregoing with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Mark B. Samburg
Mark B. Samburg

Date: November 12, 2024