No. 24-

IN THE

Supreme Court of the United States

ADIS KOVAC, *et al.*,
Petitioners,

v.

CHRISTOPHER WRAY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a series of general statements of purpose and after-the-fact references can provide the clear congressional authority required by the major-questions doctrine, even if no statute explicitly authorizes the challenged action by the relevant agencies.

2. Whether a court can properly identify clear congressional authorization under the major-questions doctrine without considering the significance of the power the government claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners (plaintiff-appellants below) are Adis Kovac, Bashar Aljame, Abraham Sbyti, and Fadumo Warsame.

Suhaib Allababidi was a plaintiff-appellant below but is not a petitioner here.

Respondents (defendant-appellees below) are Christopher Wray, Director of the Federal Bureau of Investigation, Charles H. Kable, Director of the Terrorist Screening Center, Deborah Moore, Director, Transportation Security Redress, Nicholas Rasmussen, Director of the National Counterterrorism Center, David P. Pekoske, Administrator Transportation Security Administration, and Kevin K. McAleenan, Acting Commissioner United States Customs and Border Protection.

No corporate parties are involved in this case.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the District Court for the Northern District of Texas and the Court of Appeals for the Fifth Circuit:

Kovac v. *Wray*, No. 3:18-cv-110-X (N.D. Tex.); and

Kovac v. *Wray*, No. 23-10284 (5th Cir.).

No other proceedings directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

Adis Kovac, Bashar Aljame, Abraham Sbyti, and Fadumo Warsame respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's opinion is reported at 109 F.4th 331. The amended opinion is reproduced at App. 1a–21a and the original opinion at App. 22a–43a. The district court's opinion is reported at 660 F. Supp. 3d 555 and reproduced at App. 44a–69a.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its judgment on July 22, 2024. On October 9 and November 6, 2024, Justice Alito extended the time to file this petition to November 19 and then to December 19, 2024. 28 U.S.C. § 1254(1) supplies jurisdiction.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 114(h) provides as relevant:

> In consultation with the Transportation Security Oversight Board, the Administrator shall—
>
> > (1) enter into memoranda of understanding with Federal agencies or other entities to share or otherwise cross-check as necessary data on individuals identified on Federal agency databases who may pose a risk to transportation or national security;
> >
> > (2) establish procedures for notifying the Administrator of the Federal Aviation Administration,

> appropriate State and local law enforcement officials, and airport or airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety;
>
> (3) in consultation with other appropriate Federal agencies and air carriers, establish policies and procedures requiring air carriers—
>
> (A) to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security; and
>
> (B) if such an individual is identified, notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual; and
>
> (4) consider requiring passenger air carriers to share passenger lists with appropriate Federal agencies for the purpose of identifying individuals who may pose a threat to aviation safety or national security.

6 U.S.C. § 121(d)(12) provides:

> The responsibilities of the Secretary relating to intelligence and analysis shall be as follows: . . .
>
> (12) To ensure, in conjunction with the chief information officer of the Department, that any information databases and analytical tools developed or utilized by the Department . . . are compatible with one another and with relevant information databases of other agencies of the Federal Government[.]

6 U.S.C. § 122(b)(1) provides:

> (b) Except as otherwise directed by the President, with respect to information to which the Secretary has access pursuant to this section—
>
> > (1) the Secretary may obtain such material upon request, and may enter into cooperative arrangements with other executive agencies to provide such material or provide Department officials with access to it on a regular or routine basis, including requests or arrangements involving broad categories of material, access to electronic databases, or both[.]

6 U.S.C. § 482(b)(1) provides:

> Under procedures prescribed by the President, all appropriate agencies, including the intelligence community, shall, through information sharing systems, share homeland security information with Federal agencies and appropriate State and local personnel to the extent such information may be shared, as determined in accordance with subsection (a), together with assessments of the credibility of such information.

6 U.S.C. § 485(b)(2) provides:

> The President shall . . . ensure that the [information sharing environment] provides and facilitates the means for sharing terrorism information among all appropriate Federal, State, local, and tribal entities, and the private sector through the use of policy guidelines and technologies. The President shall, to the greatest extent practicable, ensure that the [information sharing environment] provides the functional equivalent of, or otherwise supports, a decentralized, distributed, and coordinated environment that—

(A) connects existing systems, where appropriate, provides no single points of failure, and allows users to share information among agencies, between levels of government, and, as appropriate, with the private sector;

(B) ensures direct and continuous online electronic access to information;

(C) facilitates the availability of information in a form and manner that facilitates its use in analysis, investigations and operations;

(D) builds upon existing systems capabilities currently in use across the Government . . . .

49 U.S.C. § 44903(j)(2)(C) provides:

(i) Commencement of testing.—The Administrator shall commence testing of an advanced passenger prescreening system that will allow the Department of Homeland Security to assume the performance of comparing passenger information, as defined by the Administrator, to the automatic selectee and no fly lists, utilizing all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government.

(ii) Assumption of function.— The Administrator, or the designee of the Administrator, shall begin to assume the performance of the passenger prescreening function of comparing passenger information to the automatic selectee and no fly lists and utilize all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government in performing that function.

49 U.S.C. § 44903(j)(2)(E)(iii) provides as relevant:

The Secretary of Homeland Security, in consultation with the Terrorist Screening Center, shall design

and review, as necessary, guidelines, policies, and operating procedures for the collection, removal, and updating of data maintained, or to be maintained, in the no fly and automatic selectee lists.

49 U.S.C. § 44926 provides as relevant:

(a) In general.—The Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration, United States Customs and Border Protection, or any other office or component of the Department of Homeland Security.

(b) Office of Appeals and Redress.—

. . .

(3) Information.—To prevent repeated delays of a misidentified passenger or other individual, the Office shall . . . furnish to the Transportation Security Administration, United States Customs and Border Protection, or any other appropriate office or component of the Department, upon request, such information as may be necessary to allow such office or component to assist air carriers in improving their administration of the advanced passenger prescreening system and reduce the number of false positives[.]

50 U.S.C. § 3056(f)(1)(F) provides:

The Director of the National Counterterrorism Center shall . . . develop a strategy for combining terrorist travel intelligence operations and law enforcement planning and operations into a cohesive effort to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility[.]

INTRODUCTION

In the decision below—upholding the government's authority to maintain an intrusive "watchlist" of millions of American citizens—the Fifth Circuit applied the major-questions doctrine in a way that, if upheld, would eviscerate the doctrine and greatly expand federal agencies' power. Though the court claimed to look for "clear authorization," its decision looks less like a major-questions ruling and more like a *Chevron* step-two opinion, finding that the challenged government authority is merely consistent with the statutory structure and language. But this Court has made clear that this kind of close-enough-for-government-work approach is *never* acceptable, see *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2270 (2024)—let alone when the government claims vast power that affects Americans' daily lives and liberties.

Plaintiffs are among the million American citizens on the government's "watchlist" of people who supposedly may pose a threat to national security. The government can put citizens on the watchlist without probable cause or reasonable suspicion, for reasons as trivial as visiting family in certain countries abroad or associating with people already on the list. And watchlist inclusion can affect everything from a person's ability to travel on airplanes to how he is treated during traffic stops to whether he can exercise his Second Amendment right to purchase a firearm.

Whether the federal bureaucracy can restrict law-abiding Americans' liberties in this way is a vastly significant question, as the district court held. But the Fifth Circuit sidestepped that issue, merely assuming that the major-questions doctrine applies here. It thus failed to tailor its analysis to the import of the issue.

And then the court went further. In its initial opinion, the Fifth Circuit held that the major-questions doctrine applies only if a statute is ambiguous under normal statutory interpretation rules: "[B]efore proceeding to the major questions doctrine, courts must first examine the statutory text to discern if it is ambiguous as to the Government's asserted authority." App. 27a. Having so held, the court applied normal interpretive principles to rule that the government's "creation, maintenance, and use of the Watchlist" is authorized by a jumble of general purpose statements, oblique cross-references, and partial supposed ratifications. *Id.* at 42a. And while the court later revised its opinion to omit some of these characterizations of the doctrine, *id.* at 6a, it did not materially revise its *reasoning*.

The result is an opinion upholding a vast, opaque, and intrusive government program without ever identifying statutory language that clearly says the government can do this. Make no mistake: If this kind of ordinary statutory interpretation supplies the clear statement that the major-questions doctrine demands, there is no major-questions doctrine.

This decision conflicts with this Court's and other circuits' decisions and reflects broader confusion among the lower courts about how the major-questions doctrine works. It warrants review.

STATEMENT OF THE CASE

1. The watchlist—formally, the terrorist screening dataset—was created by Homeland Security Presidential Directive 6, or "HSPD-6," in 2003. Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Aug. 27, 2004). HSPD-6 established the Terrorist Threat Integration Center, which consolidated in the heads of executive agencies

the power to collect and disseminate certain intelligence information. With this power, the government created a list containing the names of potential terror suspects, including many U.S. citizens, for use in limiting access to domestic air travel. HSPD-6 and the Integration Center still serve as the express authorization for the watchlist.

As it functions today, the watchlist is a collection of information maintained by the National Counterterrorism Center that government agencies use to implement enhanced security measures. The watchlist consists of two sub-lists: (1) the no-fly list, which automatically bars people from flying; and (2) the selectee list, which subjects people to additional screening before boarding a plane. Compl. ¶ 30, D. Ct. ECF No. 1. But the watchlist reaches far beyond air travel. It is also used in background checks for firearms purchases, routine traffic stops, and re-entry into the country. *Id.* ¶¶ 3, 41, 46, 48–49.

Although placement on the watchlist can have vast impacts on citizens' lives, the government does not need probable cause or reasonable suspicion of criminal activity to put someone on the list. Simply traveling to a Muslim-majority country to visit family may result in list placement. *Id.* ¶ 9. In fact, merely associating with someone on the list is sufficient grounds to add a person to the list. *Id.* ¶¶ 63–64. The result is a strong stigma that chills free association and religious exercise. See *id.* ¶¶ 53, 256. If one member of a mosque is on the list, the entire mosque may be at risk of inclusion; indeed, those on the list face ostracization from their community because others fear they will end up on the list through guilt by association. Thus, the list can significantly interfere with Americans' personal, professional, and spiritual lives even if they can avoid air travel.

2. Adis Kovac, Bashar Aljame, Abraham Sbyti, and Fadumo Warsame are law-abiding American citizens. Each has been pulled aside and interrogated while attempting to board an airplane, leading them to believe they were on the watchlist. App. 2a–3a. Each sought relief from the Department of Homeland Security's traveler redress inquiry program, which allows DHS to alter a citizen's watchlist status. See 49 C.F.R. §§ 1560.201, .205. DHS does not confirm or deny whether a citizen is on the selectee list, so the selectee-list-plaintiffs received no-confirm-no-deny letters. DHS confirmed that Kovac was on the no-fly list.

After the redress inquiry process failed to remedy the plaintiffs' injuries, they sued the heads of the relevant agencies, seeking to be removed from the watchlist. They alleged violations of the Administrative Procedure Act, explaining that the major-questions doctrine barred the agencies from creating and using the watchlist without clear authorization from Congress, which is lacking.

The district court rejected this claim. The court noted that "the current patchwork of applicable caselaw obligates courts to employ a two-pronged analysis" to assess major-questions claims. App. 52a. First, a court must determine whether "the power an agency asserts is of vast economic and political significance." *Id.* (cleaned up). Then, the agency must "point to a clear congressional authorization permitting its action." *Id.* (cleaned up).

At the first step, the district court held that the watchlist has vast economic and political significance: "The watchlist consists of over a million people, and the Government could place an unlimited number of people on it. Further, the liberty intrusions that flow from the watchlist are significant." App. 54a. "To maintain the watchlist, the Government collects a vast

array of identifying information about an individual," which it can use to impose widespread and intrusive restrictions. *Id.* at 54a–55a (cleaned up). The court thus moved to step two. Applying various factors drawn from this Court's decisions, *id.* at 52a–53a, the court ultimately concluded that "Congress has repeatedly ratified" the watchlist, *id.* at 62a.

On appeal, the Fifth Circuit took a different approach. In its original opinion, the court of appeals concluded that "the district court should have started with the relevant statutory texts, not with the doctrine about major questions." App. 27a. This was so, the court said, because "[o]nly when there is ambiguity should other analytical steps be taken." *Id.* "Consequently, before proceeding to the major questions doctrine, courts must first examine the statutory text to discern if it is ambiguous as to the Government's asserted authority." *Id.*

The Fifth Circuit thus reviewed "text, structure, and history" to conclude that Congress had authorized the watchlist. App. 28a. The court did not identify any statute that tells any government agency to create the watchlist—much less a statute that tells the specific administering agencies to create the list and use it in all the ways they do. Instead, the court pointed mainly to statutes authorizing or requiring information sharing among national security agencies. See *id.* at 29a–31a.

Some provisions were more specific; the court cited "directions to screen airline passengers against the 'selectee and no fly lists'" and to adopt "more robust appeal and redress procedures" for passengers "wrongly identified as a threat under the regimes" used by TSA and other agencies. App. 33a–34a. And the court noted "other instances in which Congress directed

agencies to maintain, disseminate, or use the [w]atchlist for security purposes, albeit not directly related to aviation passengers." *Id.* at 35a. In the court's view, these "congressional ratifications and enhancements," *id.* at 36a, to the watchlist scheme, though not expressly authorizing the list's creation, maintenance, or many uses, established sufficient "statutory authority." *Id.* at 42a–43a. Thus, the court did "not reach the issue of whether the major questions doctrine applies in this case." *Id.* at 43a.

Three days later, the court revised its opinion. See App. 1a. It cut the language describing the major-questions doctrine as merely an ambiguity-resolving tool, but continued to apply the ordinary rule that "our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* at 6a. And the court changed nothing of substance in its analysis, merely replacing the conclusion that "the Government's statutory authority in this case is unambiguous," *id.* at 43a, with the statement that "the Government's statutory authority in this case is clearly authorized by Congress," *id.* at 21a. As before, the court did not consider whether the watchlist presents a major question in the first place.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's approach would eviscerate the major-questions doctrine, in conflict with other courts' decisions.

The Fifth Circuit did not actually require "clear congressional authorization" for the watchlist. It instead *inferred* authorization from four independent statutes passed over nearly a decade, none of which expressly empowers any governmental body to create the watchlist or use it in all the ways it is used. And it did so without considering the significance of the power the

government claimed. If allowed to stand, this approach would gut the major-questions doctrine by reducing it to little more than a mirror of the *Chevron* doctrine this Court recently interred. The decision below thus conflicts with precedent from this Court and other circuits.

A. A major question requires express authorization proportional to the magnitude of the power claimed.

As the district court correctly held—and the Fifth Circuit did not dispute—the watchlist presents a major question. App 54a–55a. The watchlist includes over a million people. Inclusion on the list burdens citizens' liberties in various concrete ways, from intrusive searches to travel restrictions to traffic stops to firearm purchases. And the associated stigma can greatly chill associative and religious freedoms. Whether the federal government can impose these burdens on U.S. citizens based merely on vague suspicions or their social networks is an issue of "vast economic and political significance." *West Virginia* v. *EPA*, 597 U.S. 697, 716 (2022).

Thus, to uphold the watchlist, the Fifth Circuit needed to find "'clear congressional authorization' for th[is] power." *Id.* at 723; see also *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2373 (2023). The clear-authorization analysis, this Court and other circuits hold, must be guided by "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude." See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *United States* v. *White*, 97 F.4th 532, 540 (7th Cir. 2024) ("the judiciary's interpretive task must be shaped, at least in some measure, by the nature of the question presented" (cleaned up)), *cert. denied,* 24-5031 (U.S. Oct. 7, 2024); *Nebraska* v. *Su*, 121 F.4th 1,

14 (9th Cir. 2024) (similar); *Kentucky* v. *Biden*, 57 F.4th 545, 552 (6th Cir. 2023)) (similar).

In other words, a court must shape its inquiry to the "nature of the question presented." *West Virginia,* 597 U.S. at 721 (citing *Brown & Williamson*, 529 U.S. at 159). This means evaluating "the 'history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion," to assess *how clearly* "Congress would have been likely to delegate" such power to the agency at issue. *Id.* at 721–23 (cleaned up); see also *Gonzales* v. *Oregon*, 546 U.S. 243, 267–68 (2006) ("The importance of the issue of physician-assisted suicide . . . makes the oblique form of the claimed delegation all the more suspect." (internal citations omitted)).

The Fifth Circuit did not do that. At first, it deemed the major-questions doctrine irrelevant because, applying ordinary interpretive tools, it perceived no ambiguity that needed resolving. See App. 27a–28a. And even after tweaking its opinion, it merely *assumed* that "the major questions doctrine applies to creating, maintaining, and using the Watchlist," *id.* at 6a, without ever evaluating the breadth and significance of the government's claimed authority—let alone looking for congressional authorization proportional to that breadth and significance. That approach clashes with this Court's "fundamental" rule that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 597 U.S. at 721.

B. Clear authorization requires explicit authority for every aspect of the agencies' claimed power.

The result of the Fifth Circuit's failure to engage with the major-questions doctrine was a search for

"clear congressional authorization" in name only, App. 6a—akin to the reflexive deference that some courts showed under the *Chevron* regime, see *Loper Bright*, 144 S. Ct. at 2270. Neither the Fifth Circuit nor the government identified any statute in which Congress told any arm of the government to create the watchlist. Nor did they identify any statute that clearly prescribes all the watchlist's uses, or that empowers the specific administering agencies to take those steps. And they pointed to no statute that, in so many words, ratifies or adopts the watchlist in its current form, with its current uses, and with the current watchmen. The closest the Fifth Circuit came was a few statutory references to, or instructions for certain agencies to use, the watchlist for specific purposes. See App. 34a–35a.

This approach again conflicts with this Court's precedent and other circuits' decisions. This Court has made clear that clear congressional authorization requires "something more than a merely plausible textual basis." *West Virginia*, 597 U.S. at 723; cf. *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 840 (1984) (asking merely whether the government offers "a reasonable construction of the statutory term"), *overruled by Loper Bright*, 144 S. Ct. 2244. A patchwork of statutes, none of which explicitly confers the full power claimed by the specific agencies at issue, does not suffice. In particular, the Fifth Circuit split with other courts by relying on (i) general authorizing statutes prescribing goals or functions, but not means, and (ii) supposed "congressional ratifications and enhancements" that stop far short of adopting the watchlist as it actually operates. App. 36a, 42a–43a.

First, the court below relied on Congress's directives to TSA to "identify individuals on passenger lists" and unnamed "databases" who may pose a risk, App. 7a–

8a, and on general instructions to "'integrate' and 'standardize' terrorism and homeland security information for greater dissemination and access." *Id.* at 12a. But other circuits rightly hold that this kind of broad, purposive language does not provide clear authorization under the major-questions doctrine: "If ever there were a 'subtle device' for conferring vast regulatory power, a general statement of purpose surely fits the bill." *Kentucky*, 57 F.4th at 552. The Sixth Circuit thus rejected the government's heavy reliance on "prologues, prefatory clauses, and purpose statements" as a supposed basis for requiring federal contractors and subcontractors to be fully vaccinated. *Id.* at 551; see also *W. Va. ex rel. Morrisey* v. *Dep't of the Treasury*, 59 F.4th 1124, 1147 (11th Cir. 2023) ("catchall delegation language" did not clearly authorize major agency action); *N.C. Coastal Fisheries Reform Grp.* v. *Capt. Gaston LLC*, 76 F.4th 291, 299 (4th Cir. 2023) ("general statutory language" does not supply "exceedingly clear" authorization for significant agency powers). This Court's decisions reflect the same principle. See *Biden*, 143 S. Ct. at 2372 (rejecting government's appeal to congressional purpose as sufficient to authorize broad student loan cancellation). The Fifth Circuit's approach conflicts with these decisions.

Second, the Fifth Circuit deemed it nearly dispositive that Congress had specifically "directed [certain] agencies to maintain, disseminate, or use the Watchlist" for certain purposes. App. 14a. But again, other circuits correctly recognize that "literal readings of the broad terms in" a statute do "not provide the required clear authorization" when "the major-questions doctrine applies." *N.C. Coastal Fisheries*, 76 F.4th at 301 (citing examples). When the government claims vastly significant powers, it is not enough that they "f[a]ll

within a literal interpretation" of statutory language. *Id.* For example, the Fourth Circuit held that "it does not follow that the Clean Water Act *clearly* regulates returning bycatch [*i.e.*, inadvertently captured marine organisms] to the ocean simply because bycatch falls within the literal definition of 'biological materials' and returning it might be understood as a 'discharge.'" *Id.* at 302. Under the same reasoning, the fact that some statutes mention the watchlist does not suffice to authorize its creation, maintenance, and use by the administering agencies in all the ways they use it. In the absence of language specifically directing the creation of the watchlist, assuming its existence is not enough. See *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring) ("[A] reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch.").

Again, this Court's decisions reflect the same limitation. In *West Virginia*, the government relied on a combination of broader regulatory purpose and ancillary provisions to argue that the Clean Air Act conferred the power to issue a rule that functionally eliminates coal. This Court disagreed. 597 U.S. at 734–35. Yet under the Fifth Circuit's reasoning, *West Virginia* would come out the other way, because the rule arguably carried out the statute's purposes and found support in the literal terms of ancillary provisions.

Likewise, in *Brown & Williamson*, the FDA relied on a congressional grant to regulate "drugs" and "devices" to restrict the sale of cigarettes. 529 U.S. at 131–32. Neither term expressly included tobacco products, but read literally, they arguably encompassed cigarettes. *Id.* As the dissent there argued, cigarettes "fall within the scope of this statutory definition" and the "statute's basic purpose—the protection of public health." *Id.* at 162 (Breyer, J., dissenting). That is the same

reasoning the Fifth Circuit adopted below. But this Court rejected that theory, reasoning that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160 (majority).

By finding authorization for the watchlist in the broader context of several disparate statutes that generally authorize information-sharing, App. 29a–31a, the Fifth Circuit produced a "clear authorization" rule that looks like ordinary statutory interpretation—and pre-*Loper Bright* interpretation at that. The Court relied heavily on general purpose language, and treated literal references to a "watchlist" as complete authority for the existing program. This is precisely the sort of ordinary "text-in-context statutory interpretation," *West Virginia*, 597 U.S. at 766 (Kagan, J., dissenting), that does not suffice for major questions, see *id.* at 723–24 (majority). This Court has been clear: Where "agencies assert[ ] highly consequential power," the required interpretive approach is "distinct" from "routine statutory interpretation." *Id.* at 724. Under the Fifth Circuit's decision, however, the major-questions doctrine might as well not exist.

C. Under the correct standard, the watchlist is not clearly authorized.

Under the approach reflected in this Court's and other circuits' decisions, Congress did not clearly authorize the watchlist. Again, all agree that no explicit authorizing provision exists. That should be the end of the matter.

Of the four main statutes the Fifth Circuit cited, two—the Aviation and Transportation Security Act and the Homeland Security Act—predated HSPD-6 and the watchlist's creation. But both contain only the

sort of general purpose statements and high-level instructions that, as just explained, cannot provide clear authorization. A directive to TSA "to identify individuals on passenger lists who may be a threat" and prevent their boarding, or to "share or otherwise cross-check as necessary data on individuals identified on Federal agency databases who may pose a risk to transportation or national security," 49 U.S.C. § 114(h)(1), (3), is far too vague. And general instructions about agency information sharing, see 6 U.S.C. §§ 121(d)(12)(A), 122(b)(1), 482(b)(1), are even further afield. See *West Virginia*, 597 U.S. at 733 ("[J]ust because a cap-and-trade 'system' can be used to reduce emissions does not mean that it is the kind of 'system of emission reduction' referred to in Section 111.").

The post-HSPD-6 statutes cited below are not much clearer. The Intelligence Reform and Terrorism Prevention Act of 2004 is mostly more of the same. The majority of the cited provisions are the same kind of high-level information-sharing directives just discussed. See 6 U.S.C. § 485(b)(2); 50 U.S.C. § 3056(f)(1)(F). To be sure, the more specific provisions mandate that DHS and TSA take on the task of "comparing passenger information to the automatic selectee and no-fly lists and utilize all appropriate records in the consolidated and integrated Terrorist Watchlist" and establish procedures "for the collection, removal, and updating of data maintained . . . in the no-fly and automatic selectee lists." 49 U.S.C. § 44903(j)(2)(C)(ii), (E)(iii). But these provisions do not mandate or authorize the watchlist as a concept, let alone in all its particulars; they merely assume its existence in some form.

Likewise, the final statute—the 9/11 Commission Act of 2007—strengthened the appeal process for people who believed "they were wrongly identified as a

threat under *the regimes utilized*." 49 U.S.C. § 44926(a) (emphasis added). At most, then, that law assumes that TSA has *some* kind of "advanced passenger prescreening system." 49 U.S.C. § 44926(b)(3)(B). It falls far short of clearly authorizing the actual watchlist.

None of this is to say Congress cannot ratify the watchlist. It surely can—before or after a Court holds the watchlist unauthorized. See Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 Harv. J. L. & Pub. Pol'y 773 (2022) (arguing that Congress can fast-track authorization when an agency action is invalidated for not being clearly authorized). But under the major-questions doctrine, it must do so *clearly*. Congress need "not codify the agency's prior rule," but it must "authorize expressly the regulatory power that the agency had claimed." *Id.* at 776, 782. Here, that would mean expressly confirming that (i) the agencies that actually administer the watchlist (ii) have the power to create and maintain the list and (iii) use it in all the ways they currently do. See *Biden*, 143 S. Ct. at 2368–71. As just explained, no statute meets these basic criteria.

II. The lower courts need guidance on the major-questions doctrine.

The Fifth Circuit's decision is yet another example of the "uncertainty," *Rest. L. Ctr.* v. *Dep't of Labor*, 120 F.4th 163, 174 n.9 (5th Cir. 2024), and "ongoing debate," *Mayfield* v. *Dep't of Lab.*, 117 F.4th 611, 616 (5th Cir. 2024), surrounding the major-questions doctrine in the lower courts. "[W]ithout knowing what that underlying theory is," the courts of appeals have applied a jumble of multi-factor tests, frameworks, and analyses. See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266–267, 315 (2022) (noting

"deep conceptual uncertainty" and "unanswered basic, critically important questions about how th[e] doctrine should apply").

Courts cannot determine whether the "clear statement" rule is a contextual canon, a separation-of-powers principle, or merely, as the Fifth Circuit initially said and ultimately applied it, an ambiguity-resolving tool. This uncertainty is rooted in this Court's disagreement regarding the purpose of the doctrine. The Court roots the doctrine in both "separation of powers" and "a practical understanding of legislative intent." *West Virginia*, 597 U.S. at 723. But some Justices emphasize how the doctrine is rooted in separation of powers or a tool of ordinary statutory construction, but not both. Compare *NFIB* v. *Dep't of Lab.,* 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) (per curiam) (the major-questions doctrine is "designed to protect the separation of powers"), with *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) ("Th[e] 'clear statement' version of the major questions doctrine 'loads the dice' so that a plausible anti-delegation interpretation wins even if the agency's interpretation is better.").

Because "the precise contours of the doctrine remain hazy," *White*, 97 F.4th at 540, the courts of appeals have created various standards and frameworks for it. Depending on where litigants bring a major-question challenge, they face different iterations of the doctrine. For example, the Ninth Circuit applies "a two-prong framework to analyze the major questions doctrine," *Nebraska*, 121 F.4th at 14, while the Fourth Circuit looks to a set of "non-exhaustive" indicators, *N.C. Coastal Fisheries*, 76 F.4th at 297; see also *Bradford* v. *Dep't of Lab.*, 101 F.4th 707, 726 (10th Cir. 2024) (considering a different but overlapping set of factors), *petition for cert. docketed,* No. 24-232 (U.S. Aug. 30,

2024). Other circuits express uncertainty or disagreement about whether the doctrine is "a linguistic canon, or a substantive canon with a constitutional basis safeguarding the separation of powers, or both." See *Save Jobs USA* v. *DHS*, 111 F.4th 76, 80 (D.C. Cir. 2024); *Georgia* v. *President of the U.S.*, 46 F.4th 1283, 1314–15 (11th Cir. 2022) (Anderson, J., concurring in part); *Nebraska*, 121 F.4th at 18 (Nelson, J., concurring). And of course the Fifth Circuit below considered *none* of these prongs, factors, or questions below.

Without guidance, courts will continue to diverge in applying the major-questions doctrine. *Kovac* magnifies the uncertainty and inconsistency surrounding the doctrine. In the Fifth Circuit—a recent hotbed of regulatory challenges—courts can now look to the cumulative effect of statutes, enacted several years apart, to infer "clear congressional authorization."

III. This case is an ideal vehicle to resolve a question of clear importance.

The consequences of the decision below are significant—both for the development of the major-questions doctrine and for the million American citizens affected by the watchlist. Under the Fifth Circuit's approach, agencies can point to the cumulative effect of purpose statements and cross references, passed over several years, to acquire vast authority. And they can use that authority to intrude on countless aspects of Americans' daily lives. The watchlist's impact is felt across air travel, border searches, police surveillance, licenses and clearances, military base access, financial institutions, visas and immigration, and the ability to exercise Second Amendment rights. And all these impacts fall disproportionately on Muslim Americans, chilling their freedoms of association and worship. This Court should decide whether Congress authorized such

sweeping civil-liberties restrictions in such oblique, scattered language.

This case is an ideal vehicle. This issue was pressed and passed upon at every stage, and the proper application of the major-questions doctrine is dispositive. No alternative grounds exist to answer whether the watchlist is authorized.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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