

Nos. 20-1530, 20-1531, 20-1778, and 20-1780

IN THE
Supreme Court of the United States

No. 20-1530

WEST VIRGINIA, *et al.*,
—v.—
Petitioners,

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

(Caption continued on inside cover)

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF SCHOLARS OF CONGRESSIONAL
ACCOUNTABILITY AS *AMICI CURIAE*
IN SUPPORT OF NEITHER PARTY**

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No. 20-1531

THE NORTH AMERICAN COAL CORPORATION,

—v.—

Petitioner,

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

No. 20-1778

WESTMORELAND MINING HOLDINGS LLC,

—v.—

Petitioner,

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

No. 20-1780

NORTH DAKOTA,

—v.—

Petitioner,

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

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Cases

<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	26
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council</i> , 467 U.S. 837 (1984)	29
<i>Costello v. INS</i> , 376 U.S. 120 (1964)	2
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<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019)	8, 26
<i>Hyde v. United States</i> , 225 U.S. 347 (1912)	2
<i>Indus. Union Dep't v. Am. Petrol. Inst.</i> , 448 U.S. 607 (1980)	8
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<i>Loving v. United States</i> , 517 U.S. 748 (1996)	8
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935)	26
<i>U.S. Telecom Ass'n v. FCC</i> , 855 F.3d 381 (D.C. Cir. 2017)	7
<i>United States v. Eurodif S.A.</i> , 555 U.S. 305 (2009)	2

Rules

Supreme Court Rule 37.6 1

Other Authorities

- Adam Bonica & Gary W. Cox, *Ideological Extremists in the U.S. Congress: Out of Step but Still in Office*, 13 Q.J. Pol. Sci. 207 (2018) 14
- Austin Bussing et al., *The Electoral Consequences of Roll Call Voting: Health Care and the 2018 Election*, 43 Pol. Behav. (forthcoming 2022) 24
- Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748 (2021) 7
- Benjamin Highton, *Issue Accountability in U.S. House Elections*, 41 Pol. Behav. 349 (2019) 21, 24
- Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019 (2018) 7
- Br. for Pet'rs,
West Virginia v. EPA, No. 20-1530 (U.S. Dec. 13, 2021) 9
- Br. of Pet'r Westmoreland Mining Holdings LLC,
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- Br. of Resp't Nat'l Mining Ass'n in Supp. of Pet'rs,
West Virginia v. EPA,
No. 20-1530 (U.S. Dec. 13, 2021) 9

- Brandice Canes-Wrone et al., *Issue Accountability and the Mass Public*, 36 *Legis. Stud. Q.* 5 (2011) 21, 24, 25
- Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 *Am. Pol. Sci. Rev.* 127 (2002) 14
- Brendan Nyhan et al., *One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election*, 40 *Am. Pol. Rsch.* 844 (2012) 24
- Chris Tausanovitch & Christopher Warshaw, *Does the Spatial Proximity Between Legislators and Voters Affect Voting Decisions in U.S. House Elections? (Feb. 2015)* (unpublished manuscript), <https://perma.cc/J2BT-SMFZ>. 17, 21, 22, 25
- Christopher H. Achen & Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (2016) 20
- Christopher J. Anderson, *The End of Economic Voting? Contingency Dilemmas and the Limits of Democratic Accountability*, 10 *Ann. Rev. Pol. Sci.* 271 (2006) 13
- Daniel E. Walters, *Decoding Delegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 *Emory L.J.* (forthcoming 2022) . . . 27
- David Samuels, *Presidentialism and Accountability for the Economy in Comparative Perspective*, 98 *Am. Pol. Sci. Rev.* 425 (2004) . . . 10

David Schleicher, <i>Federalism and State Democracy</i> , 95 Tex. L. Rev. 763 (2017)	23
David Schoenbrod, <i>Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce</i> , 43 Harv. J.L. & Pub. Pol’y 213 (2020)	30
David Schoenbrod, <i>Power Without Responsibility: How Congress Abuses the People Through Discretion</i> (1993)	9
Donald R. Songer, <i>Government Closest to the People: Constituent Knowledge in State and National Politics</i> , 17 Polity 387 (1984)	15
Edward H. Stiglitz, <i>The Limits of Judicial Control and the Nondelegation Doctrine</i> , 34 J.L. Econ. & Org. 27 (2019)	1, 26, 27
Elizabeth Garrett, <i>Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act</i> , 20 Cardozo L. Rev. 871 (1999)	11
Eric A. Posner & Adrian Vermeule, <i>Interring the Nondelegation Doctrine</i> , 69 U. Chi. L. Rev. 1721 (2002)	29
Gary C. Jacobson & Jamie L. Carson, <i>The Politics of Congressional Elections</i> 146 (9th ed. 2016)	22
Gary C. Jacobson, <i>The Republican Resurgence in 2010</i> , 126 Pol. Sci. Q. 27 (2011)	24
Gary Lawson, <i>Delegation and Original Meaning</i> , 88 Va. L. Rev. 327 (2002)	6
Glen Staszewski, <i>Reason-Giving and Accountability</i> , 93 Minn. L. Rev. 1253 (2009)	11

Gregory L. Bovitz & Jamie L. Carson, <i>Position-Taking and Electoral Accountability in the U.S. House of Representatives</i> , 59 Pol. Rsch. Q. 297 (2006)	21
James D. Fearon, <i>Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance</i> , in <i>Democracy, Accountability, and Representation</i> 55 (Adam Przeworski et al. eds., 1999)	10
James N. Druckman et al., <i>How Elite Partisan Polarization Affects Public Opinion Formation</i> , 107 Am. Pol. Sci. Rev. 57 (2013)	18
Jamie L. Carson et al., <i>The Electoral Costs of Party Loyalty in Congress</i> , 54 Am. J. Pol. Sci. 598 (2010)	23
Jeffery J. Mondak et al., <i>Does Familiarity Breed Contempt? The Impact of Information on Mass Attitudes Toward Congress</i> , 51 Am. J. Pol. Sci. 34 (2007)	15
Jerry L. Mashaw, <i>Accountability and Institutional Design: Some Thoughts on the Grammar of Governance</i> , in <i>Public Accountability: Designs, Dilemmas and Experiences</i> 115 (Michael W. Dowdle ed., 2006)	10
Jerry L. Mashaw, <i>Prodelegation: Why Administrators Should Make Political Decisions</i> , 1 J.L. Econ. & Org. 81 (1985)	29
John R. Zaller, <i>The Nature and Origins of Mass Opinion</i> 76 (1992)	15

Karlheinz Reif & Hermann Schmitt, <i>Nine Second-Order National Elections—A Conceptual Framework for the Analysis of European Election Results</i> , 8 Eur. J. Pol. Rsch. 3 (1980) . . .	23
Martin H. Redish, <i>Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine</i> , 51 Loy. U. Chi. L.J. 363 (2019)	28, 30
Matthew S. Levendusky, <i>Clearer Cues, More Consistent Voters: A Benefit of Elite Polarization</i> , 32 Pol. Behav. 111 (2010)	19
Michael X. Delli Carpini & Scott Keeter, <i>What Americans Know About Politics and Why It Matters</i> (1996)	14
Neomi Rao, <i>Administrative Collusion: How Delegation Diminishes the Collective Congress</i> , 90 N.Y.U. L. Rev. 1463 (2015)	9
Nicholas O. Stephanopoulos, <i>Accountability Claims in Constitutional Law</i> , 112 Nw. U. L. Rev. 989 (2018)	1
R. Douglas Arnold, <i>Congress, the Press, and Political Accountability</i> 117 (2004)	15
Seth J. Hill & Gregory A. Huber, <i>On the Meaning of Survey Reports of Roll-Call “Votes”</i> , 63 Am. J. Pol. Sci. 611 (2019)	19
Stephen Ansolabehere & Philip Edward Jones, <i>Constituents’ Responses to Congressional Roll-Call Voting</i> , 54 Am. J. Pol. Sci. 583 (2010)	16, 17, 24

Stephen Ansolabehere & Shiro Kuriwaki, <i>Congressional Representation: Accountability from the Constituent's Perspective</i> , 65 Am. J. Pol. Sci. (forthcoming 2021)	16, 24
Stephen Breyer, <i>Judicial Review of Questions of Law and Policy</i> , 38 Admin. L. Rev. 363 (1986) . . .	6
Thomas J. Rudolph, <i>The Meaning and Measurement of Responsibility Attributions</i> , 44 Am. Pol. Rsch. 106 (2016)	12
Toby Bolsen et al., <i>The Influence of Partisan Motivated Reasoning on Public Opinion</i> , 36 Pol. Behav. 235 (2014)	18

INTEREST OF AMICI CURIAE¹

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SUMMARY OF THE ARGUMENT

Fictions—inaccurate accounts of how the world works—sometimes pop up in the law. Legal fictions

¹ In accordance with Supreme Court Rule 37.6, *amici curiae* state that neither the parties, nor their counsel, had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. All parties were timely notified and consented to the filing of this brief.

can be comforting. They can express how we *wish* the world worked, even though it doesn't. Today's legal fictions can also reflect yesterday's truths. It's possible the world *used* to work a certain way, but now no longer does. Whatever their origin, this Court has made clear that, once their falsity has been established, legal fictions must be abandoned. The law must be built on a foundation of fact. *See, e.g., United States v. Eurodif S.A.*, 555 U.S. 305, 318 (2009) ("public law is not constrained by private fiction"); *Costello v. INS*, 376 U.S. 120, 131 (1964) ("we do well to eschew . . . fictions and to deal instead with realities"); *Hyde v. United States*, 225 U.S. 347, 390 (1912) ("The Constitution is not to be satisfied with a fiction.").

In this case, two of the doctrines Petitioners invoke are based, in part, on a fiction. These doctrines are the major question doctrine (the canon that no judicial deference is due to agency statutory interpretations involving particularly important issues) and the nondelegation doctrine (the rule that Congress is barred from delegating to agencies in overly broad terms). The fiction is that, if these doctrines were enforced more vigorously, significant gains in congressional accountability would follow. With respect to the matters returned to Congress, voters would frequently reward (or punish) legislators for policy stances of which voters approved (or disapproved).

This brief aims to expose this claim for the fiction that it is. In reality—according to volumes of empirical evidence—voters' choices at the polls usually *wouldn't* be influenced much by the additional

positions that members of Congress would take if the major question and nondelegation doctrines were applied more stringently. These doctrines' use therefore wouldn't yield a substantially more accountable Congress. To be sure, concerns beyond accountability justify the major question and nondelegation doctrines. This brief doesn't address those other rationales. Nor does the brief comment on how the Clean Air Act should be construed. Rather, the brief's intervention is limited to the accountability argument that underpins the major question and nondelegation doctrines. That argument is incorrect—it's a fiction—so if the Court relies on these doctrines, it shouldn't do so because of their supposed effects on accountability.

To see why members of Congress wouldn't be much more accountable if they tackled issues currently delegated to agencies, it's necessary to define and unpack accountability. In brief, accountability means that a principal rewards or punishes an agent based on the agent's past performance. In the case of *electoral* accountability—the kind said to be promoted by the major question and nondelegation doctrines—voters are the principal, an elected official is the agent, and the ballot is the mechanism of reward or punishment. An officeholder is electorally accountable to the extent that voters vote for (or against) her when they support (or object to) her prior activities.

More specifically, electoral accountability for a member of Congress for a vote on a bill requires four conditions to be satisfied. First, the member's constituents must know about the bill. Second, the

constituents must know how the member voted on the bill. Third, the constituents must make evaluations, positive or negative, of the member's vote. And fourth, at the next election, the constituents must cast their ballots at least partly based on these evaluations. Importantly, these conditions are both necessary and sufficient for electoral accountability to arise. If any of them isn't met, a member of Congress can't be held accountable for a vote on a bill.

The reason why greater enforcement of the major question and nondelegation doctrines wouldn't produce significant accountability gains, then, is that each accountability condition would frequently be unfulfilled. First, many voters are unaware of the bills (even the important ones) that Congress considers. In fact, *most* voters can't identify a *single* bill on which their House member voted over the last two years. Second, many voters can't say (or say incorrectly) how legislators voted on key bills. With respect to Congress's highest-profile bills over the last generation, more than forty percent of respondents, on average, weren't sure how their House member voted. Another twenty percent *were* sure but were wrong in their beliefs.

Third, many voters don't independently evaluate legislators' votes. Instead, they follow the party line, backing policies their party favors and opposing ones it doesn't. In a series of experiments, simply telling subjects how the major parties in Congress divided on a bill hugely swayed subjects' assessments of the bill, bringing their views in line with their party's. And fourth, many voters don't cast ballots based on legislators' past votes. Congress

members' votes on key bills seldom have discernible electoral implications, the exceptions being prominent bills like the Affordable Care Act. Retrospective voting based on Congress members' past votes is overshadowed by other forms of voting, like voting based on party, ideology, the state of the economy, or approval of the President.

Perhaps the accountability argument undergirding the major question and nondelegation doctrines could be made nonempirical, thus avoiding the weight of this empirical evidence. The argument would then be that voters *could* hold members of Congress accountable for the additional positions they would take if these doctrines were applied more forcefully. In practice, voters might not reward or punish members of Congress for their extra stances. But in theory, voters would be free to do so.

The trouble with this nonempirical claim is that, under its logic, sufficient accountability already exists and isn't in need of improvement. Under the status quo, voters *could* hold members of Congress accountable for their very decisions to delegate certain matters to agencies. Voters *could* also hold members of Congress (as well as the President) accountable for the choices that agencies make pursuant to these delegations. In practice, voters might not be likely to hold politicians to account in these ways. But the predicate of the nonempirical claim is that actual behavior is immaterial. What matters is the theoretical capacity of voters to hold politicians to account—and that capacity is already present, even without greater enforcement of the major question and nondelegation doctrines.

ARGUMENT

I. THE MAJOR QUESTION AND NONDELEGATION DOCTRINES ARE BASED ON ACCOUNTABILITY.

Like most legal principles, the major question and nondelegation doctrines have multiple justifications. These include a presumption about congressional intent in the case of the major question doctrine, *see, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986), and views about the original meaning of the Constitution in the case of the nondelegation doctrine, *see, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335-53 (2002). Another rationale for these doctrines—the subject of this brief—is that they promote congressional accountability. If statutory ambiguities are construed to keep important issues in Congress’s hands, or if Congress can delegate to agencies only in narrow terms, then members of Congress will be substantially more accountable for their policy choices.

In the major question context, this accountability argument was aired most thoroughly in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The majority held that the regulation of tobacco was “a decision of such economic and political significance” that judicial deference to the FDA’s interpretation of the statute was inappropriate. *Id.* at 160. Justice Breyer agreed with the majority that the regulation of tobacco was an “important, conspicuous, and controversial” issue. *Id.*

at 190 (Breyer, J., dissenting). He further noted that, because of the matter’s “importance” and “attendant publicity,” “the public is likely to be aware of it.” *Id.* He diverged from the majority only in his belief that, if the FDA rather than Congress regulated tobacco, accountability would still ensue because the President’s “administration, and those politically elected officials who support it, must (and will) take responsibility.” *Id.* Accountability would thus “take place whether it is the Congress or the Executive Branch that makes the relevant decision.” *Id.* at 191.

Since *Brown & Williamson*, lower courts have echoed this Court’s view that the major question doctrine “guards against unnecessary erosion of . . . political accountability by insisting that the legislature directly confronts the benefits and implications of these decisions.” *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 291 (4th Cir. 2018) (Gregory, C.J., concurring), *vacated*, 138 S. Ct. 2710 (2018); *see also, e.g., U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (“a major policy change should be made by the most democratically accountable process” (internal quotation marks omitted)). Scholars have also argued that the major question doctrine “aims to protect and to strengthen” accountability by ensuring that “a popular and deliberative process settles major questions of policy.” Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019, 2048 (2018); *see also, e.g., Benjamin Eidelson, Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748, 1812 (2021) (“Cases involving ‘major’

questions are . . . the cases in which political accountability is a meaningful possibility.”).

Turning to the nondelegation doctrine, Justice Gorsuch recently contended that its more vigorous application would enhance congressional accountability. At present, “[l]egislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue.” *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting). “These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved,” but they also “disguise responsibility for the decisions,” thus causing “[a]ccountability [to] suffer.” *Id.* (cleaned up). In contrast, if expansive delegation ceased, then “the lines of accountability would be clear.” *Id.* at 2134. “The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow.” *Id.*

This accountability claim built on several past statements by the Court. *See, e.g., Loving v. United States*, 517 U.S. 748, 758 (1996) (the nondelegation doctrine “allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance”); *Indus. Union Dep’t v. Am. Petrol. Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) (the nondelegation doctrine ensures that “the buck stops with Congress” for “fundamental policy decisions”). Scholars have also asserted that greater enforcement of the nondelegation doctrine

would “force[] legislators to take political responsibility for imposing regulatory costs and benefits.” David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Discretion* 17 (1993); *see also, e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1512 (2015) (“delegations erode the accountability of members of Congress”).

In short, one basis for the major question and nondelegation doctrines is that they significantly boost the accountability of members of Congress. This isn’t the sole justification for the doctrines, but it’s a common one as well as the only rationale that involves the doctrines’ putative effects.²

II. ACCOUNTABILITY REQUIRES THE SATISFACTION OF A SERIES OF CONDITIONS.

To assess the accountability rationale for the major question and nondelegation doctrines, a necessary first step is defining accountability and identifying its preconditions. Accountability is a familiar concept in political theory. As numerous scholars have explained, it requires two parties, one

² Unsurprisingly, several litigants in this case try to justify the major question and nondelegation doctrines on accountability grounds. *See* Br. for Pet’rs at 26, 30, *West Virginia v. EPA*, No. 20-1530 (U.S. Dec. 13, 2021); Br. of Pet’r Westmoreland Mining Holdings LLC at 2, *West Virginia v. EPA*, No. 20-1530 (U.S. Dec. 13, 2021); Br. of Resp’t Nat’l Mining Ass’n in Supp. of Pet’rs at 18-19, 21, *West Virginia v. EPA*, No. 20-1530 (U.S. Dec. 13, 2021).

of whom (the agent) acts on behalf of the other (the principal). Accountability also requires the principal to reward the agent for good performance and to punish it for bad performance. In this way, the agent is held accountable for its actions by the principal. As one theorist has put it, “[w]e say that one person, *A*, is accountable to another, *B*,” if “*A* is obliged to act in some way behalf of *B*,” and if *B* “sanction[s] or reward[s] *A* for her activities or performance in this capacity.” James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in *Democracy, Accountability, and Representation* 55, 55 (Adam Przeworski et al. eds., 1999); *see also, e.g.*, Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *Public Accountability: Designs, Dilemmas and Experiences* 115, 118 (Michael W. Dowdle ed., 2006) (offering a similar definition).

With this general notion in mind, it’s easy to specify the distinctive aspects of *electoral* accountability. *Voters* are the ones on whose behalf actions are taken—the principal. An *elected official* is the one who takes these actions—the agent. And the *ballot* is the tool that voters use to hold the officeholder accountable. Voters vote *for* an incumbent whose record they approve of, or *against* an incumbent whose record they disfavor. *See, e.g.*, David Samuels, *Presidentialism and Accountability for the Economy in Comparative Perspective*, 98 *Am. Pol. Sci. Rev.* 425, 426 (2004) (“[E]lectoral accountability occurs because voters retrospectively judge whether [elected officials] have acted in their

best interests and then reward or sanction them appropriately.”).

Importantly, electoral accountability is far from inevitable in a democracy. Rather, it occurs only if four conditions are satisfied. These conditions are both necessary and sufficient, meaning that their fulfillment guarantees the presence of accountability. If any condition is unmet, on the other hand, an officeholder can’t be held accountable by the voters who are unable to comply with the requirement. *See, e.g.,* Glen Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253, 1266 (2009) (for “political accountability to work,” “it would be necessary for . . . this set of conditions [to be] satisfied”).

The first prerequisite is voters’ *political knowledge*. Voters must know about an incumbent’s record. If the incumbent is a member of Congress and the relevant aspect of her record is a vote on a bill—the scenario contemplated by proponents of the accountability rationale for the major question and nondelegation doctrines—voters must know about the bill. Without this knowledge, voters can’t possibly reward or punish the member for her stance on the bill. *See, e.g.,* Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 Cardozo L. Rev. 871, 924 (1999) (“Before the public can hold elected representatives responsible for decisions, they must know the substance of the policy adopted.”).

The second condition is voters’ correct *attribution of responsibility*. Voters must hold an

elected official responsible for developments over which she had control—but not for events beyond her reach. This is a demanding requirement for issues like the state of the economy, over which many officeholders exert partial influence. But it's more straightforward for a member of Congress and a vote on a bill. Voters must simply be aware of how the member voted. They must not think that a yea vote was a nay, or vice versa. *See generally* Thomas J. Rudolph, *The Meaning and Measurement of Responsibility Attributions*, 44 Am. Pol. Rsch. 106 (2016).

The third prerequisite is voters' *independent evaluation*. Knowing an incumbent's record, and correctly attributing responsibility for it, voters must further form an independent judgment about it. If the pertinent record is a member of Congress's vote on a bill, voters must decide, in their independent opinion, whether that vote was good or bad. "Independent" here means that voters' assessments must be based on the merits of the matter. If voters' assessments are driven by other factors, like their fondness for their representative or their attachment to their party, then the content of the bill itself becomes immaterial. Whatever the bill says, the same consequences will follow.

The fourth condition is voters' *retrospective voting*. Voters must actually cast their ballots based on their evaluations, good or bad, of an elected official's record. If voters vote on other grounds, then they don't use their ballots as a mechanism of accountability. For a member of Congress and a vote on a bill, the upshot is that the member's stance must

have electoral implications. Voters must take the stance into account when they cast their ballots. Voters must not vote entirely for other reasons such as party, ideology, the state of the economy, or approval of the President. *See, e.g.*, Christopher J. Anderson, *The End of Economic Voting? Contingency Dilemmas and the Limits of Democratic Accountability*, 10 *Ann. Rev. Pol. Sci.* 271, 279 (2006) (the last “step in the chain of necessary events is that these evaluations translate into a vote for or against the [officeholder]”).

Finally, these four conditions are necessary and sufficient for electoral accountability to ensue, but on their own, they still don’t ensure that members of Congress would be *more* accountable if the major question and nondelegation doctrines were applied more stringently. For that gain in accountability to materialize, Congress would also have to change its legislating practices. That is, it would have to answer major questions itself (instead of handing them off to agencies) and draft laws with more specificity (leaving fewer issues to agencies’ discretion). If Congress didn’t change its legislative practices, then there would be no additional or different votes on bills for which members could be held accountable.

III. REQUIRING CONGRESS TO DECIDE MORE ISSUES WOULD NOT RESULT IN SIGNIFICANTLY GREATER ACCOUNTABILITY.

There are several predicates that must be satisfied, then, for more vigorous enforcement of the major question and nondelegation doctrines to yield

significantly greater congressional accountability. *Are* these predicates satisfied? As the following survey of the empirical evidence demonstrates, they frequently aren't. The doctrines' more energetic use therefore wouldn't make Congress much more accountable than it already is.³

A. Political Knowledge

Beginning with voters' political knowledge, many voters are unaware of the bills (even the important ones) that Congress considers. This was the case historically and it remains true today. In the 1960s, according to the authors of the preeminent study of Americans' political knowledge, majorities of the public didn't know about the enactment of major education, immigration, and urban affairs laws. *See* Michael X. Delli Carpini & Scott Keeter, *What Americans Know About Politics and Why It Matters* 80-81 (1996). In the 1990s, public familiarity with key bills that Congress debated but didn't pass was even lower. Surveys showed “virtually no awareness of important [bills]” addressing issues such as “abortion,

³ To be clear, this brief exclusively addresses the accountability of members of Congress for votes on particular bills. The brief doesn't examine legislators' accountability for their overall ideological profiles. Very briefly, more moderate members of Congress receive higher vote shares than more extreme legislators, *see, e.g.*, Brandice Canes-Wrone et al., *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 *Am. Pol. Sci. Rev.* 127, 132-37 (2002), but this advantage was always modest, *see, e.g., id.* at 133, and has declined further in recent years, *see, e.g.*, Adam Bonica & Gary W. Cox, *Ideological Extremists in the U.S. Congress: Out of Step but Still in Office*, 13 *Q.J. Pol. Sci.* 207, 221-32 (2018).

campaign finance, bank bailouts, defense spending,” and several others. R. Douglas Arnold, *Congress, the Press, and Political Accountability* 117, 123 (2004).

The most startling finding about voters’ political knowledge also comes from this period. A poll asked respondents, “Is there *any* legislative bill that has come up in the House of Representatives, on which you remember how your congressman has voted in the last couple years?” John R. Zaller, *The Nature and Origins of Mass Opinion* 76 (1992) (emphasis added). “Only 12 percent could think of anything.” *Id.* In other words, a supermajority of respondents couldn’t name a single bill on which their representative had recently taken a position. *See also* Donald R. Songer, *Government Closest to the People: Constituent Knowledge in State and National Politics*, 17 *Polity* 387, 388 (1984) (describing a similar result). And more recently, a survey probed respondents’ ability to state correctly whether Congress legislated in certain areas in the 2000s. Only slim majorities gave the right answers with respect to congressional activity on handgun sales and campaign finance. *See* Jeffery J. Mondak et al., *Does Familiarity Breed Contempt? The Impact of Information on Mass Attitudes Toward Congress*, 51 *Am. J. Pol. Sci.* 34, 38 tbl.1 (2007).

The implication of this work is that, if the major question and nondelegation doctrines required members of Congress to vote on more bills, many voters wouldn’t know about those additional matters. Many voters don’t know about the bills their representatives *already* address. There’s no reason to think these voters would become better informed if

more items were placed on Congress's agenda. These voters would therefore lack the necessary political knowledge to hold their representatives accountable for the extra issues on Congress's plate.

B. Attribution of Responsibility

Turning to voters' attribution of responsibility, the most comprehensive study of voters' perceptions of their U.S. House members' votes was recently released. See Stephen Ansolabehere & Shiro Kuriwaki, *Congressional Representation: Accountability from the Constituent's Perspective*, 65 Am. J. Pol. Sci. (forthcoming 2021). The authors examined thirty-six of the highest-profile bills debated by the House between 2006 and 2018. See *id.* app. tbl.B1. Over this set of bills, an average of 41 percent of respondents weren't sure how their House member voted. See *id.* Another 19 percent of respondents, on average, thought they knew their representative's stance but turned out to be wrong. See *id.* Across the thirty-six bills, a majority of respondents got their House member's vote right in just eleven cases—fewer than one out of three. See *id.*; see also Stephen Ansolabehere & Philip Edward Jones, *Constituents' Responses to Congressional Roll-Call Voting*, 54 Am. J. Pol. Sci. 583, 587 (2010) (reporting similar results).

Moreover, voters' misperceptions of their representatives' votes are far from random. One common error is voters thinking House members take more moderate positions than they actually do. Democratic representatives are thought to cast conservative votes 31 percent of the time while, in

fact, they do so at a rate of 21 percent. *See* Ansolabehere & Jones, *supra*, at 587. Similarly, voters believe Republican representatives cast liberal votes 11 percentage points more frequently than they do in reality. *See id.* Another bias in voters' attribution of responsibility involves the small but crucial group of House members who vote against their party on key bills. Voters are much more likely to misstate these representatives' stances—that is, to think incorrectly that they toe the party line. Voters' odds of accurately identifying the votes of House members who defy their party plummet by 40 percentage points compared to representatives in the party mainstream. *See id.* at 588.

This work suggests that voters can effectively distinguish between House members from different parties but not between representatives from the same party. Another study confirms that hypothesis. Across all House members (Democrats and Republicans), the correlation between the representatives' perceived votes and their actual votes is a reasonable 0.66. *See* Chris Tausanovitch & Christopher Warshaw, Does the Spatial Proximity Between Legislators and Voters Affect Voting Decisions in U.S. House Elections? 23 (Feb. 2015) (unpublished manuscript), <https://perma.cc/J2BT-SMFZ>. But considering only representatives from the same party, the correlation between perception and reality drops to just 0.28. *See id.* This weak relationship indicates that “voters only have a dim awareness of ideological differences between legislators within each party.” *Id.*

Consequently, if the major question and nondelegation doctrines forced members of Congress to vote on more bills, many voters would be unable to attribute responsibility correctly for those additional votes. Some voters would make random mistakes about their representatives' positions. More disturbingly, other voters would systematically misperceive ideologically extreme legislators as moderates and party rebels as party stalwarts. Some extremists would thus evade negative consequences for fringe stances that voters fail to ascribe to them. And some legislators willing to break with their party wouldn't benefit from boldness that voters fail to recognize.

C. Independent Evaluation

Next, the third condition for accountability is that voters independently evaluate the votes cast by members of Congress. However, an array of studies establish that many voters don't form these independent judgments. Instead, their assessments of legislators' votes are heavily driven by their partisan attachments. All these studies proceed in roughly the same fashion. Subjects are provided with a description of a particular congressional bill: the Energy Independence Act, the DREAM Act, and so on. Subjects in the control group are then asked to what extent they approve or disapprove of the bill. In contrast, subjects in the treatment group are first told about the parties' respective positions on the bill and only later prompted for their own opinions. See Toby Bolsen et al., *The Influence of Partisan Motivated Reasoning on Public Opinion*, 36 *Pol. Behav.* 235, 244 (2014); James N. Druckman et al., *How Elite Partisan*

Polarization Affects Public Opinion Formation, 107 Am. Pol. Sci. Rev. 57, 61 (2013); Seth J. Hill & Gregory A. Huber, *On the Meaning of Survey Reports of Roll-Call “Votes”*, 63 Am. J. Pol. Sci. 611, 615-16 (2019); Matthew S. Levendusky, *Clearer Cues, More Consistent Voters: A Benefit of Elite Polarization*, 32 Pol. Behav. 111, 119 (2010).

In almost all cases, subjects in the treatment group give quite different evaluations from subjects in the control group. Specifically, the treated subjects offer assessments that are significantly more aligned with their parties’ views. In the most exhaustive of these studies, including three experiments spanning thirty-one recent bills, Democratic and Republican subjects disagreed by an average of about 25 percentage points when they weren’t informed how Democratic and Republican members of Congress voted on those bills. *See Hill & Huber, supra*, at 616-17. But when Democratic and Republican subjects learned about the party split in Congress, their disagreement ballooned to an average of roughly 40 percentage points. *See id.*; *see also* Bolsen et al., *supra*, at 248 fig.1 (Democrats’ and Republicans’ opinions about the Energy Independence Act diverged by 10-15 percentage points more after exposure to the parties’ stances); Druckman et al., *supra*, at 69 fig.3b (increase in partisan divergence of 15-25 percentage points with respect to the DREAM Act); Levendusky et al, *supra*, at 121 (increase in partisan divergence of 8-10 percentage points with respect to a set of policies).

These findings mean that even if voters knew about the extra bills necessitated by a resurgence of

the major question and nondelegation doctrines, and even if voters knew how their representatives voted on those bills, many voters *still* wouldn't be able to hold their representatives accountable—at least not genuinely. Consider a Democratic voter who approves (or disapproves) of bills supported (or opposed) by her party. True, this voter's evaluations vary from bill to bill. But they don't vary based on the merits of each proposal. Instead, the driver of the voter's assessments is the Democratic Party's position, whatever it happens to be. These partisan judgments can result in partisan accountability: rewarding or punishing the voter's representative for siding with or against the Democratic Party. But they're incapable of yielding *true* accountability, grounded in the voter's independent evaluation of each bill on its own terms. Cf. Christopher H. Achen & Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* 145 (2016) (explaining how “the limitations of democratic citizens” are responsible for “the limitations of democratic accountability”).

D. Retrospective Voting

The last link in the chain of accountability is retrospective voting. Voters must cast their congressional ballots based on their evaluations of their representatives' stances on particular bills. Numerous studies investigate whether, and to what extent, voters actually vote in this way. The key independent variables in these analyses are the roll-call votes of members of Congress. The outcome variable is the legislators' subsequent electoral performance. All the studies also try to control for

other factors that might influence voters' choices at the polls. *See, e.g.*, Gregory L. Bovitz & Jamie L. Carson, *Position-Taking and Electoral Accountability in the U.S. House of Representatives*, 59 *Pol. Rsch. Q.* 297, 300 (2006); Brandice Canes-Wrone et al., *Issue Accountability and the Mass Public*, 36 *Legis. Stud. Q.* 5, 13-18 (2011); Benjamin Highton, *Issue Accountability in U.S. House Elections*, 41 *Pol. Behav.* 349, 355-56 (2019); Tausanovitch & Warshaw, *supra*, at 45-46.

The conclusion of this literature is that most positions taken by members of Congress—even on major bills—have minor electoral repercussions. Retrospective voting based on these positions therefore can't be too common. In the most thorough of these studies, the authors examine all “key votes” according to *Congressional Quarterly* between 1973 and 2000. The vast majority of these votes—the most important ones taken by members of Congress—have insignificant electoral effects. *See Bovitz & Carson, supra*, at 301 tbl.1. Similarly, another study scrutinizes votes on environmental and criminal justice bills from 1988 to 2004. Again, the bulk of these votes don't have significant impacts on incumbents' subsequent electoral results. *See Canes-Wrone et al., supra*, at 18 tbl.1, 24 tbl.3. More recently, the same approach was applied to five of the highest-profile bills of the Obama administration. In four of these five cases, “[t]here is little apparent relationship between voters' and incumbents' positions and vote choice, which suggests lack of issue accountability.” Highton, *supra*, at 358; *see also* Tausanovitch & Warshaw, *supra*, at 46 (“[T]here is no

evidence . . . that voters hold legislators more accountable on important votes than on other votes.”).

These findings shouldn't be overly surprising given the earlier discussion in this section. If many voters don't know about congressional bills, don't know how their representatives voted on those bills, or evaluate their representatives' stances on partisan rather than substantive grounds, it stands to reason that many voters don't (or can't) engage in issue-specific retrospective voting. Another explanation for the infrequency of this form of voting is the influence of other factors on voters' choices at the polls. Crucially, the potency of these other factors *is* evident empirically. That greater sway is why issue-specific retrospective voting pales in comparison.

The scholarship on voting in congressional elections is too rich to be easily summarized, but most studies agree on the importance of four variables. The first is voters' partisanship. Voters are extremely (and increasingly) likely to back candidates who affiliate with the same party as them. *See, e.g.*, Gary C. Jacobson & Jamie L. Carson, *The Politics of Congressional Elections* 146-47 (9th ed. 2016) (“partisanship [i]s the single most important influence on individuals' voting decisions”). The second variable is voters' ideology. Liberal voters are much more likely to support Democratic candidates, just as conservative voters are much more apt to pull the lever for Republicans. *See, e.g.*, Tausanovitch & Warshaw, *supra*, at 15 (“individual ideology has a strong independent effect on vote choice”).

Candidates' (as opposed to voters') ideology is the third relevant variable. As noted earlier, ideologically moderate candidates receive somewhat higher vote shares than ideologically extreme candidates, though this advantage has faded in recent years. *See supra* note 3. And the fourth driver is the President's approval rating. The more popular the President is with the public, the better candidates from the President's party do, and vice versa. *See, e.g.,* Jamie L. Carson et al., *The Electoral Costs of Party Loyalty in Congress*, 54 *Am. J. Pol. Sci.* 598, 608 (2010) ("higher levels of presidential approval help legislators of the president's party and hurt members of the opposite party").

The power of presidential approval is notable because the President is a distinct political actor from Congress. Congressional elections become what political scientists call *second-order* when they're shaped by external presidential forces instead of internal congressional ones. *See* Karlheinz Reif & Hermann Schmitt, *Nine Second-Order National Elections—A Conceptual Framework for the Analysis of European Election Results*, 8 *Eur. J. Pol. Rsch.* 3, 8-9 (1980) (coining the term). Plainly, accountability is impossible in pure second-order elections. Incumbents are rewarded or punished based on developments beyond their control—here, the popularity of a politician who isn't even a member of Congress. *See* David Schleicher, *Federalism and State Democracy*, 95 *Tex. L. Rev.* 763, 768 (2017) ("to the extent that they are second order, . . . elections provide voters with . . . little retrospective accountability").

Of course, congressional elections aren't pure second-order elections. Presidential approval is just one, not the only, factor driving voters' decisions. Nor do voters' partisanship and ideology, candidates' ideology, and the President's approval rating fully account for voters' behavior. In particular, there are some highly salient bills on which the votes of members of Congress indeed have electoral consequences. The most prominent member of this narrow set is the Affordable Care Act. Several studies find that legislators who voted for the Act did worse in the 2010 election. *See, e.g.*, Gary C. Jacobson, *The Republican Resurgence in 2010*, 126 *Pol. Sci. Q.* 27, 48-49 (2011); Brendan Nyhan et al., *One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election*, 40 *Am. Pol. Rsch.* 844, 856-58 (2012). Analogously, legislators who voted for the Act's repeal did worse in the 2018 election. *See* Austin Bussing et al., *The Electoral Consequences of Roll Call Voting: Health Care and the 2018 Election*, 43 *Pol. Behav.* (forthcoming 2022) (manuscript at 13-18). Votes on the Dodd-Frank Act may also have affected legislators' subsequent electoral performances. *Compare* Jacobson, *supra*, at 48-49 (yes), *with* Highton, *supra*, at 357 fig.1 (no). And in an earlier era, Democratic (though not Republican) representatives whose votes showed them to be "tough on crime" did better in downstream elections. *See* Canes-Wrone et al., *supra*, at 18 tbl.1.⁴

⁴ Additionally, voters' *perceptions* of Congress members' votes on bills sometimes affect voters' approval of their representatives and their likelihood of voting for them. *See* Ansolabehere & Jones, *supra*, at 589-95; Ansolabehere &

It would be wrong to claim, then, that if the major question and nondelegation doctrines caused members of Congress to vote on more bills, the legislators would *never* be held accountable for those additional votes. In general, they wouldn't be, just as they're not held accountable for most votes they currently take. Environmental issues like the ones raised in this case, for example, usually don't have electoral ramifications when they're addressed by Congress. *See* Canes-Wrone et al., *supra*, at 23-24. On rare occasions, however, greater enforcement of the major question and nondelegation doctrines might compel representatives to take stands on landmark bills akin to the Affordable Care Act. It's plausible that votes on these exceptional bills could result in electoral gains or losses for legislators. Accordingly, the most defensible conclusion is that placing more items on Congress's agenda would *slightly* enhance congressional accountability. The impact certainly wouldn't be large, but it could be nonzero.

E. Congressional Activity

Would fortifying the major question and nondelegation doctrines, though, actually place more items on Congress's agenda? That's the motivating assumption of the doctrines' proponents. If courts enforced the doctrines more forcefully, Congress

Kuriwaki, *supra*, at 21-29. However, voters' perceptions of Congress members' stances are subject to the biases discussed above. *See supra* Part III.B. And the studies of voters' perceptions are necessarily based on opinion surveys, not voters' actual choices at the polls. *See* Tausanovitch & Warshaw, *supra*, at 26-28.

would draft “statute[s] in a new and narrower way.” *Gundy*, 139 S. Ct. at 2148 (Gorsuch, J., dissenting). It would authorize agencies only to “fill[] up details and find[] facts,” not to enact consequential policies on their own. *Id.* This premise might seem intuitive—but is it accurate?

Congressional history gives an initial reason to be skeptical. This Court famously struck down two congressional statutes on nondelegation grounds in 1935. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). These dramatic judicial interventions, however, had no discernible effect on Congress’s legislative activity. Laws in the late New Deal delegated authority to agencies just as often as laws in the early New Deal. Late New Deal legislation was just as short as early New Deal legislation. And late New Deal laws continued to use “precatory” (as opposed to more restrictive) language at the same rate. *See* Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. Econ. & Org. 27, 38 (2019).

True, the 1930s are but one example. Confounding factors like changes in the Court’s composition might explain why congressional behavior didn’t budge in response to the Court’s nondelegation rulings. Fortunately, the States provide many more cases for testing how judicial limits on delegation influence subsequent legislative activity. Courts in nineteen States adhere to a strong nondelegation doctrine along the lines of *Schechter Poultry* and *Panama Refining*. *See id.* at 32. Courts in these States also deploy the doctrine with some

regularity. Over a recent twenty-year period, twenty-two statutes were invalidated for delegating to agencies in overly broad terms. *See id.* at 43; *see also* Daniel E. Walters, *Decoding Delegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 *Emory L.J.* (forthcoming 2022) (manuscript at 31) (showing nondelegation invalidation rates by state).

Yet neither the presence of a strong nondelegation doctrine, nor its judicial application, makes any material difference for State legislative activity. The doctrine's formal availability isn't a significant predictor of fewer delegations to agencies, longer legislation, or less use of precatory language. Nor are these aspects of legislative behavior significantly influenced by whether, or how often, courts strike down State statutes as excessive delegations. *See Stiglitz, supra*, at 40-47. In sum, "the nondelegation doctrine does not appear to much matter for legislative drafting practices." *Id.* at 46-47. Whether the doctrine is strong or weak, judicially enforced or not, legislative activity stays about the same.

While not dispositive, this evidence suggests one more reason why more stringent application of the major question and nondelegation doctrines might not substantially improve congressional accountability: Congress might not react to this shift in the legal landscape. Without a congressional reaction, of course, there's no prospect of a more accountable Congress. If Congress doesn't consider more or different bills, greater accountability can't ensue even if, improbably, voters are able to satisfy

all four accountability conditions. Those conditions are relevant only if there's new legislation for them to attach to—but it's precisely this new legislation that might not be forthcoming.

**IV. POTENTIAL (AS OPPOSED TO ACTUAL)
CONGRESSIONAL ACCOUNTABILITY
EXISTS ALREADY.**

A mountain of empirical analysis thus indicates that Congress wouldn't become much more accountable if the major question and nondelegation doctrines were enforced more energetically. The doctrines' advocates could try to evade this empirical roadblock by transforming their accountability argument into a nonempirical claim. They could assert, that is, that voters *could* hold members of Congress accountable if the legislators tackled major issues themselves and drafted laws in more determinate language. Maybe voters *wouldn't* do so, in fact, but that would be beside the point. Voters would have the capacity to hold their representatives accountable even if they didn't actually exercise it. *See, e.g.,* Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 *Loy. U. Chi. L.J.* 363, 387 (2019) (“citizens frustrated with a representative’s legislative choices *could* elect a new representative the following term” (emphasis added)).

The problem with this nonempirical variant of the accountability thesis is that it applies to the status quo just as well as to the hypothetical world where the major question and nondelegation doctrines have sharper teeth. When contemporary

agencies promulgate regulations about important issues, they do so pursuant to explicit or implicit congressional authorization. Likewise, when agencies are the delegates of expansive policymaking power, Congress is the delegator. Voters, then, *could* hold their representatives accountable for their choices to entrust major questions to agencies or for their open-ended delegations. Voters who approve of these moves (and their effects) *could* vote to reelect members of Congress, and disapproving voters *could* vote to oust their representatives. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1748 (2002) (“Congress *is* accountable when it delegates power—it is accountable for its decision to delegate power to the agency.”).

Furthermore, agencies are part of the executive branch, which is headed by the democratically elected President. Voters *could* therefore hold the President accountable for agencies’ actions, casting their ballots for (or against) the President when they support (or oppose) the recent record of the administrative state. In this way, accountability *could* arise in presidential elections in addition to in congressional races. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is”); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81, 95 (1985) (“All we need do is not forget there are also presidential elections and that . . . presidents are heads of administrations.”).

Proponents of the accountability thesis sometimes respond to these points about what voters *could* do by arguing that they *don't* do them. In other words, voters generally don't reward or punish members of Congress for delegating matters to agencies. *See, e.g.*, David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 Harv. J.L. & Pub. Pol'y 213, 273 (2020) (rebutting the claim that "Congress is accountable for agency-made rules" by citing "the work of political scientists"). Nor do voters often vote in presidential elections based on their evaluations of agencies' actions. *See, e.g.*, Redish, *supra*, at 386 ("while the president oversees administrative agencies in theory, this presidential oversight does not make the agencies publicly accountable in practice").

However, these rejoinders about what voters don't do are the very retorts that accountability advocates forfeit by retreating from empirical to nonempirical territory. After all, voters also don't do the things they would have to for more vigorous application of the major question and nondelegation doctrines to yield substantial accountability gains. Accountability advocates sidestep these unwelcome facts by lauding what voters *could* do in a counterfactual legal order. Having relegated reality to the sidelines, though, accountability advocates are in no position to bring it back onto the pitch when their critics make claims, too, about what voters *could* do under the status quo. If empirics don't matter, potential accountability is the same whether courts do or don't robustly enforce the major question and nondelegation doctrines. If empirics are relevant, on

the other hand, accountability is limited today and would remain limited in the world imagined by accountability advocates.

CONCLUSION

However it disposes of this case, this Court should not treat improved accountability as a persuasive rationale for the major question and nondelegation doctrines. According to voluminous empirical evidence, Congress's actual accountability would not significantly rise due to these doctrines' increased use. Congress's potential accountability would also be largely unaffected since voters may already hold their representatives accountable for all their actions.

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