ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1081 (and consolidated cases)

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF OHIO, ET AL.,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY, AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents,
ADVANCED ENERGY ECONOMY, ET AL.
Intervenors.

On Petition for Review of an Action by the United States Environmental Protection Agency

BRIEF FOR AMICI CURIAE WESTERN STATES PETROLEUM ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CALIFORNIA ASPHALT PAVEMENT ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, INC., NATIONAL TANK TRUCK CARRIERS, INC., IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)

A. Parties and Amici

All parties in this Court are listed in the Brief for the State Petitioners. In addition to this amicus brief, the following groups have filed or will file an amicus brief:

- Western States Trucking Association, Inc.;
- Owner-Operator Independent Drivers Association, Inc.;
- The Two Hundred for Housing Equity;
- ConservAmerica;
- American Commitment, Americans For Tax Reform, Caesar Rodney Institute, California Policy Center, Center Of The American Experiment, Energy And Environmental Legal Institute, Freedom Foundation Of Minnesota, Independent Women's Law Center, Institute For Energy Research, Institute For Regulatory Analysis And Engagement, Rio Grande Foundation, and Thomas Jefferson Institute For Public Policy;
- California Business Roundtable and California Manufacturers & Technology Association; and

- Texas Oil & Gas Association, Louisiana Mid-Continent Oil & Gas Association, Petroleum Alliance Of Oklahoma, Texas Independent Producers And Royalty Owners Association, and Texas Association Of Manufacturers.

B. Rulings under Review

References to the agency action at issue appear in the Brief for the State Petitioners.

C. Related Cases

The Court has consolidated with this case three other cases involving challenges to the agency action challenged here: *Iowa Soybean Ass'n v. EPA*, No. 22-1083; *Am. Fuel & Petrochemical Mfrs. v. EPA*, No. 22-1084; and *Clean Fuels Dev. Coal. v. EPA*, No. 22-1085.

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, amici Western States Petroleum Association, National Federation of Independent Business, California Asphalt Pavement Association, American Trucking Associations, Inc., and National Tank Truck Carriers, Inc., make the following disclosures:

Western States Petroleum Association is a nonprofit trade association that represents companies engaged in petroleum exploration, production, refining, transportation and marketing in Arizona, California, Nevada, Oregon, and Washington. The Association has no parent company, and no publicly held company has a 10% or greater ownership in it.

National Federation of Independent Business ("NFIB") is a 501(c)(6) membership association with no reportable parent companies, subsidiaries, affiliates, or similar entities. No publicly held company has a 10% or greater ownership in it.

California Asphalt Pavement Association is a nonprofit trade association that represents members of the asphalt pavement industry in California. The Association has no parent company, and no publicly held company has a 10% or greater ownership in it.

American Trucking Associations, Inc., is the non-profit national trade association of the U.S. trucking industry. American Trucking

Associations has no parent company, and no publicly held company has a 10% or greater ownership in it.

National Tank Truck Carriers, Inc., based in Virginia, represents companies that specialize in bulk transportation services by cargo tank throughout North America. National Tank Truck Carriers has no parent company, and no publicly held company has a 10% or greater ownership in it.

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
APA	Administrative Procedure Act
EPA	U.S. Environmental Protection Agency
FCC	Federal Communications Commission
NFIB	National Federation of Independent Business
OSHA	Occupational Safety and Health Administration

INTEREST OF AMICI CURIAE

Western States Petroleum Association is a nonprofit trade association that represents more than 15 companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in Arizona, California, Nevada, Oregon, and Washington. The Association is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible. California's standards stand to impact a large swathe of the national economy to which the Association's members contribute. In California alone, the petroleum industry employs hundreds of thousands of workers, resulting annually in $26 billion paid in wages and benefits,[1] over $21 billion contributed in local, state, and federal tax revenue, and more than $152 billion in economic output added to the State economy.[2]

National Federation of Independent Business is the nation's leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with

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[1] *See* W. States Petrol. Ass'n, *Economic Impact* (last visited Oct. 31, 2022), https://www.wspa.org/issue/economic-impact/.

[2] *See* Los Angeles County Economic Development Corporation, *Oil and Gas in California: The Industry, Its Economic Contribution and User Industries At Risk*, at 38-39 (2019), *available at* https://laedc.org/wpcms/wp-content/uploads/2022/08/LAEDC_WSPA_FINAL_20190814.pdf.

hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. Its members have consistently ranked unduly burdensome environmental regulations and the cost of fuel and energy among the biggest problems for their businesses, threatening their bottom line.[3] The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

California Asphalt Pavement Association is a nonprofit trade association that represents members of the asphalt pavement industry in California. The industry is a primary consumer of liquid asphalt, a petroleum-based product that is produced as part of the oil refining process.[4] Because there is no alternative for liquid asphalt, any reduction or elimination of the availability of this product as an indirect result of

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[3] *See, e.g.*, NFIB Research Center, *Small Business and Inflation*, at 1 (2022), *available at* https://assets.nfib.com/nfibcom/NFIB-Inflation-Survey-Questionnare-June-July-2022.pdf; NFIB Research Center, *Small Business Problems & Priorities*, at 9-10 (2020), *available at* https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf.

[4] Los Angeles County Economic Development Corporation, *supra*, at 53.

California's emissions standards will severely harm the industry. It will disrupt the ability of local, state, and federal agencies—the industry's largest customers—to build and maintain roads and highways. So, beyond impacting the 15,735 men and women employed in manufacturing asphalt pavement mixtures, California's standards will put at risk the 343,000 American jobs involved in the construction of that infrastructure.[5]

American Trucking Associations, Inc., is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and represents a significant portion of the commercial trucks in the United States. It regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court. The motor carriers represented by American Trucking Associations own and operate a significant portion of the commercial trucks in the United States, and because those trucks are heavily regulated with respect to emissions, the association's members have an acute interest in the proper construction of Section 209(b) of the Clean Air Act.

National Tank Truck Carriers, Inc., is a nonprofit, nonpartisan trade association that represents over 500 members from the tank truck industry operating in the United States, Canada, Mexico, and Japan.

[5] *See* Asphalt Pavement Alliance, *Why You Belong in the Asphalt Pavement Industry*, at 2 (2019), *available at* https://bit.ly/3zrPmJR.

For-hire carrier and private fleet members deliver vital and often-hazardous bulk commodities such as petroleum products, food and beverage, plastics, chemicals, minerals, and cryogenics. The Association champions safety and success for the tank truck community through advocacy and education.

STATEMENT OF COUNSEL

No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Petitioners, Respondents, and Intervenors consent to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

Amici are aware that other amici curiae intend to file amicus briefs. Pursuant to D.C. Circuit Rule 29(d), counsel for Amici certifies that a separate brief is necessary. Given the significant differences in the memberships of Amici and the other groups, and given the distinct interests the members of Amici and the other groups have in this case and the distinct issues they intend to brief, it is impracticable to collaborate in a single brief. Amici believe that the Court will benefit from the presentation of multiple perspectives. And, to respect this Court's and the parties' resources, Amici have sought to present their arguments in as succinct a fashion as possible. Accordingly, this brief is only 5,223 words, well below

the 6,500 words allowed by the Federal Rules of Appellate Procedure and this Court's September 22, 2022, order for an amicus curiae brief.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for the State Petitioners and the Brief for the Private Petitioners.

SUMMARY OF THE ARGUMENT

I. Amici agree with petitioners that the major-questions doctrine precludes EPA's reading of Clean Air Act § 209(b). Amici write separately to elaborate on how the Supreme Court synthesized decades of major-questions-doctrine caselaw in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). This doctrine developed over many years in various cases when agencies, including EPA, "assert[ed] highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 2609. This major-questions doctrine compels courts to view agency "assertions of extravagant statutory power . . . with skepticism." *Id.* (internal quotation marks omitted).

The doctrine applies to "cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 2608

(cleaned up). In other words, the doctrine examines both (1) the *scope* of the claimed congressional delegation and (2) the *consequences* of such a delegation. So an agency's interpretation of a statute triggers the doctrine when it would mark a "transformative expansion in its regulatory authority," when the "agency has no comparative expertise in making [the necessary] policy judgments," or when the agency purports to discover "unheralded power" "in a long-extant statute." *Id.* at 2610, 2612-13 (cleaned up).

The doctrine also applies where an agency claims "power over a significant portion of the American economy," such as the power "to substantially restructure the American energy market." *Id.* at 2609-10 (internal quotation marks omitted). And the Court has found the issue to be one of major political significance when (1) the agency claims the power "to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"; (2) the issue "has been the subject of an earnest and profound debate across the country," *id.* at 2610, 2612-14 (internal quotation marks omitted); or (3) the agency action "intrudes into an area that is the particular domain of state law," *Ala. Ass'n of Realtors v. Dep't of HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam). No single

factor is necessary, but all factors here point in the same direction: the decision to allow California to force a nationwide shift in new sales from gas-powered vehicles to electric vehicles implicates a major question.

When the major-questions doctrine applies, the agency must point to clear congressional authorization for the authority it claims. That is, it is not enough that the agency's interpretation is "textual[ly] plausib[le]." *West Virginia*, 142 S. Ct. at 2608. General, "modest," or "vague" language will not do either. *Id.* (internal quotation marks omitted). Nor can legislative history supply the necessary authorization when the statute itself is less than clear. As Private Petitioners explain, EPA cannot point to a clear congressional statement that would authorize it "to radically reorder the division of power among the States by appointing California as a co-regulator of greenhouse-gas emissions from vehicles." Private Petitioners' Br. 27.

II. Amici also agree with petitioners that EPA improperly ignored the nationwide effects of California's emissions standards. These potential but overlooked effects confirm that this case involves an issue of major economic and political significance, triggering the major-questions doctrine.

EPA failed to address the comment that one possible consequence of the standards is that automobile manufacturers will offset reduced sales of gas-powered vehicles in California by selling more of those vehicles out-of-State. California's attempt to reduce emissions in its own state could therefore have no overall impact on greenhouse gases and may even increase emissions in other states.

EPA also failed to address the comment that, to meet their California quotas, automobile manufacturers will likely have to subsidize more expensive electric vehicles by increasing the cost of other vehicles sold throughout the country. Out-of-state consumers, then, will quite literally pay the price for California's standards. Those who are unwilling to do so will hold onto their older, less fuel-efficient cars with higher emissions, slowing the roll-out of a more fuel-efficient, lower emissions fleet, and thereby slowing attainment. This outcome undermines California's position that it needs its emissions standards to address compelling and extraordinary circumstances. And it is improbable that section 209(b)'s waiver provision—intended to address local effects in California—empowered EPA to make decisions that would implicate far-reaching issues of national concern.

ARGUMENT

I. The Supreme Court's Synthesis of Decades of Caselaw in *West Virginia v. EPA* Confirms this is a Major-Questions Case.

As the Private Petitioners argue, this case implicates the major-questions doctrine. Private Petitioners' Br. 22-27; Amici write separately to explain further how the Supreme Court's recent decision in *West Virginia v. EPA* synthesizes four decades of caselaw about the doctrine and confirms that this is a major-questions case.

A. Statutory context, the separation of powers, and legislative intent provide the foundation for the major-questions doctrine. *West Virginia*, 142 S. Ct. at 2609.

As in any case, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 2607 (internal quotation marks omitted). And "[w]here the statute at issue . . . confers authority upon an administrative agency," part of the inquiry is "whether Congress in fact meant to confer the power the agency has asserted." *Id.* at 2607-08.

To be sure, "[i]n the ordinary case," it will make little difference to the

analysis that the statute at issue involves a delegation to an agency. *Id.* at 2608. But there is a category of "extraordinary cases"—those involving "major social and economic policy decisions"—"that call for a different approach." *Id.* at 2608, 2613 (internal quotation marks omitted). Because "judges presume that Congress does not delegate its authority to settle or amend" those kinds of decisions, *id.* at 2613 (internal quotation marks omitted), courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (internal quotation marks omitted).

It is in this category of cases—where an agency "assert[s] highly consequential power"—that the major-questions doctrine most clearly applies. *West Virginia*, 142 S. Ct. at 2609; *see* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

B. To identify what questions are major, courts must evaluate both

the *scope* and the *consequences* of the claimed delegation. Regarding the *scope*, courts examine "the history and the breadth of the authority that the agency has asserted." *West Virginia*, 142 S. Ct. at 2608 (cleaned up). And regarding the *consequences*, courts analyze "the economic and political significance of that assertion." *Id.* (internal quotation marks omitted). The Supreme Court's precedents over the past four decades supply ready guidance for engaging in this inquiry.

First, a case is of major *economic* significance when an agency asserts "power over a significant portion of the American economy." *Id.* at 2608 (internal quotation marks omitted). For that reason, the Court has applied the major-questions doctrine to agency attempts to "regulat[e] tobacco products, eliminat[e] rate regulation in the telecommunications industry, subject[] private homes to Clean Air Act restrictions, and suspend[] local housing laws and regulations." *Id.* at 2621 (Gorsuch, J., concurring).

The Private Petitioners explain that the vast economic impact of the section 209(b) waiver on the "automobile and energy industries" triggers the major-questions doctrine, *see* Private Petitioners' Br. 23-24, but the effects will go further still. By mandating a turn away from the internal

combustion engine, California's standards will throttle the petroleum industry, placing hundreds of thousands of jobs—and billions of dollars in tax revenue—at risk. *See* Interest of Amici Curiae, *supra*, at 1.

The damage will not stop there: downstream industries will also suffer. The asphalt industry, for example, is reliant on oil refining for liquid asphalt, a petroleum-based product. *See id.* at 2. And if petroleum production is curtailed, the industry will be unable to meet its commitments to supply those who pave America's roads. *See id.* at 2-3. Again, hundreds of thousands of jobs nationwide are on the line, not to mention core elements of this country's infrastructure. *See id.* at 3.

Indeed, this would not be the first time that EPA's actions have triggered the major-questions doctrine through their economic impact. In *West Virginia*, the Supreme Court concluded that EPA's assertion of power involved a decision of major economic significance because it would have "substantially restructure[d] the American energy market," by "forc[ing] a nationwide transition away from the use of coal to generate electricity." *West Virginia*, 142 S. Ct. at 2610, 2616 (majority opinion). And in *Utility Air Regulatory Group v. EPA*, the Court observed that the asserted authority "to require permits for the construction and

modification of tens of thousands, and the operation of millions, of small sources nationwide" would have conferred on the agency "extravagant statutory power over the national economy." 573 U.S. 302, 324 (2014).

Second, there are several ways that a case may touch on an issue of major *political* significance. An agency's interpretation will draw judicial skepticism when the agency purports to discover the power "to adopt a regulatory program that Congress ha[s] conspicuously and repeatedly declined to enact itself." *West Virginia*, 142 S. Ct. at 2610. Similarly, an agency's interpretation will be treated as "suspect" when the agency adopts a scheme that "has been the subject of an earnest and profound debate across the country." *Id.* at 2614 (internal quotation marks omitted). As Private Petitioners note, "Congress has repeatedly considered and rejected legislation authorizing EPA to establish an electric vehicle mandate." Private Petitioners' Br. 24; *see, e.g.*, Zero-Emission Vehicles Act of 2020, S. 4823, 116th Cong. (2020); Zero-Emission Vehicles Act of 2020, H.R. 8635, 116th Cong. (2020); Zero-Emission Vehicles Act of 2019, S. 1487, 116th Cong. (2019); Zero-Emission Vehicles Act of 2019, H.R. 2764, 116th Cong. (2019); Zero-Emission Vehicles Act of 2018, S. 3664, 115th Cong. (2018).

EPA's actions also have triggered the major-questions doctrine through their political significance. In *West Virginia*, for example, "Congress had conspicuously and repeatedly declined to enact" legislation similar to the agency's challenged plan. 142 S. Ct. at 2610. And the "basic scheme EPA adopted ha[d] been the subject of an earnest and profound debate across the country," making the claimed delegation "all the more suspect." *Id.* at 2614 (internal quotation marks omitted); *see also, e.g.*, *id.* at 2620 (Gorsuch, J., concurring) (noting that, "in *NFIB v. OSHA*, [142 S. Ct. 661 (2022) (per curiam),] the Court held the doctrine applied when an agency sought to mandate COVID-19 vaccines nationwide for most workers at a time when Congress and state legislatures were engaged in robust debates over vaccine mandates").

An agency action also implicates a major political question if it "would upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Because it is "central to the constitutional design" "that both the National and State Governments have elements of sovereignty the other is bound to respect," *Arizona v. United States*, 567 U.S. 387, 398 (2012), the courts have long required a clear statement from Congress in

such "traditionally sensitive" areas, *Gregory*, 501 U.S. at 461.[6]

Third, because "the breadth of the authority that the agency has asserted" is relevant, an interpretation that would "represent[] a transformative expansion in [the agency's] regulatory authority" is likely to trigger the major-questions doctrine. *West Virginia*, 142 S. Ct. at 2608, 2610 (cleaned up) (majority opinion).

MCI Telecommunications Corp. v. American Telephone & Telegraph Co., a challenge to the authority of the Federal Communications Commission ("FCC"), is instructive. 512 U.S. 218 (1994). There, one provision, section 203(a), "require[d] communications common carriers to file tariffs with the [FCC]." *Id.* at 220. Another provision, section 203(b),

[6] In this sense, the major-questions doctrine is similar to the federalism canon, the rule that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020); *see West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) ("[T]he major questions doctrine and the federalism canon often travel together."). As the Private Petitioners explain, the federalism canon applies here. *See* Private Petitioners' Br. 20-21. EPA's reading of Section 209(b) would give California authority, shared with no other state, to overhaul the *national* vehicle and fuel industries to address an inherently *global* phenomenon. At the same time, it would disrupt the supremacy of the federal government's authority on this inherently national and international topic.

"authorize[d] the [FCC] to 'modify' any requirement of § 203." *Id.* The Court rejected the FCC's argument that this second provision permitted the agency "to make tariff filing optional." *Id.* This interpretation, the Court explained, raised a red flag because it would effect "a fundamental revision of the statute": "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Id.* at 231.

Relatedly, whether the asserted power falls within the agency's "sphere of expertise" is also relevant. *NFIB*, 142 S. Ct. at 665. That is because, "[w]hen an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so." *West Virginia*, 142 S. Ct. at 2612-13 (cleaned up) (majority opinion); *cf.* Breyer, *supra*, at 370 ("[C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question."). Put slightly differently, "a mismatch between an agency's challenged action and its congressionally assigned mission and expertise" warrants judicial skepticism of the asserted delegation. *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring); *see King v. Burwell*, 576 U.S. 473, 486 (2015). That is one reason why the Supreme Court in *NFIB* was

skeptical of OSHA's asserted authority: "imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not part of what the agency was built for." 142 S. Ct. at 665 (internal quotation marks omitted).

The major-questions doctrine may be implicated even when there is no mismatch between the issue and the agency's area of expertise, *West Virginia*, 142 S. Ct. at 2623 n.5 (collecting cases), but there *is* a mismatch here. Among other things, mandating a switch to electric vehicles would put at risk entire industries, millions of jobs, and billions of tax revenues. And it would require alterations to the nation's transportation infrastructure. Given the limited scope of EPA's expertise, there is no reason to believe that Congress would have instructed EPA to make decisions implicating these weighty policy issues, much less that Congress would have directed EPA to defer to California's views on them.

Fourth, the "history . . . of the [asserted] authority" is also relevant. *Id.* at 2608 (internal quotation marks omitted) (majority opinion). In *West Virginia*, for example, the statute on which EPA relied "had rarely been used in the preceding decades," counseling skepticism towards EPA's assertion of authority. *Id.* at 2610. In *Utility Air*, EPA's "interpretation

would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements." *Id.* at 2608 (describing *Utility Air*). In *NFIB*, the Court "found it 'telling that OSHA, in its half century of existence,' had never relied on its authority to regulate occupational hazards to impose such a remarkable measure" as a workplace vaccine mandate. *Id.* at 2608-09 (quoting *NFIB*, 142 S. Ct. at 666). And here, before the Advanced Clean Car program, section 209 had never been used to mandate a shift to vehicle electrification.

An agency's historical failure to assert the claimed power is sufficient—but not necessary—to trigger the major-questions doctrine. After all, *King v. Burwell* applied the doctrine even though the relevant statute was fairly new, and the government's interpretation of the statute had been consistent over time. *See* 576 U.S. at 485-86. What mattered was that the statutory scheme in question "involve[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people." *Id.* at 485.

The major-questions doctrine applies here. EPA's interpretation of section 209(b) "may well [allow California to] dictate the future of the

automobile and energy industries." Private Petitioners' Br. 23-24. At the very least, it would "allow California to substantially restructure the American automobile market, petroleum industry, agricultural sectors, and the electric grid," *id.* at 23, costing billions of dollars and risking hundreds of thousands of jobs in the petroleum industry and downstream markets. And it would give California all this power even though "Congress has repeatedly considered and rejected legislation authorizing EPA to establish an electric-vehicle mandate." *Id.* at 24.

C. There are two main consequences when, as here, the major-questions doctrine applies. The first is that the agency's interpretation of the statute is owed no deference under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). That is because "[d]eference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). This premise falls away when a major question is involved. *King*, 576 U.S. at 485; *see Mayburg v. Sec'y of HHS*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) ("[T]he larger the question, . . . the more likely Congress intended the courts to decide the question

themselves."). *But cf.* 87 Fed. Reg. 14,332, 14,353 & n.182 (Mar. 14, 2022) (noting that EPA has traditionally relied on *Chevron* deference to justify its current interpretation of Clean Air Act section 209(b)).

The second consequence is that, when the major-questions doctrine applies, "the Government must . . . point to clear congressional authorization" "for the power it claims." *West Virginia*, 142 S. Ct. at 2609, 2614 (internal quotation marks omitted). This requirement is a demanding one. Again, caselaw supplies abundant guidance.

It is not enough that the agency's interpretation is "colorable," textually "plausib[le]," or a "definitional possibilit[y]." *Id.* at 2608-09, 2614 (internal quotation marks omitted). Nor will "oblique or elliptical language," "modest words, vague terms, or subtle devices" suffice. *Id.* at 2609 (cleaned up). In *MCI*, for instance, the Court explained that statutory "permission to 'modify' rate-filing requirements" was too "subtle a device" to empower the FCC to "determin[e] [] whether" the communications "industry [should] be entirely, or even substantially, rate-regulated." 512 U.S. at 231.

Additionally, the explicit grant of the asserted type of power in a different statute undermines the notion that the power was granted

implicitly in the instant statute. *See West Virginia*, 142 S. Ct. at 2615.

Moreover, because the major-questions doctrine functions as a "clear statement rule[]," *see id.* at 2616-17 (Gorsuch, J., concurring), the principles applying to those kinds of rules also apply in major-questions cases.

For one, "broad or general language" will not supply evidence of clear congressional authorization. *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion); *West Virginia*, 142 S. Ct. at 2622. Take *NFIB*, where the government relied on the broad power to set "*occupational* safety and health standards" to justify its workplace vaccine mandate. 142 S. Ct. at 665 (quoting 29 U.S.C. § 655(b)). Invoking the major-questions doctrine, the Supreme Court disagreed. *Id.* at 665. It explained that the statute "empower[ed] the [Government] to set *workplace* safety standards," but that it was not clear enough to justify the imposition of "broad public health measures." *Id.*

Or take *Alabama Association of Realtors*. The Court explained that the Department of Health and Human Services lacked the statutory authority to halt evictions during a pandemic—the major question at issue—even though the agency was broadly empowered "to make and enforce such regulations as in [its] judgment are necessary to prevent the

introduction, transmission, or spread of communicable diseases" between States. 141 S. Ct. at 2487; *see* 42 U.S.C. § 264(a). That broad power was insufficient to allow the agency to decide a major, tangentially related, question. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

As is the case with other clear-statement rules, clear congressional authorization may not be discerned from legislative history or an appeal to the statute's purpose. *See Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("If Congress' intention is "unmistakably clear in the language of the statute, recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile." (internal quotation marks omitted)). In *West Virginia*, for example, it was undisputed that the statute's goal was to reduce emissions and that the agency's interpretation would achieve that goal. But, absent some clear statutory statement, it remained implausible that Congress would have given to EPA the authority to adopt on its own a regulatory scheme that would force a nationwide transition away from the use of coal to generate electricity. *West Virginia*, 142 S. Ct. at 2616 (majority opinion).

II. EPA Ignored Comments that Further Confirm this is a Major-Questions Case.

Amici agree with the Private Petitioners that, in reinstating the waiver, EPA improperly ignored arguments from commenters about the effect of California's standards on overall emissions. *See* Private Petitioners' Br. 42, 52. EPA's failure to consider these arguments mandates invalidation of the waiver reinstatement. *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (explaining that the APA "obligates the agency to examine all relevant factors and record evidence"). And it is clear from the considerations EPA overlooked that this is a major-questions case. Carbon leakage and fleet turnover are just two important issues EPA failed to address in its final rule.[7]

Carbon leakage. As one commenter explained, California's carbon-dioxide standards, "when sprinkled atop a national fleet-*average* carbon

[7] To be sure, EPA stated that it had "review[ed] [] the complete record" and that "[a]mple record support exists on California's need for" the zero-emissions vehicle "sales mandate." 87 Fed. Reg. at 14,367. But "[s]tating that a factor was considered, however, is not a substitute for considering it." *Getty v. Fed. Savs. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). And EPA's "conclusory statement[]" that it reviewed the whole record supplies little reason to suppose that EPA adequately considered the comments it received. *See id.* at 1057.

dioxide standard," will likely result in what's known as "carbon leakage." R-224 at 33-34. Carbon leakage occurs when "car manufacturers simply offset any in-state emission reductions in California with out-of-state emission increases in other states, while on net meeting the same national fleet-average greenhouse gas standard." *Id.* at 1. Two factors contribute to this effect. First, because of EPA "multiplier" credits, "[f]or each compliant car sold in California, a manufacturer will be able to sell cars that emit *more* grams of carbon per mile elsewhere in the United States while still meeting the same national fleet-average greenhouse standard." *Id.* at 34. Second, "[b]ecause reducing carbon dioxide emissions is costly, car manufacturers have strong economic incentives to offset the effect of California's state standards in other states." *Id.*

As a result of these combined factors, the commenter argued, California's standards would more likely *increase* than decrease overall greenhouse gas emissions. *Id.* And they would do so by increasing emissions out-of-state. *Id.* So, even if EPA is correct that local changes to carbon-dioxide emissions can have specifically "local impacts," *see* 87 Fed. Reg. at 14,366, any improvements to conditions in California will come at the expense of other States. Yet "[t]here is little reason to think" that

"Congress implicitly tasked" EPA in section 209(b)—a provision directed at a single State—"with balancing the many vital considerations of national policy implicated in" carbon leakage. *West Virginia*, 142 S. Ct. at 2612.

Reduced fleet turnover. Another commenter argued that California's zero-emission-vehicles mandate will increase the cost of vehicles, both in-state and out-of-state. That is, because nationwide demand for electric vehicles is low, "[a]utomobile manufacturers [must] implement cross-subsidies to encourage consumers to buy [electric vehicles] while paying for the artificially low price of [electric vehicles] through charging higher prices on non-[electric vehicles]." R-140 at 17. "Overall, this mechanism drives up vehicle prices and incentivizes car owners to hold onto their vehicles longer, . . . delaying the introduction of vehicles with better fuel efficiency." *Id.*; *see* R-224 at 45 (noting that California itself acknowledged that its standards would lead to higher purchase prices). Far from hastening the roll-out of fuel-efficient vehicles, then, the zero-emission-vehicles mandate risks *delaying* attainment "by reducing fleet turnover" and leaving consumers with less fuel-efficient, higher-emission cars. R-140 at 18. Because the slowing of fleet turnover hinders attainment,

California cannot credibly claim that it needs its own emission "standards to meet compelling and extraordinary circumstances." *See* 42 U.S.C. § 7543(b)(1)(B).

What's more, the "imposi[tion] [of] cross-subsidies on new vehicle purchases shoulders states who choose not to adopt California's [zero-emission-vehicles] mandate with a significant portion of the mandate's cost," even though those states are powerless "to reduce or block the cross-subsidies imposed on their citizens that are necessary to comply with California regulations." R-140 at 17. As with the carbon-leakage problem, there is little reason to think that Congress, through section 209(b), conferred on EPA the task of balancing the States' competing interests in affordable, fuel-efficient vehicles.

CONCLUSION

The Court should set aside EPA's reinstatement of California's preemption waiver.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On October 31, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,223 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

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