ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1031 (and consolidated cases)

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

STATE OF TEXAS, ET AL.,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES 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, CALIFORNIA ASPHALT PAVEMENT ASSOCIATION, AND AMERICAN TRUCKING ASSOCIATIONS, 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 and the Brief for the Private Petitioners. In addition to this amicus brief, the following groups have filed or will file an amicus brief:

- California Manufacturers & Technology Association and California Business Roundtable;
- Texas Oil & Gas Association, Louisiana Mid-Continent Oil & Gas Association, The Petroleum Alliance of Oklahoma, Texas Independent Producers and Royalty Owners Association, Texas Association of Manufacturers, Texas Royalty Council, American Royalty Council;
- The Two Hundred For Housing Equity;
- The Buckeye Institute;
- ConservAmerica;
- Truck Renting and Leasing Association;
- The Sulphur Institute;
- Pacific Legal Foundation and National Federation of Independent Business;

- States of West Virginia, Kansas, South Dakota, Tennessee, Virginia, and Wyoming.

B. Rulings under Review

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

C. Related Cases

The Court has consolidated with this case six other cases involving challenges to the agency action challenged here: *Competitive Enterprise Institute v. EPA,* No. 22-1032; *Illinois Soybean Association v. EPA*, No. 22-1033; *American Fuel & Petrochemical Manufacturers v. EPA*, No. 22-1034; *Arizona v. EPA*, No. 22-1035; *Clean Fuels Development Coalition v. EPA*, No. 22-1036; and *Energy Marketers of America v. EPA*, No. 22-1038.

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, amici Western States Petroleum Association, California Asphalt Pavement Association, and American Trucking Associations, 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.

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.

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GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
EPA	U.S. Environmental Protection Agency
FCC	Federal Communications Commission
FDA	Food and Drug Administration
NHTSA	National Highway Traffic Safety Administration
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. EPA's standards would 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]

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

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[1] *See* W. States Petrol. Ass'n, *Economic Impact* (last visited Nov. 10, 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.

petroleum-based product that is produced as part of the oil refining process.[3] Because there is no alternative for liquid asphalt, any reduction or elimination of the availability of this product as an indirect result of EPA'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, EPA's standards will put at risk the 343,000 American jobs involved in the construction of that infrastructure.[4]

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 202 of the Clean Air Act.

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

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

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, their members, or their 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 4,524 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

A. Amici agree with petitioners that the major-questions doctrine precludes EPA's reading of Clean Air Act § 202. 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).

B. 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 2608-10 (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"; or (2) the issue "has been the subject of an earnest and profound debate across the country." *Id.* at 2610, 2614 (internal quotation marks omitted). No single factor is necessary, but all factors here point in the same direction: the decision to use fleet averaging to force a nationwide shift in new sales from gas-powered vehicles to electric vehicles implicates a major question.

C. 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].” *Id.* at 2608. General, “modest,” or “vague” language will not do either. *Id.* at 2609 (internal quotation marks omitted). Nor can legislative history supply the necessary authorization when the statute itself is less than clear. As the Private Petitioners explain, EPA cannot point to a clear congressional statement that would authorize it “to set standards in such a way that manufacturers can comply only by abandoning internal-combustion[-engine] vehicles in favor of electric vehicles.” Private Petitioners’ Br. 37.

ARGUMENT

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

As the petitioners argue, this case implicates the major-questions doctrine. Private Petitioners’ Br. 22-37; State Petitioners’ Br. 15-28, 22-24. 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 dictate that the major-questions doctrine applies when an agency asserts highly consequential power.

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 v. Dep't of HHS*, 141 S. Ct. 2485, 2489 (2021) (per

curiam) (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. The factors relied on in *West Virginia v. EPA* and other Supreme Court decisions indicate that this is a major-questions case.

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.* (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 EPA's standards triggers the major-questions doctrine, *see* Private Petitioners' Br. 24-28, but the effects will go further still. By mandating a turn away from the internal combustion engine, EPA'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 1-2. 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 1-2. Again, hundreds

of thousands of jobs nationwide are on the line, not to mention core elements of this country's infrastructure. *See id.* at 2.

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. 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).

The sheer cost of compliance with EPA's standards confirms that this is a major-questions case. The Clean Power Plan at issue in *West Virginia* was projected to cost up to $8.4 billion in 2030. Private Petitioners' Br. 24. EPA's rule in *Utility Air* would have imposed "permitting costs of $147 billion." *Utility Air*, 573 U.S. at 322. The rule in *Alabama*

Association of Realtors that triggered the major-questions doctrine had an economic impact of around $50 billion. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. And the provision before the Court in *King v. Burwell* "involv[ed] billions of dollars in spending each year"—enough to implicate the major-questions doctrine. *See* 576 U.S. 473, 485-86 (2015). EPA's emissions standards would be more expensive than *all* of those programs, costing $19 billion by 2030 and the present value of $300 billion between 2021 and 2050. 86 Fed. Reg. 74,434, 74,509 (Dec. 30, 2021).

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).

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. *Id.* 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").

So too here with EPA's use of section 202 to mandate the production of electric vehicles. As Private Petitioners note, "both Houses of Congress have previously considered and rejected multiple bills with effects similar to EPA's rule," including a "bill that would have mandated a level of electric-vehicle penetration roughly equal to the 50%-by-2030 target EPA embraces in the rule." Private Petitioners' Br. 32 (internal quotation marks omitted); *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).

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).

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), "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.

EPA's asserted authority here is similarly transformative. Relying on a provision that permits it to regulate "*standards*" for "new motor vehicles" that "emi[t] . . . air pollutant[s]," 42 U.S.C. § 7521(a)(1) (emphasis added), EPA purports to derive the authority for the *wholesale prohibition* of the production of such vehicles in favor of electric vehicles. Yet "[i]t is highly unlikely that Congress would leave the determination of whether" the automobile "industry will be entirely, or even substantially," electrified "to agency discretion." *See MCI*, 512 U.S. at 231.

Relatedly, whether the asserted power falls within the agency's "sphere of expertise" is also relevant. *Nat'l Fed'n of Indep. Bus.*, 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); *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*, 576 U.S. at 486. That is one reason

why the Supreme Court in *National Federation of Independent Business* 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 (Gorsuch, J., concurring) (collecting cases), but there *is* a mismatch here. Among other things, mandating a switch to electric vehicles would put at risk entire industries and supply chains, millions of jobs, and billions of tax revenues. It would require alterations to the nation's transportation and energy infrastructures. And it would raise questions about national security. *See* State Petitioners' Br. 22-24; Private Petitioners' Br. 29-30. 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.

Congress confirmed as much when it passed the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021). The Act directs the Secretaries of Transportation and Energy, not EPA, to

"establish an electric vehicle working group to make recommendations regarding the development, adoption, and integration of light-, medium-, and heavy-duty electric vehicles into the transportation and energy systems of the United States." *Id.* § 25006(a)-(b)(1); *see id.* § 20002(2). EPA is permitted to participate in the working group, but only as one of many federal stakeholders including the Department of Transportation, Department of Energy, Council on Environmental Quality, and the General Services Administration. *Id.* § 25006(b)(2)(B)(i). The Act directs the Secretary of Energy, not EPA, to study "the cradle to grave environmental impact of electric vehicles." *Id.* § 40435; *see id.* § 40001(3). And the Act directs the Secretary of Energy, "in coordination with the Secretary of State and the Secretary of Commerce," not EPA, to "study the impact of forced labor in China on the electric vehicle supply chain." *Id.* § 40436. In short, Congress has recognized that EPA is not qualified to make the policy determinations necessary to electrify the Nation's vehicles. This Court should do the same.

Fourth, the "history . . . of the [asserted] authority" is also relevant. *West Virginia*, 142 S. Ct. at 2608 (internal quotation marks omitted). 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 *National Federation of Independent Business*, 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 *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666). And here, before EPA promulgated the challenged standards, it had never used its authority under Clean Air Act section 202(a) to mandate the production of electric vehicles. *See* Private Petitioners' Br. 34-35.

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 483, 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 controls here. EPA's interpretation of section 202(a) would result in the restructuring of entire industries, including the American energy and automobile markets. It would cost hundreds of billions of dollars and risk hundreds of thousands of jobs in the petroleum industry and downstream markets. And it would give EPA all this power even though Congress has "considered and rejected multiple bills with effects similar to EPA's rule." Private Petitioners' Br. 32 (internal quotation marks omitted).

C. EPA cannot clear the high hurdle of pointing to clear congressional authorization for the power it claims.

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.").

The second consequence is that, when the major-questions doctrine applies, "the agency [] must point to clear congressional authorization" "for the power it claims." *West Virginia*, 142 S. Ct. at 2609 (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. This principle counsels against EPA's interpretation of section 202 as permitting fleetwide averaging. Section 202(a)(1), upon which EPA relies, speaks to "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines," and says nothing about average emissions across a manufacturer's products. 42 U.S.C. § 7521(a)(1). Meanwhile, Title II of the Clean Air Act elsewhere explicitly mentions "average annual aggregate emissions." *Id.* § 7545(k)(l)(B)(v)(II). Similarly, the Energy Policy Conservation Act instructs the Secretary of Transportation to "prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer [for each] model year." 49 U.S.C. § 32902(a).

Moreover, because the major-questions doctrine functions as a "clear statement rule[]," *see West Virginia*, 142 S. Ct. 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 2622-23 (Gorsuch, J., concurring). Take *National Federation of Independent Business*, 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.* 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 (quoting 42 U.S.C. § 264(a)). That broad power was insufficient to allow the agency to decide a major, tangentially related, question. *See Id.* 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.

The same is true here. It is undisputed that the purpose of the Clean Air Act in general—and of section 202 in particular—is to reduce "the emission of [] air pollutant[s]." 42 U.S.C. § 7521(a)(1). But Congress specified that EPA must work toward that purpose under section 202(a) through regulations prescribing "standards applicable to the emissions . . . from any class or classes of new motor vehicles or new motor vehicle engines," *id.*, not by eliminating the production of those vehicles or

engines, and not by pushing production to another type of vehicle or engine. It remains implausible that Congress would have given EPA the authority—particularly through a standards-setting provision like section 202—to force a nationwide transition away from the use of internal-combustion-engine vehicles to electric vehicles.

CONCLUSION

The Court should set aside EPA's section 202(a) emissions standards.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On November 10, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ *Scott A. Keller*
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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 4,524 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).

/s/ *Scott A. Keller*
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