[ORAL ARGUMENT NOT YET SCHEDULED]

No. 24-1129 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEBRASKA, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for Review from the United States Environmental Protection Agency

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Constitutional Accountability Center (CAC) represents that counsel for all parties have consented to the filing of this brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. *Amicus* is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights, freedoms, and structural safeguards that our nation's charter guarantees. In furtherance of those goals, CAC has studied the rich history of legislative delegations to agencies, the development of the major questions doctrine, and its effects on the separation of powers. CAC accordingly has a unique interest in this case and is well situated to discuss the proper interpretation of the Supreme Court's decisions applying the major questions doctrine.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for *amicus* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Respondents, all parties, intervenors, and *amici* appearing in this Court are listed in the Briefs for Petitioners and the Brief for Respondents.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Respondents.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Respondents.

Dated: January 21, 2025

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GLOSSARY

CAA	Clean Air Act
CDC	Centers for Disease Control and Prevention
DOT	Department of Transportation
EPA	U.S. Environmental Protection Agency
EV	electric vehicle
FDA	U.S. Food and Drug Administration
GHG	greenhouse gas
HHS	U.S. Department of Health and Human Services
IRS	Internal Revenue Service
OSHA	Occupational Safety and Health Administration
RTC	EPA's Response to Comments

INTEREST OF *AMICUS CURIAE*

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to the progressive promise of the Constitution's text and history. CAC has studied the development of the major questions doctrine, along with its implications for the separation of powers, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The major questions doctrine applies only in "extraordinary" cases, when agencies radically transform their authority by citing vague, ancillary provisions to claim breathtaking new powers beyond their traditional roles and expertise. This is not a major questions case. EPA promulgated its 2024 Heavy Duty Motor Vehicle Emissions Standards under its core Title II authority, taking into account—as it long has—electrification technologies. The standards represent neither a transformation of EPA's power nor an end-run around congressional intent. For these reasons and others, applying the major questions doctrine here would defy precedent. It would also run roughshod over textualism and the separation of powers.

In a series of cases over recent years, the Supreme Court concluded that agencies were claiming enormous new authority despite indications that Congress did not mean to grant that authority. Taking stock of this case law, *West Virginia*

v. EPA explicitly recognized a "major questions doctrine," explaining that "there are 'extraordinary cases' that call for a different approach" from "routine statutory interpretation." 597 U.S. 697, 721-24 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

In these "extraordinary" cases, courts take an extraordinary approach. Instead of relying exclusively on "the ordinary tools of statutory interpretation," *Biden v. Nebraska*, 600 U.S. 477, 506 (2023), courts weigh various factors outside of the text—including political controversy, prior agency practice, projected economic implications, and legislative history—to help decide whether a disputed question of statutory interpretation is a "major question." If so, courts require "clear congressional authorization" for the agency's interpretation. *Id.* (quoting *West Virginia*, 597 U.S. at 723). The Court has limited this unusual doctrine to "extraordinary" claims of authority, *id.* at 503, that amount to a "fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation into an entirely different kind," *id.* at 502 (quoting *West Virginia*, 597 U.S. at 728).

The doctrine thus has two requirements, applying only "[i]f both prongs are met." *Nebraska v. Su*, 121 F.4th 1, 14 (9th Cir. 2024); *see Bradford v. Dep't of Lab.*, 101 F.4th 707, 725-28 (10th Cir. 2024). First, an agency's newly claimed power must represent a "transformative expansion in [its] regulatory authority," *West Virginia*, 597 U.S. at 724 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S.

302, 324 (2014)), reaching "beyond what Congress could reasonably be understood to have granted," *id.* Second, the scope of this new power must be "breathtaking," *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam), with "staggering" economic and political significance, *Nebraska*, 600 U.S. at 502.

The first requirement is satisfied when agencies assert "unheralded" new power by twisting the "vague language" of "ancillary" provisions to "make a radical or fundamental change to a statutory scheme," particularly where the agency "has no comparative expertise" in the area it seeks to regulate and where Congress has "conspicuously and repeatedly" denied that same power to the agency. *West Virginia*, 597 U.S. at 723-24, 748 (quotation marks omitted). All told, the agency's claim must transform the statute "from one sort of scheme of ... regulation into an entirely different kind." *Id.* (brackets and quotation marks omitted).

Here, however, EPA—an agency with long-established expertise regulating motor vehicle emissions—did not employ an "obscure, never-used section of the law" to assert a new type of power beyond its regulatory mandate and expertise. *Id.* at 711 (quotation marks omitted). Instead, the agency used its flagship authority under Title II of the Clean Air Act to regulate automobiles as it has for

decades: by setting technologically feasible emissions standards for classes of vehicles to protect health and welfare while accounting for compliance costs.

Extending the major questions doctrine to cases like this would not only conflict with Supreme Court precedent but would also undermine textualism. Unlike "normal statutory interpretation," *id.* at 723 (quotation marks omitted), and its "ordinary tools," *Nebraska*, 600 U.S. at 506, the major questions doctrine emphasizes factors outside of a statute's text and structure, including the subjective expectations of the legislators who passed it and the practical ramifications of agency action. *See id.* at 500-07. Some of these factors require judges to venture beyond their expertise into non-legal evaluations of political controversy or economic import. Many of these factors have no bearing on a statute's original public meaning because they hinge on developments that occurred after its passage. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024) ("every statute's meaning is fixed at the time of enactment" (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018))).

Precisely because the major questions doctrine is "distinct" from "routine statutory interpretation," *West Virginia*, 597 U.S. at 724, it is reserved for the most extraordinary cases, in which staggering new assertions of power—despite their "textual plausibility," *id.* at 722—are at odds with other evidence of congressional intent.

Overuse of the major questions doctrine would also erode critical limits on the judiciary's role. The doctrine aims to promote "separation of powers principles" by preventing agencies from exceeding Congress's "legislative intent." *Id.* at 723. But the doctrine constrains Congress too, blocking its efforts to authorize agency action whenever courts decide that a major question is implicated, unless Congress used language that courts deem sufficiently clear. The doctrine does so based on a presumption that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* Yet that presumption is at odds with congressional practice dating to the Founding as well as Congress's manifest intent in the Congressional Review Act to allow agencies to issue rules with vast practical consequences. *Cf. Loper Bright*, 603 U.S. at 399 ("Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality."). The risk of judicial aggrandizement in applying this presumption is further exacerbated by the subjective nature of some of the factors that implicate the doctrine.

These tensions make clear why the Supreme Court has confined the major questions doctrine to the most extraordinary cases, involving stark attempts to disregard an agency's limited mandate. When an agency claims stunning new powers that appear incongruous with the relevant statutory scheme, the history of its implementation, and the agency's expertise, "a practical understanding of

legislative intent" may call for hesitation. *West Virginia*, 597 U.S. at 723. But when radical innovation of that sort is absent, artificially narrowing the meaning of a statute's text would undermine, not vindicate, Congress's authority.

ARGUMENT

I. The Major Questions Doctrine Is Reserved for "Extraordinary" Cases Involving Breathtaking New Claims of Power that Congress Likely Did Not Intend.

"[W]hile the major questions 'label' may be relatively recent, it refers to 'an identifiable body of law that has developed over a series of significant cases.'" *Nebraska*, 600 U.S. at 504-05 (quoting *West Virginia*, 597 U.S. at 724). Under those cases, a major question arises only when an agency makes "a radical or fundamental change to a statutory scheme" by claiming "an unheralded power representing a transformative expansion in its regulatory authority." *West Virginia*, 597 U.S. at 723-24 (quotation marks and brackets omitted). The issue is not whether agencies are asserting "highly consequential power," but rather whether they are asserting "highly consequential power *beyond what Congress could reasonably be understood to have granted*." *Id.* (emphasis added).

Two requirements must therefore be met. First, an agency's claimed power must represent an "unheralded" and "novel reading" that reflects "a fundamental revision of the statute," departing from how the agency has "always" interpreted it and transforming the agency's authority "into an entirely different kind." *Id.* at

723, 726, 728, 701 (quotation marks omitted). Second, the agency must be claiming an "[e]xtraordinary grant[] of regulatory authority" by asserting "extravagant statutory power over the national economy." *Id.* at 723-24.

Importantly, therefore, the economic and political significance of an agency action cannot alone trigger the major questions doctrine, so long as the action "fits neatly within the language of the statute" and aligns with the agency's role. *Biden v. Missouri*, 595 U.S. 87, 93-94 (2022) (per curiam). For example, the Court refused to apply the doctrine to a vaccination mandate that allegedly "put more than 10 million healthcare workers to the choice of their jobs or an irreversible medical treatment." *Id.* at 108 (Alito, J., dissenting). Despite its significant impact, the mandate was not "surprising" because "addressing infection problems in Medicare and Medicaid facilities is what [the HHS Secretary] does." *Id.* at 95 (majority opinion). Likewise, the Court found no major question when EPA decided whether to regulate greenhouse gas emissions, despite the immense stakes, because that decision involved no "counterintuitive" departure from the agency's "pre-existing mandate." *Massachusetts v. EPA*, 549 U.S. 497, 530-31 (2007).

Only when extraordinary economic and political significance is paired with a dubious transformation of an agency's role does the doctrine come into play. No major questions case has involved economic and political significance alone. *See West Virginia*, 597 U.S. at 724-29 ("unheralded" and "transformative" use of

"ancillary provision[s]," reaching beyond the agency's "comparative expertise"); *Nebraska*, 600 U.S. at 501-03 (use of "never previously claimed powers" to work a "fundamental revision of the statute" and claim "virtually unlimited power to rewrite [it]"); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 112, 118 (2022) (per curiam) ("*NFIB*") (a type of mandate "never before imposed" that regulated beyond the agency's "sphere of expertise" despite Congress's choice to deny the agency this power); *Realtors*, 594 U.S. at 761, 764-65 ("unprecedented" claim of power with "no limit," which required reading selected text "in isolation"); *Util. Air*, 573 U.S. at 324 ("unheralded" and "transformative" power that "the statute [was] not designed to grant"); *Brown & Williamson*, 529 U.S. at 126, 160 (new reliance on "cryptic" provisions to assert power "inconsistent with the ... overall regulatory scheme").

In *West Virginia*, for instance, the Court described EPA's attempt to "substantially restructure the American energy market" as giving the agency "unprecedented power over American industry." 597 U.S. at 724, 728 (quotation marks omitted). But the agency's plan was not merely significant in scope—the Court concluded that it represented a "transformative expansion" of authority based on a "novel reading of the statute," giving the agency an "unheralded" power that converted the statutory scheme "into an entirely different kind." *Id.* at 724, 716, 728 (quotation marks omitted). This "newfound power" was based on "the

vague language of an ancillary provision[],” required expertise not traditionally held by EPA, and was an approach that Congress “repeatedly declined to enact itself.” *Id.* at 724 (quotation marks omitted).

Biden v. Nebraska confirmed these demanding standards in applying the doctrine to a student debt relief plan. This “extraordinary program” was judged to be completely unlike prior exercises of the same statutory authority. 600 U.S. at 503. Indeed, the executive branch was claiming “virtually unlimited power to rewrite the Education Act” and “unilaterally define every aspect of federal student financial aid.” *Id.* at 502. This was “a fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation into an entirely different kind.” *Id.* (quoting *West Virginia*, 597 U.S. at 728). Notably, the Court *first* concluded that the agency was asserting a new type of authority that Congress likely did not intend, *id.* at 500-02, and only then determined that this authority had “staggering” economic and political significance, *id.* at 502. Unless both criteria are met, the major questions doctrine does not apply. *Accord West Virginia*, 597 U.S. at 724-32.

The recent *Loper Bright* decision provides further reason for caution before applying the doctrine. *Loper Bright* underscores that all statutes “have a single, best meaning,” and that ambiguity does not relieve courts “of [their] obligation to independently interpret” statutes using “the traditional interpretive tools.” 603

U.S. at 400, 397. A court may not short-circuit its inquiry into a statute's best meaning simply because significant issues are at stake, because that too would be "to *ignore*, not follow, the reading the court would have reached had it exercised its independent judgment." *Id.* at 398-99 (quotation marks omitted).

Loper Bright also refused to allow a "sweeping presumption of congressional intent," particularly a "fictional presumption," to serve as "a distraction from the question that matters: Does the statute authorize the challenged agency action?" *Id.* at 401, 406. As discussed below, the major questions doctrine rests on a similarly questionable presumption of congressional intent. And as the briefing here illustrates, deciding whether a "major question" is present similarly risks distracting from the statutory question that matters. "The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes." *Id.* at 403.

II. EPA's Latest Motor Vehicle Emissions Standards Do Not Trigger the Major Questions Doctrine.

As explained above, "[t]he Supreme Court has adopted a two-prong framework to analyze the major questions doctrine." *Su*, 121 F.4th at 14. "First, [courts] ask whether the agency action is 'unheralded' and represents a 'transformative expansion' in the agency's authority in the vague language of a long-extant, but rarely used, statute. Second, [courts] ask if the regulation is of 'vast economic and political significance' and 'extraordinary' enough to trigger the

doctrine." *Id.* (quoting *West Virginia*, 597 U.S. at 716, 721, 724-25) (citations omitted).

EPA's new motor vehicle emissions standards are a continuation of decades of regulation under the agency's flagship rulemaking authority, reflecting both longstanding agency practice and congressional approval. Petitioners do not indicate precisely what legal question arises under these standards that constitutes a major question, but they generally claim the standards force too extreme a switch to electrification. Because the standards do not transform the agency's authority beyond Congress's expectations, however, the major questions doctrine does not apply. And while the standards may require widespread adjustments by manufacturers, that is an inherent part of the statutory framework, not the type of "extravagant" new power that triggers the doctrine.

A. Transformative Expansion Beyond Congressional Intent

No matter how great its economic and political significance, agency action triggers the major questions doctrine only if it represents a "radical or fundamental change to a statutory scheme" that Congress is "very unlikely" to have intended. *West Virginia*, 597 U.S. at 723 (quotation marks omitted); *see Nebraska*, 600 U.S. at 504 ("Congress did not unanimously pass the HEROES Act with such power in mind"); *Save Jobs USA v. DHS, Off. of Gen. Couns.*, 111 F.4th 76, 80 (D.C. Cir. 2024) ("the major questions doctrine is a tool of statutory interpretation" meant to

help "figure out what a statute means"). To identify such radical departures from congressional intent, the doctrine looks for eyebrow-raising novelty, reliance on cryptic or ancillary provisions, mismatch with agency expertise, and conflict with the overall statutory scheme. *See Bradford*, 101 F.4th at 725-28. Those telltale signs are all absent here.

1. Belated assertions of novel authority

The major questions doctrine is skeptical of "unprecedented" claims of "unheralded power" newly discovered in "a long-extant statute." *West Virginia*, 597 U.S. at 728, 724 (quotation marks omitted). But the Court considers novelty at a high level of generality, looking for agency action "strikingly unlike" past efforts. *NFIB*, 595 U.S. at 118; *see Nebraska*, 600 U.S. at 496 (the agency created a "fundamentally different loan forgiveness program," in which "[n]o prior limitation … is left standing"). The doctrine does not apply when an agency has long regulated a particular area and its new policy merely goes "further than what [it] has done in the past." *Missouri*, 595 U.S. at 95.

EPA's rule is far from novel. Since the CAA's enactment half a century ago, the agency has set vehicle emissions standards of ever-increasing stringency, *see* 89 Fed. Reg. 29440, 29471 (Apr. 22, 2024), which often require dramatic emissions reductions, *see* Response to Comments ("RTC") at 111 tbl.2 (Mar. 2024) (2016 rule reduced carbon output by more than three times the projected

reductions under the 2024 rule). EPA's standards frequently encourage or require the development of cleaner technologies, *see* 89 Fed. Reg. at 29445, 29468 n.167, just as the statute directs, *see* 42 U.S.C. § 7521(a)(2) (EPA should prescribe standards that take effect "after such period as the Administrator finds necessary to permit the development and application of the requisite technology"). The agency "has been regulating emissions from motor vehicles based upon the availability of feasible technologies to reduce vehicle emissions for over five decades." 89 Fed. Reg. at 29469.

Petitioners artificially distinguish electrification from other technologies EPA has considered in setting standards, claiming that the CAA contemplates only "incremental steps to improve vehicles that actually emit the relevant pollutants," not the development of "different types of vehicles." Priv. Pet. Br. 45. But Section 202(a) applies to all "motor vehicles," defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. §§ 7521(a), 7550(2). Unlike other CAA provisions that limit EPA's authority based on the type of powertrain, *see id.* §§ 7547(a)(1), 7550(10) (authorizing regulation of "internal combustion engine[s]"), and restrict the technological controls that the agency may impose, *see id.* § 7651f(d) (authorizing only a requirement of "low NOx burners"), Section 202(a) does not limit the

technology the agency may consider or ascribe any significance to the type of powertrain involved.

Instead, it instructs the agency to define the "class or classes of new motor vehicles or new motor vehicle engines" to which its emissions standards will apply, *id.* § 7521(a)(1), which the agency has defined through weight and function, not powertrain method, since its first GHG rulemaking in 2011. *See* 76 Fed. Reg. 57106, 57196 (Sept. 15, 2011). Standards that foster the use of electric powertrain technologies are thus no different from standards that foster the development of other new technologies. *Cf.* 116 Cong. Rec. 32902 (1970) (Sen. Muskie) (recognizing that the "urgency of the problems" of automotive emissions "requires that the industry consider, not only the improvement of existing technology, but also alternatives to the internal combustion engine").

Accordingly, EPA has accounted for EV technology as a tool enabling emissions reduction since the earliest days of electric vehicle proliferation. *See* 65 Fed. Reg. 6698, 6793 (Feb. 10, 2000). In its very first GHG rulemaking, EPA anticipated that some heavy-duty manufacturers would use EV technology to comply with the new standards, while indicating that EPA would consider the availability of EV technology in setting future standards. 76 Fed. Reg. at 57133. Every GHG rulemaking since has also taken EV technology into account. *See* RTC 105 tbl.1.

EPA's use of fleetwide averaging is similarly longstanding, dating back to the 1980s. *See* 50 Fed. Reg. 10606 (Mar. 15, 1985). This Court upheld EPA's averaging authority, *see NRDC v. Thomas*, 805 F.2d 410, 425 (D.C. Cir. 1986), which Congress consciously declined to disturb when amending the CAA in 1990. *See* 136 Cong. Rec. 35367 (1990); *cf. West Virginia*, 597 U.S. at 725 (EPA's only attempt at a similar rule "was never addressed by a court"). Since then, fleetwide averaging, together with banking and trading, has been a regular feature of EPA's vehicle emissions rules. *See* RTC 105 tbl.1. Indeed, *all* the agency's GHG standards have employed this approach. *Id.*

Thus, the new rule is not a "novel reading of the statute," *West Virginia*, 597 U.S. at 716, but merely "iteratively strengthens the GHG standards" set by past rules, based on technological advances, 89 Fed. Reg. at 29471.

For these reasons, Petitioners' superficial analogy to *West Virginia* falls flat. There, "an unbroken list" of prior regulations had "always" set emissions limits through "a technology-based approach" that focused on "measures that would reduce pollution by causing the regulated source"—power plants—"to operate more cleanly." 597 U.S. at 701, 725. The Clean Power Plan departed from that approach by regulating something else entirely: rather than causing power plants to operate more cleanly, it aimed to "improve the *overall power system*" by orchestrating the mix of energy sources utilized by the power grid. *Id.* at 727-28;

see id. at 728 (quoting Administrator's remark that the plan was "not about pollution control"). "[T]here [was] no control a coal plant operator [could] deploy to attain the emissions limits," and the agency "had never regulated in that manner." *Id.* at 731, 726.

As explained above, however, EPA's new vehicle emissions standards "reduce pollution by causing the regulated source"—motor vehicles—"to operate more cleanly." *Id.* at 725. The standards accomplish that goal through the same performance-based approach the agency has always employed. Manufacturers need not reduce or shut down production, and they can comply without adopting any particular technology. 89 Fed. Reg. at 29469. Even if increased electrification is the most appealing compliance option, that will merely foster more rapid adoption of an emerging technology—which is exactly what EPA's vehicle standards have always done, and what the statute clearly requires. *See* 42 U.S.C. § 7521(a)(2) (directing the Administrator to consider "the requisite technology," the necessary lead time, and "the cost of compliance"). The new standards are thus a "straightforward and predictable example," *Missouri*, 595 U.S. at 95, of EPA's longstanding use of its statutory authority.

2. Reliance on vague or ancillary provisions

The major questions doctrine is wary of claimed authority that rests on "'subtle device[s]'" or "cryptic" delegations, *Brown & Williamson*, 529 U.S. at 160

(quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994)), because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In *West Virginia*, for instance, the Court stressed that EPA was using an "obscure," "ancillary," "little-used backwater" for its wide-reaching policy. 597 U.S. at 711, 724, 730 (quotation marks omitted).

Far from being ancillary or obscure, Section 202(a) is the "heartland" of EPA's regulatory authority for motor vehicle emissions. 89 Fed. Reg. at 29468. Unlike in *West Virginia*, where the disputed statutory provision had been used "only a handful of times," 597 U.S. at 710, EPA has issued dozens of regulations under Section 202(a), *see* Timeline of Major Accomplishments in Transportation, Air Pollution, and Climate Change, EPA, https://www.epa.gov/transportation-air-pollution-and-climate-change/timeline-major-accomplishments-transportation-air.

And Section 202(a) is not "cryptic." It requires the Administrator to set emission standards covering "any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). This "broad language," *Massachusetts*, 549 U.S. at 532, is quite clear—it confers a "general power,"

NRDC v. EPA, 655 F.2d 318, 322 (D.C. Cir. 1981), to tackle air pollution from motor vehicles by defining the appropriate "classes" of vehicles to regulate.

Furthermore, the provision expressly delegates discretion to assess and balance competing considerations—authorizing EPA to protect "public health or welfare" from air pollution, but only within the bounds of feasible "development and application" of the "requisite technology," giving "appropriate consideration" to costs. 42 U.S.C. § 7521(a)(1), (2). This text explicitly authorizes the agency to make these "basic and consequential tradeoffs." *West Virginia*, 597 U.S. at 730.

In short, EPA is not leaning here on the malleability of a word like "system," *id.* at 732, "shorn of all context" and plucked from a "gap filler" provision that "had rarely been used in the preceding decades," *id.* at 732, 724. The obvious centrality of Section 202(a) to the regulatory scheme, together with its detailed terms outlining the agency's mandate, offers no "reason to hesitate," *id.* at 724 (quotation marks omitted), before giving force to those terms.

3. Mismatch between asserted power and agency expertise

An agency's expertise sheds significant light on whether it is claiming power Congress did not likely intend. "[W]hen [an] agency has no comparative expertise in making certain policy judgments ... Congress presumably would not task it with doing so." *Id.* at 729 (quotation marks omitted).

Here, it does not "raise[] an eyebrow," *id.* at 730 (quotation marks omitted), that EPA would be tasked with determining the feasibility of meeting emission standards using new automotive technology. The agency has substantial expertise, having exercised this authority for decades. *See NRDC*, 655 F.2d at 331 (noting "EPA's expertise in projecting the likely course of development" of such technology). The agency's laboratory tests "electrified and conventional vehicles" and "produces critical test data on new and emerging vehicle and engine technologies." EPA FY 2025 Budget Request Tab 04: Science and Technology, 18. Setting emission standards that safeguard "public health or welfare" while projecting the time needed for "development and application of the requisite technology," 42 U.S.C. § 7521(a), falls squarely within EPA's "sphere of expertise," *NFIB*, 595 U.S. at 118.

Although EPA's new standards may indirectly affect other matters, like the shipping industry or electric grid reliability, that is an inherent result of any standards issued under Section 202(a). "Every effort at pollution control exacts social costs," and Congress "made the decision to accept those costs," *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979), both in enacting Section 202(a) and in repeatedly amending it without further constraining the agency's discretion. The agency's prior GHG rules reduced demand for gasoline and diesel, and every emissions rule potentially affects the global supply

chain. 89 Fed. Reg. at 29470. EPA "has regularly considered such indirect impacts" in prior rules, and it used that accumulated expertise here. *Id.*

Nor does the Department of Transportation's regulation of fuel economy mean that EPA lacks expertise on emission standards or automotive technology. EPA has "a statutory obligation wholly independent of DOT's mandate to promote energy efficiency," and the latter's authority "in no way licenses EPA to shirk its environmental responsibilities." *Massachusetts*, 549 U.S. at 532. "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations." *Id.* The major questions doctrine is relevant only when an agency has "*no* comparative expertise" relative to Congress. *West Virginia*, 597 U.S. at 729 (emphasis added); *see King v. Burwell*, 576 U.S. 473, 486 (2015) (an agency with "no expertise in crafting health insurance policy"); *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) (an agency that "lacks medical expertise"). Otherwise, courts would be forced to second-guess *Congress's* decision about which agency is best suited to tackle a particular problem. And under the laws Congress enacted, "there is no statutory requirement for joint rulemaking" between EPA and DOT. 89 Fed. Reg. at 29458.

4. Actions incongruent with overall regulatory scheme

Claims of agency authority that clash with a statute's overall regulatory structure can support applying the major questions doctrine. *Brown & Williamson*,

529 U.S. at 134-37. Incongruence that amounts to a "fundamental revision of the statute," *West Virginia*, 597 U.S. at 728 (quoting *MCI*, 512 U.S. at 231), can signal an attempt to transform the agency's authority "into an entirely different kind," *Nebraska*, 600 U.S. at 502 (quotation marks omitted).

Not so here. Petitioners' only arguments concerning statutory structure focus on fleetwide averaging, which did not originate with the new emissions rule but rather dates to the 1980s and has repeatedly been preserved by statutory amendments. Averaging allows manufacturers greater flexibility in updating their products, *see* 48 Fed. Reg. 33456 (July 21, 1983), which "encourages the early use of improved emission control technologies," 136 Cong. Rec. 35367 (1990), consistent with the statutory design.

As EPA has explained, *see* RTC 349-69, arguments that averaging is inconsistent with requirements for testing, certification, and warranties simply misunderstand that "compliance and enforcement do in fact apply to individual vehicles," 89 Fed. Reg. at 29472. For instance, under the GHG regulations, both the fleetwide-average standard and an individual-vehicle standard "are specified in each vehicle's individual certificate of conformity, and apply both at certification and throughout that vehicle's useful life." RTC 1353. Moreover, EPA "can suspend, revoke, or void certificates for individual vehicles," and warranties "apply to individual vehicles." *Id.* Ultimately, the proof is in the pudding: fleetwide

averaging has been part of EPA's emission standards for years, with no strain on the regulatory structure. *See, e.g.*, 40 C.F.R. § 86.1865-12(j)(7)(iv) (explaining how the agency issues certificates of compliance based on averaging).

If the original statute left any doubt whether averaging comports with Congress's design, subsequent amendments have removed it. When Congress amended the CAA in 1990, it contemplated and declined to prohibit averaging. *See* 136 Cong. Rec. 35367 (1990) (lawmakers "chose not to amend the [CAA] to specifically prohibit averaging" but "to retain the status quo"). In 2007, Congress based a new statutory requirement on "the manufacturer's fleet average ... emissions for that class of vehicle." 42 U.S.C. § 13212(f)(3)(C); *see* RTC 1348. And when Congress made further CAA amendments in 2022, more than ten years after EPA began regulating carbon via fleetwide averages, it once again did not disturb that method. *See* Pub. L. No. 117-169, §§ 60101-60103, 136 Stat. 1818, 2063-67 (2022). Plainly, EPA's continued use of averaging does not "render the statute unrecognizable to the Congress that designed it." *Util. Air*, 573 U.S. at 324 (quotation marks omitted).

5. Legislative activity implying lack of authorization

The Supreme Court has occasionally considered legislative efforts occurring after a statute's enactment in its major questions analysis. *E.g.*, *West Virginia*, 597 U.S. at 731 (failed bill adopting cap-and-trade scheme suggested EPA's similar

approach was unauthorized). But other cases have downplayed such evidence. *E.g.*, *Brown & Williamson*, 529 U.S. at 155-56 (disclaiming reliance "on Congress' failure to act"). The Court's usual guidance is that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quotation marks omitted), and failed bills are "a particularly dangerous ground" for doing so, *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 362 n.9 (2021).

In any event, the unenacted bills Petitioners cite proposed entirely different regulatory schemes—for instance, requiring manufacturers to produce a set percentage of zero-emission vehicles. *See* H.R. 2764, 116th Cong. (2019). EPA's rule relies on "performance-based standards, not a specific technology mandate." RTC 116. Congress's failure to enact such mandates does not imply that EPA lacks authority to continue setting standards that reflect the latest technological developments, including electrification.

B. Economic and Political Significance

Because Congress uses agencies to help solve nationwide problems, much of what they do has economic and political significance. To implicate the major questions doctrine, a "novel" claim of authority must be "staggering," *Nebraska*, 600 U.S. at 502, "breathtaking," *Realtors*, 594 U.S. at 764, or "extravagant," *West Virginia*, 597 U.S. at 724 (quoting *Util. Air*, 573 U.S. at 324).

As explained above, there is no newly claimed authority here—no assertion of "*unprecedented* power over American industry." *Id.* at 728 (emphasis added) (quotation marks omitted). And the economic impact of the emissions standards resembles those of past rules. *See* RTC 111 tbl.2. Petitioners' claim that EPA is expanding its authority by restructuring the automobile industry is belied by half a century of EPA regulations requiring infrastructure updates, technological changes, and substantial price tags for manufacturers. *See* 89 Fed. Reg. at 29470-71.

Indeed, Petitioners' arguments echo those made in *Massachusetts*, where EPA itself claimed that economic consequences precluded it from regulating vehicular greenhouse gases. *Compare* 68 Fed. Reg. 52922, 52928 (Sept. 8, 2003) (regulation would "require a wholesale remaking of this sector"), *with* Priv. Pet. Br. 23 (the standards will "fundamentally restructure the trucking industry"). The Court disagreed, finding no indication that the broad impact of regulating such emissions would transform the agency's power: "there is nothing counterintuitive to the notion that EPA can curtail the emission of [greenhouse gases]." *Massachusetts*, 549 U.S. at 531.

Moreover, the major questions doctrine focuses more on the number of entities newly swept into regulatory schemes—*see Realtors*, 594 U.S. at 765; *Brown & Williamson*, 529 U.S. at 159; *MCI*, 512 U.S. at 231—than on new costs for already-regulated entities, *see Util. Air*, 573 U.S. at 332 ("We are not talking

about extending EPA jurisdiction" but merely increasing demands for "entities already subject to its regulation."). There is no newly regulated entity here. *See* RTC 110.

III. Extending the Major Questions Doctrine to Cases Like This Would Undermine Textualism and the Separation of Powers.

As shown above, the Supreme Court has limited the major questions doctrine to "extraordinary" cases in which a rigorous two-part standard is met. Following that precedent helps ameliorate the doctrine's serious tensions with both textualism and the separation of powers.

"The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County*, 590 U.S. 644, 674 (2020). Courts should therefore "interpret the words consistent with their ordinary meaning ... at the time Congress enacted the statute." *Wis. Cent.*, 585 U.S. at 277 (quotation marks omitted); *cf.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 22-23, 29-30 (1997) (discounting legislative history, pragmatic concerns, and Congress's perceived goals).

Departing from these principles, however, the major questions doctrine emphasizes factors outside of a statute's text and structure, including economic fallout, political controversy, legislators' subjective expectations, and how an agency has previously implemented the statute. Many of these factors postdate the

statute's passage and therefore cannot have informed its meaning, which "is fixed at the time of enactment." *Loper Bright*, 603 U.S. at 400 (quotation marks omitted). And because the doctrine requires sifting through various extratextual considerations with undetermined relative weights, it resembles the type of multi-factor balancing test that textualists typically disparage.

Accordingly, Justices across the ideological spectrum have recognized the problems the doctrine poses for textualists. *See Nebraska*, 600 U.S. at 507-08 (Barrett, J., concurring) ("[S]ome articulations of the major questions doctrine on offer ... should give a textualist pause."); *West Virginia*, 597 U.S. at 751 (Kagan, J., dissenting) (calling the doctrine a "get-out-of-text-free card[]"). The Court itself has acknowledged that the doctrine is "distinct" from "routine statutory interpretation." *Id.* at 724 (majority opinion).

After all, when the text of a statute gives an agency broadly worded authority, "imposing limits on an agency's discretion" based on extratextual considerations is to "alter, rather than to interpret," the statute. *Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657, 677 (2020). Statutory language should not be artificially constrained due to "undesirable policy consequences," *Bostock*, 590 U.S. at 680, or because a policy "goes further than what the [agency] has done in the past," *Missouri*, 595 U.S. at 95. Instead, "courts must respect the delegation." *Loper Bright*, 603 U.S. at 413.

To be sure, other interpretive canons demand heightened clarity from certain laws. But these rules center on questions about the *legal* effects of statutes, such as whether they apply retroactively. By contrast, the major questions doctrine incorporates hazy inquiries such as whether a topic is "the subject of an earnest and profound debate." *West Virginia*, 597 U.S. at 732 (quoting *Gonzales*, 546 U.S. at 267). Thus, even when the doctrine is employed to reflect "common sense" about how Congress likely delegates authority, *Nebraska*, 600 U.S. at 511 (Barrett, J., concurring), it still requires courts to look outside the text and make subjective, policy-oriented assessments, while allowing political and social developments over time to change how a statute's words are interpreted.

Precisely because the major questions doctrine departs from "the ordinary tools of statutory interpretation," *id.* at 506 (majority opinion), the doctrine is reserved for "extraordinary" cases in which agencies transform their authority "into an entirely different kind," *id.* at 502 (quoting *West Virginia*, 597 U.S. at 728).

Applying the doctrine more broadly risks undermining the elected branches. While the doctrine is meant to promote "separation of powers principles," *West Virginia*, 597 U.S. at 723, an aggressively applied doctrine would raise its own separation-of-powers concerns, shifting authority to the courts. As a judicial creation that "directs how Congress must draft statutes," Mila Sohoni, *The Major*

Questions Quartet, 136 Harv. L. Rev. 262, 276 (2022), the doctrine risks becoming "a license for judicial aggrandizement," Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 200 (2022).

At bottom, the major questions doctrine disallows "plausible" readings of a statute based partly on real-world impacts, agency practice, and legislators' perceived expectations. *E.g.*, *Nebraska*, 600 U.S. at 503-05. It cannot be taken further by allowing those considerations to displace a statute's "single, best meaning." *Loper Bright*, 603 U.S. at 400. Distorting a statute's best meaning because of cost, political controversy, or other post-enactment developments risks "amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (quotation marks omitted).

The possibility that the doctrine's "justifying presumption" may be "a fiction" heightens these concerns. *Loper Bright*, 603 U.S. at 404; *see id.* at 399 (interpretive presumptions should be employed "only to the extent that they approximate reality"). In *West Virginia*, the Court asserted, without citation, that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." 597 U.S. at 723. But that presumption runs contrary to congressional practice dating to the Founding. As historical scholarship has

demonstrated, the earliest Congresses repeatedly granted the executive vast discretion to resolve critical policy questions concerning the era's most pressing challenges.[2]

This presumption is also in tension with Congress's explicit choice to allow agencies to make decisions with immense consequences, as reflected in the Congressional Review Act. Under that law, agencies must identify "major" rules (defined by economic impact, *see* 5 U.S.C. § 804) when reporting new regulations to Congress. These major rules "shall take effect" unless Congress acts to disapprove them. *Id.* § 801. Thus, Congress has expressly empowered agencies to make decisions with "major" consequences and has made those agency decisions presumptively valid, not presumptively invalid. *See* Chad Squitieri, *Major Problems with Major Questions*, Law & Liberty (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions.

The potential for encroachment on the elected branches underscores the need to employ the doctrine only in "extraordinary" cases, in which an agency seeks a "radical or fundamental" expansion of its power that goes beyond what Congress

[2] *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 96 Notre Dame L. Rev. 243 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power*, 130 Yale L.J. 1288 (2021).

reasonably could have expected. *West Virginia*, 597 U.S. at 723-24. Doing otherwise would not serve the separation of powers but instead would severely undermine it.

CONCLUSION

This Court should dismiss or deny the petitions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,489 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 21st day of January, 2025.

/s/ Brianne J. Gorod
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2025, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: January 21, 2025

/s/ Brianne J. Gorod
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