ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1080 (and consolidated cases)

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

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,
v.
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, ET AL.,
Respondents.

On Petition for Review of an Action by the National Highway Traffic Safety Administration

BRIEF FOR AMICI CURIAE WESTERN STATES PETROLEUM ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CALIFORNIA ASPHALT PAVEMENT ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, INC., AND ENERGY MARKETERS OF AMERICA IN SUPPORT OF PETITIONER AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS AND STATE PETITIONERS

Scott A. Keller
Michael B. Schon
Adam Steene*
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
scott@lehotskykeller.com

**Admitted in New York; not admitted in D.C., but being supervised by D.C. Bar members.*

Counsel for Amici Curiae Western States Petroleum Association et al.

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 of Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners and the Brief of Petitioner Natural Resources Defense Council. In addition to this amicus brief, California Business Roundtable and California Manufacturers & Technology Association have filed an amicus brief.

B. Rulings under Review

References to the agency action at issue appear in the Brief of Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners and the Brief of Petitioner Natural Resources Defense Council.

C. Related Cases

The Court has consolidated with this case two other cases involving challenges to the agency action challenged here: *State of Texas v. NHTSA*, No. 22-1144; and *American Fuel & Petrochemical Manufacturers v. NHTSA*, No. 22-1145.

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 Energy Marketers of America 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 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.

Energy Marketers of America is a non-profit trade association that represents family-owned and operated small business energy marketers throughout the United States. Energy Marketers of America has no parent company, and no publicly held company has a 10% or greater ownership in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Rules

Proposed Legislation

Other Authorities

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. NHTSA'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]

---

[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.

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 hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, the National Federation of Independent Business'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 National Federation of Independent Business 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

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

business, the Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

California Asphalt Pavement Association, founded in 1953, 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 NHTSA's fuel-economy 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, NHTSA'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

---

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

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

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 and fuel economy, the association's members have an acute interest in the proper construction of the Energy Policy and Conservation Act.

Energy Marketers of America is a federation of 47 state and regional trade associations representing family-owned and -operated small business energy marketers throughout the United States. Energy marketers represent a vital link in the motor and heating fuels distribution chain. The organization's members supply 80 percent of all finished motor and heating fuel products sold nationwide, including renewable hydrocarbon biofuels, gasoline, diesel fuel, biofuels, heating fuel, jet fuel, kerosene, racing fuel, and lubricating oils. Moreover, energy marketers represented by the organization own and operate approximately 60,000

retail motor fuel stations nationwide and supply fuel to an additional 40,000 independent retailers.

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 5,606 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 of Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners and the Brief of Petitioner Natural Resources Defense Council.

SUMMARY OF THE ARGUMENT

I. Amici agree with Petitioner American Fuel & Petrochemical Manufacturers and the State Petitioners that NHTSA's fuel-economy standards violate the Energy Policy and Conservation Act. When setting those standards, NHTSA considered the fuel economy of electric vehicles and of the electric portion of hybrid vehicles, two impermissible factors under the Act.

II. It is possible that NHTSA will attempt to justify its actions by invoking *Chevron* deference or relying on supposed congressional silence about the permissibility of NHTSA's *de facto* electric-vehicle mandate. But as the American Fuel & Petrochemical Manufacturers and the State Petitioners argue, this case implicates the major-questions doctrine. And, as Amici write separately to explain, that doctrine requires more than

ambiguous language or statutory silence to justify NHTSA's latest fuel-economy standards.

A. 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. The 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, 2610 (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 impose a *de facto* electric-vehicle mandate 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 American Fuel & Petrochemical Manufacturers and State Petitioners explain, the Energy Policy and Conservation Act *is* clear—it *prohibits* NHTSA's latest fuel-economy standards. The Act requires NHTSA to set "fuel economy standards" that are "feasible" for vehicles that contain internal-combustion engines and burn fuel. *See* 49 U.S.C. § 32902(a), (h)(1)-(2). It does not permit the agency to eliminate the production of those vehicles or engines or to push production to another type of vehicle or engine.

ARGUMENT

I. The Energy Policy and Conservation Act Expressly Forecloses Consideration of Electric Vehicles When Setting Fuel-Economy Standards.

"[T]o resolve a dispute over a statute's meaning," a court must "exhaust all the textual and structural clues at [its] disposal to uncover Congress's intended meaning." *iTech U.S., Inc. v. Renaud*, 5 F.4th 59, 63 (D.C. Cir. 2021) (internal quotation marks omitted). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue," the inquiry ends: "that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v.*

Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *accord Truck Trailer Mfrs. Ass'n v. EPA*, 17 F.4th 1198, 1201 (D.C. Cir. 2021).

This "inquiry begins with the statutory text," *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004), and, here, the text governing the government's fuel-economy standards is abundantly clear. The Energy Policy and Conservation Act provides that, when setting fuel-economy standards, NHTSA "may not consider the fuel economy of dedicated vehicles," 49 U.S.C. § 32902(h)(1)—that is, vehicles that "operate[] only on [an] alternative fuel" including "electricity," *id.* § 32901(a)(1)(J), (a)(8). Disregarding the Act, NHTSA considered the fuel economy of electric vehicles anyway. *See* Br. of American Manufacturers and State Petitioners 35-51. Similarly, in setting its standards, NHTSA must "consider dual fueled automobiles"—that is, hybrid vehicles—"to be operated only on gasoline or diesel fuel." 49 U.S.C. § 32902(h)(2). Again, NHTSA ignored this clear congressional command, taking into account in its model the energy consumption associated with the operation of the *electric* component of hybrid vehicles. *See* Br. of American Manufacturers and State Petitioners 18, 52-62; 87 Fed. Reg. 25,710, 25,996 (May 2, 2022) ("NHTSA has held the interpretation since the 2012 final rule that it is reasonable

and appropriate to begin considering the full calculated fuel economy of dual-fueled vehicles."). The fuel-economy standards violate the Act.

The unavoidable consequence of NHTSA's standards, a *de facto* electric vehicle mandate, *see* Br. of American Manufacturers and State Petitioners 3, 42, is also beyond the agency's statutory authority. The Act permits NHTSA to promulgate "average fuel economy standards," 49 U.S.C. § 32902(a), a term that refers to "the average number of miles traveled by an automobile for each gallon of gasoline," "diesel oil," or "other liquid or gaseous fuel," *id.* § 32901(a)(10), (11). In other words, the Act presupposes that the vehicles subject to NHTSA regulation "have engines and burn fuel," *Truck Trailer Mfrs. Ass'n*, 17 F.4th at 1206—a presupposition confirmed by the prohibition against considering the fuel economy of electric vehicles, *see* 49 U.S.C. §§ 32901(a)(1)(J), 32902(h)(1). The authority to regulate the efficiency of the internal combustion engine is not a license to mandate the production of "vehicles [that] use no fuel." *Truck Trailer Mfrs. Ass'n*, 17 F.4th at 1200; *see id.* at 1205.

II. The Major-Questions Doctrine Forecloses NHTSA's Interpretation of the Energy Policy and Conservation Act.

It is possible that NHTSA will argue that the Act is ambiguous or does not address whether the agency may mandate the electrification of the Nation's vehicles. *See* 87 Fed. Reg. at 25,997 (asserting that *Chevron* deference applies whenever "the statute is silent or ambiguous regarding the specific question"). The Court should reject any such arguments as foreclosed by the major-questions doctrine.

As the American Fuel & Petrochemical Manufacturers and the State Petitioners argue, the major-questions doctrine applies here. *See* Brief of Manufacturers and State Petitioners 26, 43-45. The Supreme Court's recent decision in *West Virginia v. EPA*, which synthesizes four decades of caselaw about the doctrine, confirms that this is a major-questions case. And when the doctrine applies, agencies must show clear congressional authorization to assert the kind of sweeping regulatory authority NHTSA asserts here.

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 also* 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).

NHTSA's own calculations confirm the vast economic significance of its fuel standards. Compliance with the standards through 2029 would cost $213.8 billion. 87 Fed. Reg. at 26,005 (total private and external costs for Alternative 2.5, NHTSA's chosen standards). These costs place NHTSA's standards firmly within major-questions territory. They are more than twenty-five times the $8.4 billion projected compliance costs for the Clean Power Plan that triggered the major-questions doctrine in *West Virginia v. EPA*. *See* 80 Fed. Reg. 64,662, 64,679 (Oct. 23, 2015); *West Virginia*, 142 S. Ct. at 2610. They exceed the $147 billion in permitting costs imposed by the rule in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 322 (2014)—a rule that implicated the major-questions doctrine because it would have conferred on the agency "extravagant

statutory power over the national economy," *id.* at 324. They exceed the costs of the provision before the Court in *King v. Burwell*, which "involv[ed] billions of dollars in spending each year"—again, enough to implicate the major-questions doctrine. *See* 576 U.S. 473, 485-86 (2015). And they do not even "include the ancillary costs of electric vehicles, such as building additional charging stations [and] improving the grid." 87 Fed. Reg. at 25,888 (footnote omitted).[6]

The effects of NHTSA's standards will go further still. By mandating a turn away from the internal combustion engine, the standards will throttle the petroleum industry, placing hundreds of thousands of jobs—and billions of dollars in tax revenue—at risk. *See* Br. of American Manufacturers and State Petitioners 23-25; 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* Interest of Amici Curiae, *supra*,

[6] The necessary infrastructure investment alone would cost billions of dollars each year. *See* Energy Marketers of America, *Utility Investments and Consumer Costs of Electric Vehicle Charging Infrastructure*, at iii (2020), *available at* https://bit.ly/3VlGqOI.

at 3. 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.* Again, hundreds of thousands of jobs nationwide are on the line, not to mention core elements of this country's infrastructure. *See id.*

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).

Consider *West Virginia v. EPA* and *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022), two cases where the political significance of agency action raised major questions. In *West Virginia*, it was telling that "Congress had conspicuously and repeatedly declined to enact" legislation similar to the agency's challenged plan. *Id.* at 2610. The "basic scheme EPA adopted ha[d] [also] been the subject of an earnest

and profound debate across the country," making the "claimed delegation all the more suspect." 142 S. Ct. at 2614 (internal quotation marks omitted). And in *National Federation of Independent Business*, "the Court held the [major-questions] 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." *Id.* at 2621 (Gorsuch, J., concurring).

So too here with NHTSA's use of the Energy Policy and Conservation Act to effectively mandate the production of electric vehicles. Over the last few years alone, both Chambers of Congress have repeatedly considered and rejected bills with effects similar to NHTSA's standards. *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). And the National Academies of Sciences, Engineering, and Medicine, supported by the Department of Energy, have recommended that Congress "amend the statute to delete the . . . prohibition on considering the fuel economy of [electric]

vehicles in setting [fuel economy] standards." 87 Fed. Reg. at 25,994 (internal quotation marks omitted); *see id.* at 25,754. But Congress has not acted on that recommendation.

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, 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.

NHTSA's asserted authority here is similarly transformative. Relying on a provision that permits it to "*prescribe* . . . fuel economy *standards*," 49 U.S.C. 32902(a) (emphases added), for automobiles that "have engines and burn fuel," *Truck Trailer Mfrs. Ass'n*, 17 F.4th at 1206, NHTSA purports to derive the authority to drive production *away from* these 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 dramatically affect the Nation's jobs, energy grid, and national security." Br. of American Manufacturers and State Petitioners 43; *see* 87 Fed. Reg. 25,993 (acknowledging that sourcing some of the materials needed to comply with the standards could raise "geopolitical challenges"). Given the limited scope of NHTSA's expertise, there is no reason to believe that Congress would have instructed NHTSA 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 mandates the establishment of "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(b)(1). Although the Department of Transportation (of which NHTSA is a part) is directed to participate in the working group, it is only as one of many federal stakeholders including the Department of Energy, Council on Environmental Quality, EPA, and the General Services Administration. *Id.* § 25006(b)(2)(B)(i). The Act directs the Secretary of Energy, not NHTSA, 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 NHTSA, to "study the impact of forced labor in China on the electric vehicle supply chain." *Id.* § 40436. In short, Congress has recognized that NHTSA does not have the expertise 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 NHTSA promulgated the challenged standards, it had never used its authority under the Energy Policy and Conservation Act to set fuel-economy standards that incorporate mandates to produce electric vehicles.

An agency's historical failure to assert the claimed power is sufficient—but not necessary—to trigger the major-questions doctrine. For example, *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 482, 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. NHTSA's fuel-economy standards 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 industries. And it would give NHTSA all this power even though Congress has considered and rejected multiple bills with effects similar to those of the challenged standards.

C. NHTSA 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). *Contra* 87 Fed. Reg. at 25,997 (suggesting that NHTSA's interpretation of the Energy Policy and Conservation Act would be entitled to *Chevron* deference). 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 "plausible," 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. Here, as the American Fuel & Petrochemical Manufacturers and the State Petitioners explain, the Energy Policy and Conservation Act is not at all vague about the use of electric-vehicle fuel economy—the Act affirmatively and expressly prohibits it. Br. of American Manufacturers and State Petitioners 35-45, 51-60.

Additionally, the explicit grant of the asserted type of power in a different statutory provision undermines the notion that the power was granted implicitly in the instant provision. *See West Virginia*, 142 S. Ct. at 2615. This principle counsels against NHTSA's interpretation of the Act. For instance, although the Act prohibits NHTSA from considering the fuel economy of the electric portion of hybrid vehicles, 49 U.S.C. § 32902(h)(2), NHTSA treats that provision as if it contained a now-operative sunset clause. *See* Br. of American Manufacturers and State Petitioners 54-55 (describing NHTSA's rationale for treating the prohibition as "moot"). But other provisions of the Act explicitly phase out over time certain rules relating to hybrid vehicles, undermining the notion that section 32902(h)(2) contains an implicit sunset provision. *See* Br. of

American Manufacturers and State Petitioners 55-56.

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. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion); *see 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 some sort of implicit 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 Energy Policy and Conservation Act in general—and of section 32902 in particular—is to improve automobile fuel economy. *See Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1324 (D.C. Cir. 1986); *Truck Trailer Mfrs. Ass'n*, 17 F.4th at 1220 (Millett, J., concurring in the judgment and dissenting in part). But Congress specified that NHTSA must work toward that purpose under section 32902 through "fuel economy standards" that are "feasible" for vehicles that contain internal-combustion engines and burn fuel, *see* 49 U.S.C. § 32902(a), (h)(1)-(2), 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 NHTSA the authority—particularly through a standards-setting provision like section 32902—to mandate a nationwide transition away from the use of internal-combustion-engine vehicles to electric vehicles.

CONCLUSION

The Court should set aside NHTSA's fuel-economy standards.

Respectfully submitted.

/s/ *Scott A. Keller*
Scott A. Keller
Michael B. Schon
Adam Steene*
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
scott@lehotskykeller.com

Counsel for Amici Curiae Western States Petroleum Association et al.

**Admitted in New York; not admitted in D.C., but being supervised by D.C. Bar members.*

CERTIFICATE OF SERVICE

On December 1, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ *Scott A. Keller*
Scott A. Keller

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 5,606 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*
Scott A. Keller