ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1081 (and consolidated cases)

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

STATE OF OHIO, ET AL.,

Petitioners,

v.

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

Respondents.

ADVANCED ENERGY ECONOMY, ET AL.,

Intervenors.

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

***REVISED* BRIEF OF *AMICI CURIAE* 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, AND TEXAS ROYALTY COUNCIL IN SUPPORT OF PETITIONERS**

JAMES K. VINES
Fontaine Law Group
1128 Crater Hill Drive
Nashville, Tennessee 37215
(615) 218-8029
jvines1128@gmail.com

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* 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, and Texas Royalty Council certify as follows:

A. Parties and *amici*

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, and Texas Royalty Council are participating as *amici curiae* before this Court in support of Petitioners. All other parties appearing to date in this Court are referenced in the Petition of (and subsequent Briefs of) Petitioners States of Ohio, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia ("State petitioners"), Doc. No. 1946617, filed on February 12, 2022, and American Fuel & Petrochemical Manufacturers, Clean Fuels Development Coalition, Diamond Alternative Energy, LLC, Domestic Energy Producers Alliance, Energy Marketers of

America, ICM, Inc., Illinois Corn Growers Association, Iowa Soybean Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Minnesota Soybean Growers Association, Missouri Corn Growers Association, National Association of Convenience Stores, South Dakota Soybean Association, and Valero Renewable Fuels Company, LLC, ("Private petitioners"), cases number 22-1083, 22-1084, and 22-1085 consolidated with State petitioners case number 22-1081 pursuant to order of this Court's Clerk Doc. Nos. 1947083 and 1947294, filed on May 18 and 19, 2022.

B. Ruling under review

The ruling under review is the final action taken by Respondents United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency, entitled *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision*, published in the Federal Register at 87 Fed. Reg. 14,332 (Mar. 14, 2022) (California Waiver Reinstatement Action).

C. Related cases

Three cases in the U.S. Court of Appeals for the District of Columbia Circuit involve challenges to the same agency action challenged here in No. 22-1081. These are: *Iowa Soybean Assn.* v. *EPA*, No. 22-1083; *Am. Fuel & Petrochemical Mfrs.* v. *EPA*, No. 22-1084; and *Clean Fuels Dev. Coal.* v. *EPA*, No. 22-1085. As noted, the Court consolidated review of these three cases under lead case No. 22-1081, Ohio v. EPA.

Amici believe two additional pending cases before the Court are related to this action. These are: *State of Texas v. EPA,* No 22-1031 and *National Resources Defense Council v. NHTSA,* No. 22-1080. These two cases challenge other actions by EPA and NHTSA implementing the same Presidential Executive Order, *Exec. Order No. 14037*, *Strengthening American Leadership in Clean Cars and Trucks,* 86 Fed. Reg. 43,583 (Aug. 5, 2021), that motivated EPA's action in the California Waiver Reinstatement rulemaking. These two other final agency actions cause nearly identical harm to *Amici's* interests and suffer from the same constitutional defect asserted here.

RULE 29 STATEMENTS

All identified parties have consented to the filing of this *amicus* brief.

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Circuit Rule 29(b), undersigned counsel states that:

(1) *Amicus curiae* Texas Oil & Gas Association is a non-profit, tax-exempt organization incorporated in Texas. Texas Oil & Gas Association Has no parent corporation, and no publicly held company has 10% or greater ownership in the Texas Oil & Gas Association.

(2) *Amicus curiae* Louisiana Mid-Continent Oil & Gas Association is a non-profit, tax-exempt organization incorporated in Louisiana. Louisiana Mid-Continent Oil & Gas Association has no parent corporation, and no publicly held company has 10% or greater ownership in Louisiana Mid-Continent Oil & Gas Association.

(3) *Amicus curiae* The Petroleum Alliance of Oklahoma is a non-profit, tax-exempt organization incorporated in Oklahoma. The Petroleum Alliance of Oklahoma has no parent corporation and

no publicly held company has 10% or greater ownership in The Petroleum Alliance of Oklahoma.

(4) *Amicus curiae* Texas Independent Producers and Royalty Owners Association is a non-profit, tax-exempt organization incorporated in Texas. Texas Independent Producers and Royalty Owners Association has no parent corporation, and no publicly held company has 10% or greater ownership in Texas Independent Producers and Royalty Owners Association.

(5) *Amicus curiae* Texas Association of Manufacturers is a non-profit, tax-exempt organization incorporated in Texas. Texas Association of Manufacturers has no parent corporation, and no publicly held company has 10% or greater ownership in Texas Association of Manufacturers.

(6) *Amicus curiae* Texas Royalty Council is a non-profit, tax-exempt organization incorporated in Texas. Texas Royalty Council has no parent corporation, and no publicly held company has 10% or greater ownership in Texas Royalty Council.

Pursuant to Circuit Rule 29(d), *amici* here are unaware of other entities or individuals participating as *amici* to represent the concerns of Texas', Louisiana's and Oklahoma's:

- upstream, midstream and downstream sectors of the oil and gas industry;
- royalty owners; and
- manufacturing and supply chain businesses that depend on refined oil and gas products to supply these states and the nation with "every day" products essential to modern life.

Texas, Louisiana, and Oklahoma are the first, second and sixth largest crude oil producers in the United States. Each has a similar ranking in the areas of natural gas production and refining capacity. Oil and gas production, transport, and refining in just these three states substantially impacts not only these states' interests but the national interests, as well, across a broad range of factors. This brief will address how the rulemaking under review here impacts these three leading oil and gas producing states, and the nation.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY

EPA	U.S. Environmental Protection Agency
NHTSA	National Highway Traffic Safety Administration

STATUTES AND REGULATIONS

All applicable statutes and regulations and their pertinent parts are set forth in the Petitioners' briefs and addenda to those briefs.

INTERESTS OF THE *AMICI CURIAE*

Texas Oil & Gas Association is a business association representing the interests of the oil and gas industry of the United States' leading oil and gas producing State, Texas. All of Texas Oil & Gas Association's member companies and the dependent sectors of Texas' economy are subject to material adverse consequences from the regulatory actions addressed in this appeal. The Texas oil and gas industry comprises 20 separate major business and employment sectors in the Texas economy.[1] In the most recent years for which composite annual data is available, 2020 and 2021, Texas continued to be the number one oil and gas producing state of the world's number one oil and gas producing nation. Texas' oil and gas industry contributed $344 billion to the state's economy amounting to 10% of total direct and 22% of indirect state gross domestic product. Texas' downstream sector operates 31% of U.S. refining capacity while the upstream sector accounts for 43% of all US crude production at 4.9 million barrels per day. In FY 2021, the

[1] Texas oil & gas industry economic data in this section comes from: [Texas Oil & Gas Association] Annual Economic Impact Report 2022 at https://issuu.com/txoga/docs/1-11-22_txoga_economic_impact_report_2021

industry employed 422,122 Texans; every direct job in the Texas oil and natural gas industry creates an additional 2.2 jobs elsewhere in the Texas economy. In total, direct oil and natural gas employment plus the industry's spending capital goods, electricity, construction, services and supplies generates a total of 1.37 million Texas jobs. Texas oil and gas employers paid an average of $108,988 per job in 2021 while other private sectors in the state averaged $63,027. Texas' oil and gas industry paid $15.8 billion in state and local taxes and state royalties in Fiscal Year 2021. This revenue from oil and natural gas production, pipelines, refineries and liquid natural gas facilities translates into about $43 million each day that pay for schools, universities, roads, first responders and essential services. Since 2007, when Texas Oil & Gas Association first started compiling this data, the Texas oil and natural gas industry has paid more than $178.7 billion in state and local taxes and state royalties. Oil and natural gas royalties to state funds, particularly the Permanent University Fund and Permanent School Fund, widely support Texas public education. Of the state's oil and natural gas royalties, 99% were deposited into these education funds with the Permanent University Fund receiving $979 million and the Permanent School Fund receiving over $1.1 billion. Texas independent school districts also directly received $1.84 billion in property taxes from mineral properties producing oil and natural gas, pipelines, and gas utilities. The Texas oil and gas industry is the funding source for the state's Economic Stabilization (a/k/a "Rainy Day") Fund. The Rainy Day Fund also supports substantial educational funding in Texas. The sum of all Rainy Day appropriations since inception totals $18.2 billion. Without the direct funding from taxes paid by the Texas oil and natural gas industry, numerous state funding priority items would not have received the substantial dollars allocated to meet essential needs.

Louisiana Mid-Continent Oil & Gas Association is a business association representing the interests of the oil and gas industry of the second largest oil producing and fourth largest gas producing State in the nation, Louisiana. Louisiana ranks second in the nation in crude oil refining capacity. All of Louisiana Mid-Continent Oil & Gas Association's member companies and the dependent sectors of Louisiana's economy are subject to material adverse consequences from the regulatory actions addressed in this appeal. In the most recent year for which composite annual data is available, 2019, Louisiana supported the production of 738 million barrels of crude oil and liquid condensate, 3.81 trillion cubic feet of dry (or pipeline quality) natural gas, and 102.4 million barrels of natural gas plant liquids.[2] At the point of first

[2] Louisiana oil & gas industry economic data in this section is from ICF International, Inc. - The Economic Impact of the Oil and Natural Gas Industry in Louisiana (Oct. 5, 2020) at:

sale, these production volumes amounted to a total value of $55.5 billion. Recently constructed liquid natural gas export operations also provided $7.1 billion in output value in the state. The Louisiana oil and gas industry provided $73.0 billion dollars of direct, indirect, and related state income. State and local tax revenues also provided $4.5 billion to the state economy throughout the supply chain. In the eleven economic sectors throughout Louisiana representing "direct" oil and gas activity, there were a total of 94,200 private sector employees. Additionally, sectors that provided intermediate goods and services to the eleven direct oil and gas sectors employed 50,800 "indirect" employees. The spending of income earned by direct and indirect employees led to 84,100 additional jobs in Louisiana in 2019 created by the spending of those employees. And, there were also approximately 20,700 related jobs among sole proprietorships, partnerships, and independent contractors across the industry. Therefore, a total of 249,800 private sector employees received wages or salaries in 2019 supported by oil and gas activity. For every direct employee in the oil and gas industry in the state, there are 1.43 additional employees supporting the

https://www.lmoga.com/assets/uploads/documents/LMOGA-ICF-Louisiana-Economic-Impact-Report-10.2020.pdf state economy through related industry spending and industry employees' spending.

The Petroleum Alliance of Oklahoma is a business association representing the oil and gas industry of the 4th largest oil and gas producing state, Oklahoma. All of The Petroleum Alliance of Oklahoma's member companies and the dependent sectors of Oklahoma's economy are subject to material adverse consequences from the regulatory actions addressed in this appeal. According to the U.S. Energy Information Administration, Oklahoma is the 5th largest producer of natural gas and the 6th largest producer of crude oil in the nation with more than 1.48 billion in proved crude oil reserves and more than 30 trillion cubic feet of natural gas reserves. The Oklahoma oil and gas industry directly contributed $19 billion to state GDP in 2021.[3] This provided $16.5 billion in income to Oklahoma households or 25% of all state household earnings. The oil and natural gas industry is both the largest private-sector employer and the largest taxpayer providing $1 of every $4 in tax revenue. The industry employs more than 85,000 direct employees with average earnings of $137,000 per year and estimated 145,000 are employed

[3] Oklahoma oil & gas industry economic data in the section is from OKLAHOMA'S OIL AND GAS ECONOMY, Prepared for: Oklahoma Energy Resources Board (January 2022) at http://oerb.com/wp-content/uploads/2022/02/RegTrk-OK-Oil-Gas-Final-Draft-20220201.pdf

in related and linked jobs. The industry contributed $2.66 billion in business taxes; $720 million in severance tax revenue; and $410 million in ad valorem taxes. State royalty payments exceeded $1.9 billion. In Oklahoma, the oil and natural gas industry is the only major source of earmarked funding for education and county roads. The earmarked funds for education totaled $2.1 billion over the last decade and were $204 million in 2021. Earmarked funds for county roads and bridges totaled $62.5 million in 2021. The industry is responsible for more than half of Oklahoma's real annual GDP growth every year.

Texas Independent Producers and Royalty Owners Association is one of the country's largest oil-and-gas trade associations. Texas Independent Producers and Royalty Owners Association advocates to preserve the ability for independents to explore for and produce oil and natural gas. All of Texas Independent Producers and Royalty Owners Association's member companies and individual members, and the dependent sectors of Texas' economy, are subject to material adverse consequences from the regulatory actions addressed in this appeal. The organization's nearly 3,000 members include small family-owned businesses and the largest publicly traded independent oil and gas producers, in addition to large and small royalty owners. In 2021, 37 percent of all oil and gas jobs nationwide were located in Texas.[4] Texas had the highest oil and gas payroll in the country in 2021, totaling $41 billion. Texas led the country in the number of oil and gas businesses with over 12,000 establishments. Oil production in Texas exceeded 1.7 billion barrels in 2021 and natural gas production was over 10.7 trillion cubic feet in the same year. The Texas oil and natural gas industry purchased U.S. goods and services in the amount of $166 billion, 81 percent of which came from Texas businesses, further illustrating the significant economic contributions from the industry across virtually all business sectors in state. Mineral owners also play an integral role in the United States oil and natural gas industry. There are more than 600,000 royalty owners in Texas that include farmers, ranchers, individuals, and families who lease the mineral rights beneath their land and in turn receive royalties each year.

Texas Association of Manufacturing is the leading manufacturing association in Texas, representing small and large companies in every industrial sector. All of Texas Association of Manufacturer's member

[4] Texas Independent Producers and Royalty Owners Association data on oil and gas production and royalty owners in this section is from STATE OF ENERGY REPORT at: https://infogram.com/tipro-2022-state-of-energy-report-1h7j4dv1kpgnv4n?live

companies and the dependent sectors of Texas' economy are subject to material adverse consequences from the regulatory actions addressed in this appeal. Texas has been the number one exporting state in the nation for nearly 20 years, exporting $203 billion in manufactured goods in 2020 as well as the leading business creation, relocation, and expansion destination in the world.[5] Texas manufacturers are the State's biggest job creators, and account for 13.07% of the total economic output in the state—more than $241 billion as of 2019. Texas manufacturers employ more than 881,000 Texans in jobs that pay an average of over $90,100 annually. Each manufacturing job created also provides an average five additional jobs in Texas communities. Texas' oil and gas and manufacturing sectors are mutually dependent on one another. For instance, according to the U.S. Department of Energy, "refined products made from oil & natural gas make the manufacturing of over 6000 everyday products and high-tech devices possible."[6] The Department of Energy's Infographic lists over 160 examples of consumer product and health care necessities including "Antiseptics … Cell phones … Clothing … Hearing aids … Heart valves … Laptops … Motorcycle helmets … Pharmaceuticals … Shoes …

[5] Texas Association of Manufacturer's economic data in this section is from *Manufacturing Matters* at https://manufacturetexas.org/manufacturing-matters

[6] *INFOGRAPHIC: Products Made from Oil and Natural Gas* at: https://www.energy.gov/fecm/downloads/infographic-products-made-oil-and-natural-gas

Soft contact lenses … Synthetic rubber … Wind turbine blades.” The nation simply cannot do without these 6000+ manufactured products that are dependent on oil & gas refined products as production raw materials.

Texas Royalty Council is a grassroots entity dedicated to representing and advancing the interests of Texas royalty owners and energy professionals. The Texas Royalty Council was organized to monitor, advocate, and educate royalty owners, elected officials, and the energy industry on issues affecting royalty owners in Texas. Texas Royalty Council primary focus is to promote the exploration and production of Texas oil, natural gas, and minerals while maximizing the return on the value of Texas’ natural resources. All of the royalty owners and energy professionals represented by Texas Royalty Council are subject to material adverse consequences from the regulatory actions addressed in this appeal.

The oil and gas industry is unquestionably the foundation for the economies of the states reflected by *amici.* Public welfare in these states is undeniably dependent on the industry in the immediate and long-term futures. The rulemaking under consideration here – part of an expressed Executive branch effort to drastically reduce or even eliminate internal combustion engine powered vehicles across the nation and replace them with electric vehicles or “zero-emission” vehicles - is a clear and present danger to the oil and gas industry’s, the states’, and the nation’s prosperity and survival.

SUMMARY OF ARGUMENT

EPA's California Waiver Rule under federal Clean Air Act § 209, along with the associated Clean Air Act § 177 opt in actions by several other states, reflects an intentional Executive Branch attempt to mandate shifts away from internal combustion engine powered vehicles to electric vehicles, or so called "zero-emission" vehicles. The rule and opt-ins would destroy approximately 40% of the gasoline demand for new vehicles. The damage to the Texas, Louisiana, and Oklahoma economies and public welfare, along with the negative national ripple effects, clearly illustrate that the objective of the Rule is a major question of national policy. Since there is absolutely no clear congressional authorization in the Clean Air Act for EPA to take such a sweeping action, the rule fails constitutionally under the Major Question doctrine and should be struck down. Even in the unlikely event the Court were to find some faint trace of congressional authorization for EPA's action, there is no clear intelligible principle in the legislation to guide EPA's execution of that delegation. As such, the delegation, and the rule, would fail for violation of the constitutional non-delegation doctrine.

ARGUMENT

I. INTRODUCTION

This appeal challenges EPA's recent final agency action in C*alifornia State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision*, published in the Federal Register at 87 Fed. Reg. 14,332 (Mar. 14, 2022) (California Waiver Reinstatement Rulemaking). This rulemaking, a final agency action purportedly under the Clean Air Act, 42 U.S.C. §§ 7401-7671q , is one of a set of three actions taken by EPA and NHTSA following the President's Executive order 14037 of August 5, 2021, *Strengthening American Leadership in Clean Cars and Trucks,* 86 Fed. Reg. 43,583 (Aug. 10, 2021).

Executive Order 14037 directs EPA, using the Clean Air Act "to establish new multi-pollutant emissions standards, including for [greenhouse gas] emissions, for light- and medium-duty vehicles beginning with model year 2027 and extending through and including at least model year 2030. " Exec. Order 14037 sec. 2. (a), 86 Fed. Reg. 43,583 (Aug. 10, 2021). The Order separately directs NHTSA, via delegation from the Secretary of Transportation and using the Energy Independence and Security Act of 2007 (42 U.S.C., ch. 152 § 17001 *et seq*.) "to establish new fuel economy standards for passenger cars and light-duty trucks beginning with model year 2027 and extending through and including at least model year 2030," Exec. Order 14037 sec. 2. (b), consistent with the greenhouse gas reduction objectives set out in this and earlier, related Executive Orders. 86 Fed. Reg. 43,583 (Aug. 10, 2021).

To implement the President's instructions, EPA and NHTSA, finalized three separate rulemakings: (1) the California Waiver Reinstatement action addressed in this appeal; (2) EPA's *2023 and Later Model Year Light-Duty Vehicle [Greenhouse Gas] Standards,* 86 Fed. Reg. 74,434 (Greenhouse Gas Tailpipe Rule) (December 30, 2021) currently under appeal in *Texas v. EPA*, No. 22-1031 (D.C. Cir.); and (3) *NHTSA's Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks*, 87 Fed. Reg. 25,710 (May 2, 2022) (Corporate Average Fuel Economy 2024-26 Rule), subject of the pending appeal in *NRDC v. NHTSA*, No. 22-1080 (D.C. Cir.) Each of these rules, in their own way, mandate a reduction in gasoline powered vehicles and a replacement for them in the new vehicle markets with electric vehicles or zero-emission vehicles. As noted, *amici* believe pending actions in this Court Nos. 22-1031 (addressing Greenhouse Gas Tailpipe Rule), 22-1080 (addressing Corporate Average Fuel Economy 2024-26 Rule), and 22-1081 (the instant appeal, addressing the California Waiver Reinstatement) are related actions as they reflect the concerted actions of Executive Branch agencies responding to agency-wide instructions from the President.

As discussed, below, the consequences of these three rulemakings would be an abrupt, government-mandated transformation of the nation's vehicle fleet away from internal combustion engine powered vehicles towards electric vehicles, or so-called "zero-emission" vehicles.[7] Each of the three rulemakings individually lead to this result and, in concert, the three rulemakings accomplish a force multiplier for achieving the desired end of eliminating internal combustion engine powered vehicles and replacing them with electric vehicles or zero-emission vehicles.

Whether U.S. citizens and businesses can continue to use the vehicles of their choice or whether the government should mandate an abrupt shift to electric vehicles is, of course, a Major Question of national policy. This would be as great, or even greater, a change to the national economy and infrastructure, not to mention the national culture and world standing, than the attempted EPA "Clean Power Plan" that was recently struck down for lack of Congressional

[7] *Amici* point out that use of the phrase "zero-emission" is materially misleading to consumers and the public on the true environmental emission impact of these vehicles. These vehicles do not suddenly appear and run on water. The "cradle-to-grave" environmental impact of the so called zero-emission vehicles, including their manufacturing processes and raw material inputs, has not been shown to be materially different than for the complete life-cycle of internal combustion engine powered vehicles. Also, the production processes for "alternative" fuels (e.g., electrons) powering zero-emission vehicles have their own substantial life-cycle environmental impacts.

authorization by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). At a minimum, the impact would be radical and lead to massive transformations in the vehicle manufacturing industry, the oil and gas industry and the public power generation industry. The destructive ripple effects in other indirect industry sectors would be massive and probably immeasurable.

There is no demonstrable Congressional authorization for any of these three rulemakings by EPA and NHTSA, either individually or collectively. Accordingly, they fail under the Separation of Powers required under the Constitution. *Amici* here address the part the waiver reinstatement plays in this unconstitutional trinity and urge the Court to strike down EPA's California Waiver Reinstatement rule under the Major Questions doctrine.

II. EPA's "California Waiver Reinstatement" Rule Is A Decision Of Such Magnitude And Consequence – A Major Question Of National Policy - That It Would Require A Clear Delegation Of Authority From Congress And No Such Delegation Exists.

A. EPA's Action Clearly Appropriates A Major Question Of National Policy.

Not only have EPA and NHTSA pushed electric vehicle mandates through their greenhouse gas tailpipe emissions standards and Corporate Average Fuel Economy standards, respectively, but EPA also reversed the previous Administration's withdrawal of California's Clean Air Act § 209 waiver which permitted California—and only California—to enact its own motor vehicle emissions standards. Whether the resulting destruction of major portions of the conventional fuel markets is appropriate or desired is plainly a Major Question of National Policy.

Normally, under § 209 of the Clean Air Act, 42 U.S.C § 7543, states are expressly preempted from adopting or enforcing emissions standards for new motor vehicles; however, once California has a § 209 waiver from EPA, other states may "opt in" to California's standards under § 177 of the Clean Air Act, 42 U.S.C § 7507, which allows states to either adopt California's standards in full or not at all. California has adopted stringent regulations known as the Advanced Clean Cars I Program establishing vehicle greenhouse gas tailpipe emission standards and mandating electric vehicles or zero-emission vehicles. See *https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program*. California's stringent mandates will essentially be nationalized. These rulemakings have also been adopted, pursuant to Clean Air Act section 177, by a number of other states, which along with California collectively constitute approximately 40 percent of the nation's new vehicle market. Currently, seventeen states and the

District of Columbia have opted into California's greenhouse gas emission control standards, electric vehicle mandate, or both, under Clean Air Act § 177.[8]

EPA effectively allowed California to dictate national policy by approving a preemption waiver under the Clean Air Act under which California expressly mandates the sale of electric vehicles. The current California rule, covered by EPA's Section 209 waiver, the Advanced Clean Cars I Program, requires approximately 22 percent of new light duty vehicles to be electric vehicles. The California Reinstatement Rule, under section 209, in concert with the "opt in" States would have the intended consequence of decreasing demand for gasoline for nearly half of the new vehicle market. This gasoline demand destruction will have a direct catastrophic impact on *amici and amici's* home states as well as on the national economy due to the national interdependence on *amici's* states' oil and gas and related industries.

[8] On August 26, 2022, California approved its "Advanced Clean Cars Program II" rulemaking that bans all new internal combustion engine vehicle sales beginning in 2035; if EPA grants California a waiver for the part II rule based on the authority EPA claims here, other states could adopt the same standards as California and thus could also phase out gasoline- and ethanol-powered vehicles altogether.

With these actions, the Executive Branch threatens to irreversibly alter the U.S. vehicles market to the detriment of the American public—and especially consumers. To comply with electric vehicle mandates, U.S. auto manufacturers and dealers must increase the price of gasoline-powered vehicles to make up for losses on electric vehicles that must be priced artificially low to make up for sluggish electric vehicle demand and fulfill California's mandates. Therefore, electric vehicle subsidies force purchasers of gasoline-powered vehicles to cross- subsidize electric vehicle purchasers.

Likewise, reinstating California's waiver undermines the U.S. oil and biofuels industries, which provide billions of dollars to the economy and millions of American jobs up and down the supply chain—through jobs in extracting, refining, farming, blending, transporting (via pipeline, truck, and rail) and selling oil, biofuel, and finished fuel like gasoline and diesel. EPA would effectively have *amici's* states give up, among numerous other economic necessities, massive levels of income, various critical state tax bases, and education funding. Furthermore, gasoline production drives production of virtually all other petroleum-based products, including asphalt which is critical to resolving the nation's transportation infrastructure crisis. The amount of asphalt produced is a function of the amount of petroleum refined. Regulations that force refiners to scale back transportation fuel production necessarily reduce asphalt production too. The oil and gas industry's process infrastructure is not designed or built such that operators can pick and choose between elements of the crude refining process; getting rid of gasoline and keeping all other selected refinery products such asphalt is simply not feasible.

Citizens and businesses who use conventional, internal combustion engine powered vehicles will be made worse off from more expensive vehicles and fuel, while those who form the fuel supply chain—biofuel producers, pipelines, terminals, tank trucks service stations, and convenience store owners—will lose their investments or have their work or customers dry up.[9]

Reinstating California's wavier also has major implications for national security policy. Electrification of the motor vehicle fleet represents an erosion of U.S. energy security because China presently controls most of the sources or critical minerals needed to produce electric vehicle batteries.

[9] While *amici* cannot speak directly for them, the United States military and the nation's commercial aviation industry inevitably rely on the ongoing vitality of *amici's* oil and gas industries. EPA's disregard for that threat to national defense and the commercial airline transport sector is more proof that EPA has misfired on key questions of major national policy in the waiver rulemaking.

B. EPA's California Reinstatement Rulemaking – An Action Materially Addressing A Clear Question Of National Policy - Fails Constitutionally Under The Major Question Doctrine.

The Major Question doctrine is an established part of the canon for judicial review of agency rulemaking.

> As for the major questions doctrine "label" …it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting *highly consequential* power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. *So have we.*
>
> *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022) (emphasis added).

In reviewing EPA's Clean Power Plan, the Supreme Court observed: EPA's "point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar." *West Virginia*, 142 S.Ct. at 2604. The Court noted that: "EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables." *West Virginia*, 142 S.Ct. at 2603. The unmissable analogy here is that EPA's "point, after all" in the California Waiver Reinstatement Rule is for EPA to leverage the California state-level mandated shift in the Advanced Clean Cars I program from internal combustion engine powered vehicles to electric vehicles using the California waiver and the Section 177 "opt in" states adoption of California's mandates.

Amici's members, here, are not so much facing a mere "shift" in their sectors as an intentional destruction of their business sectors. Their home states are facing a "highly consequential" destruction of their most significant economic base. The negative fallout from this will be felt nationwide and abroad.

"A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia,* 142 S.Ct. at 2616. "[T]he Government must – under the major questions doctrine – point to 'clear congressional authorization' to regulate in that matter.'" *West Virginia,* 142 S.Ct. at 2614. There is obviously no congressional authorization for EPA to utilize the Clean Air Act's authority to destroy key industrial sectors and the prosperity of the millions of citizens who depend on those sectors.

The Clean Air Act's state regulation prohibition and waiver provision relied on by EPA in its California Waiver Reinstatement action are as follows:

(a)Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any *standard* relating to the *control of emissions* from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the *control* *of emissions* from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b)Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted *standards* (other than crankcase emission standards) for the *control of emissions* from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State *standards* will be, in the aggregate, at least as protective of public health and welfare as applicable Federal *standards*. [ ]

(2)

If each State *standard* is at least as stringent as the comparable applicable Federal *standard*, such State *standard* shall be deemed to be at least as protective of health and welfare as such Federal *standards* for purposes of paragraph (1).

(3)

In the case of any new motor vehicle or new motor vehicle engine to which State *standards* apply pursuant to a waiver granted under paragraph (1), compliance with such State *standards* shall be treated as compliance with applicable Federal *standards* for purposes of this subchapter.

Clean Air Act, § 209, 42 U.S. Code § 7543 (emphasis added). The waiver contemplated in this provision is generally known as "the California waiver" provision because California is the only state that had adopted standards for the control of emissions prior to March 30, 1966, per Clean Air Act section 209(b)(1).

The sole subject of these portions of the Clean Air Act is "standards" for the "control of emissions." There is simply no manipulation of the English language or the imagination to support the notion that Congress authorized EPA, via the California Waiver provision and other states' opt ins, to roil the states' and national economies or initiate the destruction of the century-old oil and gas industry that would result from the California Waiver Reinstatement rule. There is not so much as a faint trace of any such congressional authorization, much less a clear statement. Indeed, Congressional attempts to legislate federal mandates for electric vehicles have failed on at least five separate occasions.[10]

III. Even If A Clear Delegation Of Authority From Congress For EPA's "California Reinstatement Rule" Were Found Any Such Delegation Would Fail For Non-compliance With The Intelligible Principle Requirement Of The Non-Delegation Doctrine

The Major Question doctrine, as noted, tasks the Court with looking for a demonstrable delegation of Congressional authority supporting agency action. A separate constitutional question arises if a delegation is found as to whether the delegation is unconstitutional because the delegation violates

[10] See, S. 3664, 115th Cong. § 2 (2018) at: https://www.congress.gov/bill/115th-congress/senate-bill/3664; S. 1487, 116th Cong. §1 (2019) at: https://www.congress.gov/bill/116th-congress/senate-bill/1487; H.R. 2767, 116th Cong. § 1 (2019) at: https://www.congress.gov/bill/116th-congress/house-bill/2764; H.R 8635, 116th Cong. § 2 (2020) at https://www.congress.gov/bill/116th-congress/house-bill/8635; S. 4823, 116th Cong. § 2 (2020) at: https://www.congress.gov/bill/116th-congress/senate-bill/4823

the Non-Delegation Doctrine. For decades, the federal courts have used the "intelligible principle" rule to determine whether Congressional delegations of authority to agencies pass constitutional muster. Under the rule, Congress may delegate its authority to an agency to engage in legislative-like regulatory action if the delegation contains "intelligible principles" or a "discernable standard" for the agency to follow in implementing the Congressional will. *Gundy v. U.S.,* 139 S.Ct. 2116, 2138-2141 (J. Gorsuch dissenting). For years, the federal courts have given only perfunctory scrutiny to the intelligible principle requirement, *see id.,* finding an intelligible principle in literally every instance of federal court review of Congressional delegation over at least the last 75 years.

It has become apparent recently that an emerging majority of sitting justices of the U.S. Supreme Court plan to take a fresh look at the Non-delegation Doctrine and intelligible principle rule. *Id.* at 2131; *see also An Empty Attack on the Nondelegation Doctrine,* American Enterprise Institute Op-Ed (Peter J. Wallison, April 22, 2021) at https://www.aei.org/op-eds/an-empty-attack-on-the-nondelegation-doctrine/. Their aim is application of the doctrine and rule with much more rigor than the increasingly perfunctory application federal courts have traditionally given the rule.

Here, in the unlikely event the Court were to find some trace of a Congressional delegation of authority for the California Waiver Reinstatement Rule, the obvious faintness of that trace would strongly suggest that the delegation fails the intelligible principle rule if the rule is applied with any rigor. *Amici* respectfully urge this Court, as the leading U.S. appellate court on administrative law, to rigorously scrutinize any delegation detected for an intelligible principle to guide EPA's execution of the delegation. In that event, *Amici* are confident an intelligible principle would be found lacking.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions of the State and Private petitioners and set aside EPA's *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision* published in the Federal Register at 87 Fed. Reg. 14,332 (Mar. 14, 2022).

Respectfully Submitted,

/ s/ James K. Vines

JAMES K. VINES

Fontaine Law Group
1128 Crater Hill Drive
Nashville, Tennessee 37215
(615) 218-8029
jvines1128@gmail.com

NOVEMBER 3, 2022

(Original brief filed October 31, 2022)

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD COUNT LIMITATIONS

I, James K. Vines, counsel for *amici curiae* 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, and Texas Royalty Council, and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Revised Brief is proportionately spaced, has a typeface of 14 points or more, and contains 5779 words.

/s/ James K. Vines
James K. Vines

NOVEMBER 3, 2022

(Original brief filed October 31, 2022)

CERTIFICATE OF SERVICE

I, James K. Vines, counsel for *amici curiae* 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, and Texas Royalty Council, and a member of the Bar of this Court, certify that, on October 31, 2022, a copy of the attached brief was filed electronically through the CM/ECF system with the Clerk of this Court. The participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ James K. Vines
JAMES K. VINES

NOVEMBER 3, 2022