ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1031 (and consolidated cases)

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

STATE OF TEXAS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,

and

ADVANCED ENERGY ECONOMY, *et al.*,
Intervenors.

On Petitions for Review of a Final Action of the United States Environmental Protection Agency

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PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS'S AMICUS BRIEF IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES[1]

A. Parties and Amici

All parties and intervenors appearing in this Court are listed in Petitioners' opening briefs. The California Business Roundtable and California Manufacturers & Technology Association filed an Amicus Brief Supporting Petitioner. (#1973004).

B. Rulings Under Review

References to the rulings under review appear in Petitioners' opening briefs.

C. Related Cases

References to related cases appear in Petitioners' opening briefs.

STATEMENT ON SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Amici Pacific Legal Foundation and National Federation of Independent Business file this separate amicus brief in compliance with

[1] In compliance with D.C. Circuit Rule 29(b), all parties have consented to the filing of this amicus brief. This brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person other than Amici or their counsel, contributed money to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

the word limits in the Court's September 22, 2022, Order (#1965622). A single joint brief is not practicable because other amici will not address PLF's and NFIB's unique perspective about the Constitution's Separation of Powers and how it protects the liberty of small businesses. *See* D.C. Circuit Rule 29(d).

CORPORATE DISCLOSURES

Under Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the undersigned counsel for Amici certify that neither PLF nor NFIB is a corporation that has issued stock and that neither has a parent company whose ownership interest is 10 percent or greater.

DATED: November 10, 2022.

Respectfully submitted,

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GLOSSARY

EPA – Environmental Protection Agency

GHG – greenhouse gases

NADA – National Automobile Dealers Association

NATSO – Trademark, formerly standing for National Association of Truck Stop Operators

NDFU – North Dakota Farmers Union

NFIB – National Federation of Independent Business

NHTSA – National Highway Transportation and Safety Administration

PLF – Pacific Legal Foundation

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SDFU – South Dakota Farmers Union

SIGMA – Society of Independent Gasoline Marketers of America

State Br. – Proof Brief for State Petitioners

IDENTITIES AND INTERESTS OF AMICI CURIAE

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt California corporation established to litigate matters affecting the public interest. PLF defends Americans' liberties when threatened by government overreach and is the most experienced public-interest legal nonprofit, both as lead counsel and amicus curiae, in cases involving the Constitution's Separation of Powers and the freedom it provides. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116 (2019); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006).

National Federation of Independent Business ("NFIB") 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, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center ("Legal Center") is a nonprofit, public

interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the Legal Center frequently files amicus briefs in cases that will impact small businesses.

This amicus brief supports but does not duplicate Petitioners' argument that the "Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards," 86 Fed. Reg. 74,434 (Dec. 20, 2021) (effective date Feb. 28, 2022) ("Tailpipe Rule") violates the major questions doctrine. *See* State Br. 14–22; Priv. P. Br. 22–34.

Amici have an interest in the case because EPA is attempting through the Tailpipe Rule to expand its power under the Clean Air Act—last amended in 1990—to phase out the internal-combustion engine and require automobile manufacturers to shift their fleets to electric vehicles. In doing so, EPA is not only seeking to reshape the American automobile market without clear congressional approval but is also causing severe economic harm to America's small businesses.

This brief brings a unique perspective to this issue by giving fuller context to the critical role clear statement rules like the major questions

doctrine play in protecting the Constitution's Separation of Powers. And why these principles are essential to protect economic liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case fits within an all-too-common fact pattern that has developed in the modern administrative state. The President cannot persuade Congress to enact his preferred policy into law, so he directs an executive branch agency to regulate under a decades-old statute and smuggle that policy in through the Code of Federal Regulations.[2]

But this "pen and phone" lawmaking is not how our Constitution works. The Constitution's Separation of Powers requires Congress to make the laws and policies governing society. And for good reason: the Constitution's lawmaking process provides checks and balances to protect against arbitrary government and ensure the government will not restrict freedom without broad consensus. *See Bond v. United States*, 564 U.S. 211, 222–23 (2011) (finding the Constitution's "checks and balances" protect individual liberty); *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was

[2] *See* State Br. at 2, 8–9; Priv. P. Br. at 35–36.

adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power."). Indeed, the Constitution's structural provisions reflect the founding generation's deep conviction that lawmaking should be hard and that "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

The major questions doctrine is a vital tool to uphold these first principles. It is a long-standing clear statement rule grounded in the Separation of Powers ensuring that the executive branch does not expand its power and create policies that Congress has not enacted into law. And the doctrine is now more vital than ever. Over the last few decades, presidents have increasingly sought to instill their preferred policies by directing executive branch agencies to expand their power under old statutes with no authority to do so.

The Tailpipe Rule is just the latest example. At the President's direction, EPA is attempting to phase out the internal combustion engine and regulate the entire automobile market. And in the process, EPA is expanding its own power under the Clean Air Act over an issue of great economic and political significance. But Congress did not give EPA the

power to reshape the entire auto industry through the Act's broad language.

The Tailpipe Rule's economic and political consequences also cannot be overstated. EPA's attempt to reshape the American automobile market without clear congressional approval will cause severe economic harm to America's small businesses. The Tailpipe Rule, if upheld, will result in these businesses paying higher energy costs and will have other downstream effects that will stifle their ability to thrive. And it will do so without these businesses' input through the legislative process guaranteed by the Constitution.

* * * * *

There is a national debate about what if any balance needs to be struck between economic policies and environmental regulation. But that debate must take place in the legislative branch. Yet EPA has taken that debate away from the American people and taken it upon itself to strike that balance it believes is right in the Tailpipe Rule. This Court should vacate the rule and make clear that if the federal government is going to revamp an entire industry and force automobile manufacturers to transition their fleets, that policy must come from Congress.

ARGUMENT

I. The Tailpipe Rule Violates the Major Questions Doctrine.

A. The major questions doctrine is a long-established clear statement rule that enforces the Constitution's Separation of Powers.

Courts have long applied clear statement rules to fulfill their judicial duty to protect the freedom provided by the Constitution's structure and protect foundational constitutional guarantees. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring). As Chief Justice Marshall explained, "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the . . . general doctrines of national law." *Talbot v. Seeman*, 5 U.S. 1, 43 (1801).

The major questions doctrine is one such clear statement rule. It is grounded in the Constitution's exclusive delegation of legislative power to Congress and protects against the other branches from claiming unheralded subdelegations of that power. Indeed, it is the flip side of the same nondelegation coin: the doctrine presumes that Congress did not seek to transgress the Constitution's nondelegation limits through vague, open-ended statutory text. In this way, the major questions doctrine, like the nondelegation doctrine, "ensures that the national government's power to make the laws that govern us remains where Article I of the

Constitution says it belongs—with the people's elected representatives." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).[3]

The doctrine thus is grounded in "separation of powers principles," *West Virginia*, 142 S. Ct. at 2609, and requires "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*) (internal quotation marks omitted).

The principle is not new. As Justice Gorsuch recently explained, "[s]ome version of [the major questions doctrine] can be traced to at least 1897," when the Supreme Court in *ICC v. Cincinnati* denied the agency's "vast and comprehensive" claim of authority absent a clear delegation in the statutory text. *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring) (citing *ICC v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479, 499 (1897)). In *ICC*, the Court found that claims of delegations of legislative power to "any administrative body is not to be presumed or

[3] *See also id.* at 669–70 (Gorsuch, J., concurring) ("Whichever the doctrine, the point is the same[:] Both serve to prevent 'government by bureaucracy supplanting government by the people.'").

implied from any doubtful and uncertain language." *Id.* And this principle has persisted, in some form or another, in state and federal courts throughout the last 125 years.[4]

B. The major questions doctrine is a vital check on modern executive branch lawmaking.

While the doctrine's principle is not new, it has become more prominent over the last few decades as the primary constitutional check against executive lawmaking. This is because the federal government today is characterized by "presidential administration" as famously described by then-professor Elena Kagan.[5] Because of the relative ease of regulating compared to legislating, the President—and not Congress—now leads "in setting the direction and influencing the outcome of" administrative policy.[6] Rather than go through proper constitutional procedures and persuade lawmakers to enact laws, contemporary

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[4] Louis Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L.J. (forthcoming 2023) (explaining the major questions doctrine's history in state and federal courts to prevent agencies from expanding their regulatory reach without a clear statement from respective legislative branches).

[5] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2248 (2001) (describing how "presidential control of administration … expanded dramatically during the Clinton years").

[6] *Id.* at 2246.

presidents bypass the Constitution's checks and balances and chart a unilateral path by directing agencies to adopt expansive interpretations of long-extant statutes.[7]

To curb the worst excesses of executive lawmaking inherent to "presidential administration," the Supreme Court has embraced the major questions doctrine. For example, the case that ushered in the resurgence of the doctrine, *FDA v. Brown & Williamson Tobacco Corp.*, involved a challenge to one of the first examples of "presidential administration": a sweeping tobacco regulation ordered by President Clinton in the late 1990s.[8] And the trend has continued. Indeed, the Supreme Court has applied the major questions doctrine mainly when presidents compelled agencies to exercise novel and capacious authority. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. 661 (reviewing agency's vaccine mandate ordered by the president); *Alabama Ass'n of Realtors*,

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[7] To be sure, the President has the authority, indeed the duty, to make sure the laws are "faithfully executed." *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010). But that does not mean the executive branch may transgress the Constitution's Separation of Powers through the laws' execution.

[8] *Compare* 529 U.S. 120, 133 (2000) (reviewing tobacco regulation under major questions framework) *with* Kagan, 114 Harv. L. Rev. at 2282–83 (using same tobacco regulation as exemplar of presidential administration).

141 S. Ct. 2485 (reviewing agency's eviction moratorium requested by the president).

This executive overreach is nowhere more pronounced than in environmental regulation. For years, presidents have directed EPA and similar agencies to expand their power and "update" laws to fit modern environmental problems—most prominently through the Clean Air Act. But the Court has been unwilling "to stand on the dock and wave goodbye as EPA embarks on [] multiyear voyage[s] of discovery" under the Act. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (*UARG*).

Most recently, the Court applied the major questions doctrine in *West Virginia*. After failing to persuade Congress to enact a bill addressing climate change, President Obama directed EPA to use the Clean Air Act to regulate powerplants and require them to "shift" from using traditional forms of energy, such as coal and natural gas, to "clean energy" such as wind and solar. *West Virginia*, 142 S. Ct. at 2602–03.

The Court held EPA did not have this power. In doing so, the Court explained there are "extraordinary cases" where "both separation of powers principles and a practical understanding of legislative intent" should make courts hesitant to "read into ambiguous statutory text the

delegation claimed to be lurking there." *Id.* at 2609 (citing *UARG*, 573 U.S. at 324). "To convince" the Court "otherwise, something more than a merely plausible textual basis for the agency action is necessary." *Id.* Instead, under the major questions doctrine, an agency "must point to clear congressional authorization for the power it claims." *Id.* EPA flunked the test.

C. The Tailpipe Rule raises a major question that EPA has no authority to answer.

As the State Petitioners explain, this case "is a rerun of *West Virginia*." State Br. at 1. Indeed, the Tailpipe Rule is the latest example of "presidential administration," seeking to alter an entire sector of the economy under the Clean Air Act with no clear authority from Congress. In this way, it is almost on all fours with *West Virginia*.

Rather than persuade Congress to enact legislation to regulate automobile emissions and mandate electric vehicles, President Biden issued an executive order. In doing so, he announced his administration's "goal that 50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles, including battery electric, plug-in hybrid

electric, or fuel cell electric vehicles."[9] To put this policy into practice, he directed EPA to consider suspending, revising, or rescinding the automobile emissions standards issued by his predecessor administration.[10]

EPA was happy to oblige and promulgated the Tailpipe Rule, which, by some estimates, is the most expensive regulation in the nation's history. Priv. P. Br. at 64–68 (discussing costs). But it is not just the price tag that makes the rule a major question; the rule is also an unprecedented agency action that would significantly expand EPA's authority.[11] This is the first time EPA has issued a rule setting emissions standards without the National Highway Transportation and Safety Administration (NHTSA). Why? Because NHTSA operates under a statutory restraint on its discretion to factor electric vehicles into its decision-making. 49 U.S.C. § 32902(h)(l). By "decoupling" itself from

[9] 86 Fed. Reg. 43,583, 43,583 (Aug. 5, 2021).

[10] 86 Fed. Reg. 7037, 7037–38 (Jan. 20, 2021).

[11] The major questions doctrine not only applies for claims of authority specific to an issue addressed in a single case, but also to future uses an agency can use with the power it is claiming. *See The Past and Future of the Major Questions Doctrine, supra* note 4, at 33 (citing Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. at 3 (forthcoming 2023)).

NHTSA, the EPA is, for the first time, broadening its purported authority to transform the automobile market through the forced adoption of electric vehicles. Priv. P. Br. at 35. Of course, other factors abound. Directing the automobile market is not within the EPA's expertise and mandating the transition to electric vehicles is a policy that Congress has repeatedly considered but declined to enact into law. Priv. P. Br. at 32–33.

At bottom, the Tailpipe Rule's attempt to set emissions standards to require manufacturers to shift to electric vehicles—and thus transform the automobile market—is a major question that Congress has not enacted into law. And like *West Virginia*, its attempt violates the major questions doctrine.

The alternative is that Congress violated the nondelegation doctrine by delegating EPA open-ended legislative authority through a vague provision in the Clean Air Act. But Congress cannot delegate EPA the power in broad, open-ended language to legislate—which is what it is doing by altering the automobile market by mandating manufacturers transition to electric vehicles. Yet under the EPA's reading of the statute, Congress did just that. Indeed, under the agency's reading, "the law

would afford it almost unlimited discretion—and certainly, impose no 'specific restrictions' that 'meaningfully constrai[n]' the agency." *Nat'l Fed'n of Indep. Bus.*, 142 U.S. at 669 (Gorsuch, J., concurring) (citing *Touby v. United States*, 500 U.S. 160, 166–67 (1991)).

In short, if Congress delegated EPA the authority to legislate under the Clean Air Act and set emissions standards at a level forcing automobile manufacturers to shift to electric vehicles—despite that being near if not downright impossible—there is simply no limiting, much less intelligible, principle in the statutory scheme.

II. The Tailpipe Rule Will Harm Small Businesses and Consumers by Increasing Costs.

There is a debate about the balance Congress should strike between economic considerations and climate change—the EPA's primary rationale for the Tailpipe Rule. Yet Congress has not directly dealt with that balance through legislation. And until it does, neither the President nor EPA can alter the law to instill the executive branch's preferred policy preferences. The major questions doctrine's protection of freedom from administrative lawmaking is thus vital to individuals and small businesses across the country who depend on the automobile market. As this case shows, snatching the debate away from Congress—the body the

Constitution tasks with the legislative power—can have significant adverse effects on Main Street and consumers.

Many people exercise their economic liberty by creating and running small businesses. And small business owners are rightly concerned about government regulations and rising energy costs. Energy costs already represent one of the largest expenses for small businesses, with the EPA's Energy Star program estimating that small businesses spend around $60 billion on energy per year.[12] But energy costs have been rising and continue to soar. The U.S. Bureau of Labor Statistics' Consumer Price Index paints a direr picture. For year-end October 2021, energy prices rose 30% over the preceding twelve months, its largest 12-month increase since 2005.[13] Electricity rates rose 6.5% during that same preceding 12-month period.[14] For the 12-month period ending in September 2022, the Consumer Price Index reported that energy costs rose 19.8% while

[12] Energy Star, *Small Businesses: An Overview of Energy Use and Energy Efficiency Opportunities*, bit.ly/3pYjKGq (last visited Nov. 9, 2022).
[13] U.S. Bureau of Labor Statistics, *Consumer prices increase 6.2 percent for the year ended October 2021* (Nov. 19, 2021), https://bit.ly/3DDmFLA.
[14] *Id.*

electricity costs increased 15.5%.[15] In two years, energy prices have risen by almost 50% and electricity rates by 22%.

The government's regulatory burden on energy prices is thus an important issue for the millions of small businesses across America. Every four years, the NFIB Research Center surveys America's small businesses to identify those obstacles hindering their success. In 2020, small businesses ranked "Unreasonable Government Regulations" as the sixth-biggest problem facing their business, with almost one in five respondents labeling it "critical."[16] "Electricity Costs" and the "Cost of Natural Gas, Propane, Gasoline, Diesel, Fuel Oil" also ranked as the 16th and 19th most important problems for small businesses.[17]

Small businesses labeled "Environmental Regulations" as their 38th biggest problem.[18] Compared to 2016, the "Cost of Natural Gas, Propane, Gasoline, Diesel, Fuel Oil" jumped 15 positions, representing the largest

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[15] U.S Bureau of Labor Statistics, Consumer Price Index – September 2022 (Oct. 13, 2022), https://www.bls.gov/news.release/pdf/cpi.pdf.

[16] NFIB Research Ctr., *Small Business Problems & Priorities* 9 (2020), https://bit.ly/3NwwO0T.

[17] *Id.* at 10.

[18] *Id.*

delta in the 2020 survey.[19] For many small business owners, energy costs ranked as a more important concern than poor sales, cash flow, cybercrime, interest rates, unemployment compensation, and family sick leave. Regulations that increase energy costs, such as the Tailpipe Rule, will thus hurt the bottom line and exacerbate the above concerns for these businesses.

What's more, the Secretary avoided the Regulatory Flexibility Act's (RFA) required analyses. He did so by certifying that the Tailpipe Rule "will not have a significant economic impact on a substantial number of small entities under the RFA" because it does "not impose any requirements on small entities" and "existing regulations exempt from the GHG standards any manufacturer, domestic or foreign," meeting the Small Business Administration's small business definition.[20] The Secretary's certification that more stringent greenhouse gas emissions standards on light-duty vehicles will not have a significant economic effect on most small businesses is dubious and highly misleading at best and at worst patently false. While the Tailpipe Rule may impose no *direct*

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[19] *Id.* at 13.

[20] 86 Fed. Reg. at 74,520; *see* Regulatory Flexibility Act, Pub. L. No. 96-354, § 3(a), 94 Stat. 1164, 1168 (1980), *codified at* 5 U.S.C. § 605(b).

requirements on small entities, the certification ignores the economic reality that the *indirect* costs will be steep. The EPA itself projects that the rule will have total upfront costs of between $180 billion and $300 billion.[21] For Model Year 2026, the rule estimates the car cost per vehicle will increase up to $1,194 with an average of $596 per car.[22]

These costs will flow downstream to the small businesses and consumers that work with and rely on the vehicle manufacturers and sellers directly regulated by the rule. Businesses also confront higher production costs by passing these costs on to other supply chain members and consumers.[23] Federal Reserve surveys of chief financial officers in Q4 2021 and Q3 2022 confirm the point. In a Q4 2021 survey, 90% of businesses faced higher-than-normal cost increases, and 80 percent of firms planned to pass these higher costs on to consumers through price

[21] 86 Fed. Reg. at 74,443.

[22] 86 Fed. Reg. at 74,482–83.

[23] *See, e.g.*, Dan Eberhart, *Rising Energy Poses Big Inflationary Threat To U.S. Economy*, Forbes (Sept. 21, 2021), bit.ly/3sahXAw; Josh Mitchell, *Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy*, Wall St. J. (Oct. 10, 2021), on.wsj.com/3ytuhNE.

increases.[24] For Q3 2022, the data was almost identical—nearly 80 percent of firms were passing higher costs to consumers.[25] Not to mention, the primary energy cost for 38 percent of small businesses is operating vehicles.[26] These operating vehicles are many of the same which the final rule regulates. Thus, the Tailpipe rule—a rule that increases production costs for vehicle manufacturers and sellers—will indirectly raise prices for the small businesses and consumers who buy these vehicles.

Based on the enormous consequences the rule would have on independent businesses and consumers, multiple interested parties submitted comments and proposed alternatives in response to the EPA's draft rule. Yet the agency did not adequately consider their concerns. NATSO and SIGMA, representing travel centers, truck stops, and fuel marketers, urged the EPA not to "establish unbalanced regulatory

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[24] News Release, Federal Reserve Bank of Richmond, *CFOs Report Rising Costs That Could Last Through 2022* (Dec. 2, 2021), https://bit.ly/3FQHCoG.

[25] Federal Reserve Bank of Richmond, *The CFO Survey: Data & Results – Q3 2022* (Sept. 28, 2022), https://bit.ly/3DYKS03.

[26] NFIB Research Found., *NFIB National Small Business Poll* (2006), bit.ly/3GtHoBc.

incentives that skew the market towards a particular technology," such as repealing policies that "removed barriers to natural gas certification and incentivized expanded natural gas vehicle ('NGV') production."[27] In the final rule, EPA plowed forward, "remov[ing] . . . extended multiplier incentives for natural gas vehicles (NGVs)" because they are "not a near-zero emissions technology."[28] Similar to the concerns noted above, NATSO and SIGMA warned that the new standards would "increase costs and stifle innovation" while forcing "American businesses and individuals [to] subsidize [EV] costs through higher electricity bills."[29]

The North Dakota Farmers Union, representing "50,000 farm and ranch families, members, and their energy and agriculture supply cooperatives," and the South Dakota Farmers Union, representing "nearly 19,000 family farmer, rancher, and rural resident members across the state," each submitted comment letters expressing concern

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[27] NATSO & SIGMA, Comment Letter on Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards 1–2 (Sept. 27, 2021) (hereinafter "SIGMA Comment Letter"), https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0570.

[28] 86 Fed. Reg. at 74,442.

[29] SIGMA Comment Letter, *supra* note 27, at 4.

with the EPA's proposed GHG standards.[30] Each asked the EPA to consider high-octane fuels like a mid-ethanol level blend, which would "increase fuel octane without expensive refinery upgrades."[31] EPA's final rule disregards this proposed alternative and its advantages to independent farmers and ranchers compared to the rule's standards.

One final example—the National Automobile Dealers Association (NADA), which "represents over 16,000 franchised automobile and truck dealerships" employing "1,100,000 people nationwide," submitted a comment letter.[32] Most franchised dealerships NADA represents are "small businesses as defined by the Small Business Administration."[33]

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[30] North Dakota Farmers Union, Comment Letter on Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards 1 (Sept. 27, 2021) (hereinafter "NDFU Comment Letter"), https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0293; South Dakota Farmers Union, Comment Letter on Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards 1 (Sept. 27, 2021) (hereinafter "SDFU Comment Letter"), https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0250.

[31] NDFU Comment Letter, *supra* note 30, at 2–3; SDFU Comment Letter, *supra* note 30, at 2–3.

[32] National Automobile Dealers Association, Comment Letter on Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards 1 (Sept. 27, 2021) (hereinafter "NADA Comment Letter"), https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0208-0290.

[33] *Id.*

NADA expressed justified concerns that the rule's pricing analysis was flawed because it offset upfront costs through long-term fuel-savings costs and sidestepped lending practices. Lenders consider the purchase and finance amounts of vehicles, meaning higher upfront costs will prevent consumers from obtaining electric vehicles and seeing the long-term fuel savings that the rule relies on.[34] EPA conceded that raising upfront costs could be a "potential barrier" to new-vehicle purchasing and that lenders may not approve loans for "more expensive vehicle[s] with lower cost[s] of ownership." But instead of directly confronting the issue, EPA resorted to a red herring—it relied on government subsidies and historical data showing high debt-to-income ratios have not prevented access to financing.[35]

Small business owners agree that "reducing energy use in a cost-effective manner" is important.[36] It even ranks as the fifth-most agreed-upon issue of importance.[37] But the EPA's final rule imposing stringent

[34] *Id.* at 4–6.

[35] 86 Fed. Reg. at 74,519.

[36] *See* NFIB Research Ctr., *Small Business Problems & Priorities*, *supra* note 16, at 1.

[37] *Id.* at 14.

GHG standards on light-duty vehicle manufacturers and sellers is not cost-effective—it will skyrocket energy costs for small businesses. And the businesses directly regulated by the rule will raise prices or reduce their workforce to offset these costs. Those at the bottom of the supply chain—small businesses and consumers—will bear the brunt of these costs.

The bottom line is that the concerns of the small business community are major economic issues that Congress should resolve—the body the Constitution charges with making law. The President and EPA lack authority under the Clean Air Act to unilaterally decide that these concerns take a back seat to environmental regulation. These issues must be debated and go through the checks and balances the Constitution provides for the laws to garner broad consensus.

CONCLUSION

The Supreme Court's recent case law applying the major questions doctrine clarifies that the era of broad agency deference to executive lawmaking is over. Agencies like the EPA must have a clear statement from Congress to implement major policies. This Court should follow suit

and exercise its duty to provide a check on the EPA's executive lawmaking and vacate the Tailpipe Rule.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5), and the Court's September 22, 2022, Order (#1965622), because this brief has 4,470 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32. This statement is based on the word count function of Microsoft Office Word.

I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a 14-point Century Schoolbook, a proportionally spaced font.

s/ Frank D. Garrison
FRANK D. GARRISON

CERTIFICATE OF SERVICE

I certify that on November 10, 2022, I electronically filed this amicus brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants are registered CM/ECF users and that I will serve this amicus brief through the appellate CM/ECF system.

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