ORAL ARGUMENT NOT SCHEDULED YET

No. 22-1031 (and consolidated cases)

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

STATE OF TEXAS, ET AL.,

Petitioners,

v.

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

Respondents,

ADVANCED ENERGY ECONOMY, ET AL.,

Intervenors.

On Petition for Review from the United States Environmental Protection Agency (No. EP A-HQ-OAR-2021-0208)

BRIEF OF TRUCK RENTING AND LEASING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under D.C. Circuit Rule 28(a)(1), *amicus curiae* submits this certificate as to parties, rulings, and related cases.

A. Parties and *Amici*

All parties and amici appearing before this court are listed in the opening briefs of Private and State Petitioners.

B. Rulings Under Review

Under review is the final action of the Administrator of the U.S. Environmental Protection Agency, entitled "Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards," published in the Federal Register at 86 Fed. Reg. 74,434 (Dec. 30, 2021) (effective date Feb. 28, 2022).

C. Related Cases

All related cases that *amicus curiae* is aware of are listed in the opening briefs of Private and State Petitioners.

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Truck Renting and Leasing Association ("TRALA") makes these disclosures: TRALA is a nonprofit corporation representing the interest of nearly 500 companies representing the vast majority of truck renting and leasing operations in the United States. TRALA has no parent corporation, and no publicly held company owns 10% or more of its stock.

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE

Under FRAP 29(a)(2), all parties have consented to the filing of this brief. Under D.C. Circuit Rule 29(d), counsel for *amicus curiae* TRALA certifies that it is unaware of any other non-government amicus brief addressing the subject of this brief from the perspective of truck renting and leasing operations. As the Nation's preeminent association on truck renting and leasing, *amicus curiae* is particularly well-suited to provide the court important context on these subjects that will help it resolve this case.

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GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
ICC	Interstate Commerce Commission
NHTSA	National Highway Traffic Safety Administration
OIRA	Office of Information and Regulatory Affairs
OMB	U.S. Office of Management and Budget
RIA	Regulatory Impact Analysis
RTC	Response to Comments
TRALA	Truck Renting and Leasing Association

INTRODUCTION

TRALA agrees with petitioners that EPA's *de facto* electric vehicle requirement ("Electric Vehicle Requirement") is unlawful because the Rule violates the major questions doctrine and is arbitrary and capricious. TRALA writes separately, from the perspective of truck renting and leasing operations, to explain why the court should vacate the Electric Vehicle Requirement.

First, EPA exceeded its statutory authority. Under the major questions doctrine, when a rule implicates issues of vast economic or political significance, the agency must point to a clear statement from Congress authorizing the action. Whether the Electric Vehicle Requirement violates the major questions doctrine reeks of déjà vu. In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Supreme Court considered whether the CAA authorized EPA to mandate power plants reduce coal-based electricity generation in favor of other electricity generation that uses a cleaner source, such as natural gas, solar, and wind. *Id.* at 2599-2600. The Court said no. The best type of energy source for power plants was a major question, and EPA could point to no clear authorization. *Id.* at 2616.

Swap out "coal" for "gas" and "power plants" for "motor vehicles," and you have this case. If anything, this case is even more straightforward than *West Virginia*: The Electric Vehicle Requirement costs about *double* the action in *West Virginia*, and Section 202 has language far vaguer than the troublesome language in that case. By promulgating the Electric Vehicle Requirement, EPA violated the major questions doctrine and thus exceeded its statutory authority.

The Electric Vehicle Requirement is also arbitrary and capricious. As Private and State Petitioners explain, EPA inadequately explained a host of issues. Two issues, however, warrant attention from TRALA. First, EPA repeatedly championed that it considered "social equity." But nowhere did EPA meaningfully address how the affordability and functionality of electric vehicles affect the ability of ordinary Americans to earn a living in a State and city that best suits their needs and values. That is a relevant issue implicating "social equity" that a rational agency would've reasonably addressed. Second, EPA previously found that there are important differences between rental and privately owned vehicles, but this time EPA failed to reasonably address that finding. Either failure dooms the Electric Vehicle Requirement.

In short, this case has far-reaching implications for the separation of powers and the rule of law. EPA says it has unquestionable and unilateral discretion to transform mainstay industries that affect millions of Americans. EPA also says it has unquestionable and unilateral discretion to inflict billions of dollars in costs on private individuals and businesses and choose a side in an ongoing political debate. And EPA says it can do all this because of vague statutory language enacted long ago. If EPA were correct, it would supplant the rule of law with the rule of administrative say-so. The court should reject EPA's view and hold the Electric Vehicle Requirement unlawful and void.

STATUTES AND REGULATIONS

All applicable statutes and regulations are in the brief of Private Petitioners and their Addendum.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

TRALA is a voluntary nonprofit trade association founded in 1978 to serve as the unified and focused voice for the truck renting and leasing industry. TRALA's mission is to foster a positive legal and regulatory climate within which companies engaged in leasing and renting vehicles and trailers, as well as related businesses, can compete without discrimination in the North American marketplace. TRALA's nearly 500 members engage mainly in commercial truck renting and leasing, vehicle finance leasing, and consumer truck rental. Its membership also includes companies with motor-carrier operations, and more than one hundred supplier member companies that offer equipment, products, and services to TRALA renting and leasing company members. TRALA members purchase approximately 30% of all over-the-road Class 2-8 trucks and

[1] No party's counsel authored this brief in whole or in part, and no person other than *amicus curiae* and their counsel contributed money intended to fund the preparation or submission of this brief. The parties have consented to its filing.

tractors in the U.S. annually and today about one in every four trucks on the road, regardless of size, is a rented or leased vehicle.

TRALA has an interest in the petitions for review because EPA's rule affects the affordability and functionality of trucks and trailers and thus affects TRALA's members.

ARGUMENT

The CAA directs courts to "reverse" any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. §7607(d)(9)(A), (C). Courts apply the same standards as the APA. *See Clean Wisconsin v. EPA*, 964 F.3d 1145, 1160 (D.C. Cir. 2020) (apply same standards as APA); 5 U.S.C. §706(2)(A), (C) (materially identical language to the CAA). EPA's Electric Vehicle Requirement[2] (I) exceeds its statutory authority and (II) is arbitrary and capricious.

[2] Private Petitioners explain how EPA's Final Rule is a *de facto* electric vehicle requirement. *See* Private Pet. Br. 8-16. The court should treat it as such, regardless of EPA's statements that it expects electric vehicles to be only a portion of new vehicles. EPA's standards are so strict that the only way to meet them is to make electric vehicles. In this way, the Rule is no different than the one in *West Virginia*. *See* 142 S. Ct. at 2604 ("The calculations resulted in numerical emissions ceilings so strict

I. EPA lacks statutory authority to promulgate the Electric Vehicle Requirement.

EPA exceeded its authority. "Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line." *West Virginia*, 142 S. Ct. at 2609 (cleaned up). When the issue involves "vast economic and political significance," the agency must "point to clear congressional authorization for the power it claims." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *West Virginia*, 142 S. Ct. at 2609 (cleaned up).

Requiring electrification is a question of vast economic and political importance and thus is a major question. And EPA cannot point to clear authorization. So EPA violated the major questions doctrine.

A. Electrification is a major question.

As Private Petitioners explain, "whether and how internal-combustion vehicles should be phased out in favor of electric vehicles is

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that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above."). The Supreme Court did not ignore the reality of the rule in *West Virginia*. Neither should this court here. TRALA thus calls the rule at issue "the Electric Vehicle Requirement" because that's what it does.

hugely consequential: it involves millions of jobs, the restructuring of entire industries, and the Nation's energy independence and relationship with hostile powers." Private Pet. Br. 4. The Rule is a major question for three reasons: (1) the enormous financial cost of electrification, (2) the vast political significance of electrification, and (3) EPA's lack of expertise in areas that the Rule affects.

1. Economic Significance. A question is major "when [an agency] seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities." *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up). Both are here.

It's undisputable that the auto and truck industries are a significant portion of the U.S. economy. For this reason, it's unsurprising that the Electric Vehicle Requirement compels private persons and entities to spend billions of dollars. EPA estimates that its Rule will cost $6 billion in 2023, $19 billion by 2020, and $300 billion by 2050. 86 Fed. Reg. at 74,509. "This would be the most expensive agency rules, if not *the* most expensive, in the Nation's history." Private Pet. Br. 23. And it's about double the economic cost of the Clean Power Plan—the very action

that the Supreme Court found triggered the major questions doctrine in *West Virginia*. *See* 142 S. Ct. at 2610; EPA, *RIA for the Clean Power Plan Final Rule* 3-22 (projecting $3 billion in costs in 2025 and $8.4 billion in costs in 2030).

The "number of people affected" underscores the Rule's vast economic significance. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissental); *see also ICC v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479 (1897) (finding a major question in part because "[m]illions of passengers" used railroads every year); *King v. Burwell*, 576 U.S. 473 (2015) (finding a major question in part because the agency action "affect[ed] the price of health insurance for millions of people"). As EPA admits, millions of Americans depend on motor vehicles for all aspects of their life. *See* 86 Fed. Reg. at 74,518 ("Access to transportation improves the ability of people, including those with low income, to pursue jobs, education, health care, and necessities of daily life such as food and housing."). And each of these Americans is affected by the Rule. A rule that will affect so many Americans is major.

Comparing the Supreme Court's treatment of an agency's power over the railroad industry in the late 1800s to motor vehicles today

confirms that the Electric Vehicle Requirement is a major question. There is no material difference between the railroad industry in the late 1800s and motor vehicles today. As the Supreme Court explained:

> The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country, and subjected to varying and diverse conditions.

ICC, 167 U.S. at 494. So too here. The court should require the same "clear and direct" language the Supreme Court required of the ICC for railroads. *Id.* at 505.

Finally, the Executive Branch's own practice for determining whether a rule is significant cements the Electric Vehicle Requirement's major-question status. The Executive Branch distinguished between "significant" regulations and less important ones. *See* Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735, §3(f) (Sept. 30, 1993). OMB and OIRA use a multipart test, and they "deem[] a regulation significant if it has an 'annual impact on the economy of $100 million or more.'" Louis Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 Ohio State L.J. (forthcoming) (manuscript at 34-

35), https://bit.ly/3FYlAAy.[3] OMB and OIRA found the Electric Vehicle Requirement to be "an economically significant regulatory action." 86 Fed. Reg. at 74,520. If the Rule is economically significant to the Executive Branch, it's major for the judiciary.[4]

2. Political Significance. Whether and how quickly to electrify the auto and truck industries is a matter of great political significance. Failed congressional efforts, state legislation, and presidential intervention all show as much.

Start with Congress. There are several failed legislative proposals banning the internal combustion engine in favor of electric vehicles. *See, e.g.*, Zero-Emission Vehicles Act of 2019, H.R. 2764, 116th Cong. (2019) (proposing "amend[ing] the Clean Air Act to create a national zero-

[3] Congress has found OMB's and OIRA's definition meritorious. Congress adopted it as the definition of "major rule" to identify which rules are subject to congressional vetoes under the Congressional Review Act. *See* 5 U.S.C. §804(2). And the Electric Vehicle Requirement is a "major rule." *See* 86 Fed. Reg. at 74,521 ("This action is a 'major rule' as defined by 5 U.S.C. §804(2).").

[4] To be sure, the court need not adopt the Executive's test. But at the very least, the court should view EPA's contrary contentions with skepticism. After all, it's entirely "fair" to "hold[] the Executive Branch to its own method of identifying what constitutes a major question." Capozzi, *supra*, at 34-35.

emission vehicle standard" and requiring all vehicle manufacturers to sell only zero-emission vehicles by 2040); Zero-Emission Vehicles Act of 2020, S.4823, 116th Cong. (2020) (similar); Zero-Emission Vehicles Act of 2018, S.3664. 115th Cong. (2018) (similar); 116 Cong. Rec. 19238-40 (1970) (proposing banning internal combustion engines by 1978).[5] This history strongly suggests that the question here is major. *See West Virginia*, 142 S. Ct. at 2614 (finding significant that "Congress considered and rejected [similar policies] multiple times" (cleaned up)). That's because EPA is trying to "work around the legislative process to resolve for itself a question of great political significance." *Id.* at 2621 (Gorsuch, J., concurring).

The States' efforts further reinforce the Rule's vast political significance. States have debated electrification, and there is no unified view. On the one hand, California and Washington are moving to accelerate electrification. *See* Cal. Code Regs. Tit. 13, §1962.4; Wash. S.B.

[5] *Cf.* Green New Deal, H. Res. 109 §(2)(H)(i), 116th Cong. (2019) (stating a 10-year goal of "overhauling transportation systems in the United States to remove pollution and greenhouse gas emissions from the transportation sector as much as is technologically feasible, including through investment in … zero-emission vehicle infrastructure and manufacturing").

5974 §415(1) (2022) ("A target is established for the state that all publicly owned and privately owned passenger and light duty vehicles of model year 2030 or later that are sold, purchased, or registered in Washington state be electric vehicles."). On the other, West Virginia opposes such efforts. *See, e.g.*, 2022 W. Va. Legis. Ch. 235.

Last, President Biden weighed in on electrification. This "unusual presidential action … underscores the enormous significance of the [electrification] issue." *U.S. Telecom Ass'n*, 855 F.3d at 423-24 (Kavanaugh, J., dissental). In 2021, President Biden declared 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." Exec. Order No. 14037, *Strengthening American Leadership in Clean Cars and Trucks*, 86 Fed. Reg. 43,583, 43,583 (Aug. 5, 2021). President Biden also ordered EPA to reconsider the prior Administration's emission standards. *See* Exec. Order No. 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7,037, 7,037-38 (Jan. 20, 2021). The President's intervention is strong evidence of a major political issue because EPA is an "independent" agency. *U.S.*

Telecom Ass'n, 855 F.3d at 423-24 (Kavanaugh, J., dissental). And it's even stronger evidence where, as here, the independent agency adopted stricter regulations after the President's intermeddling.

In sum, members of Congress, the President, administrative agencies, and the States all believe the Electric Vehicle Requirement tries to answer a major political question. This court should conclude so too.

3. EPA's Lack of Expertise. If any doubts remained, EPA's lack of expertise in energy infrastructure and innovation of motor vehicles (among other things) extinguishes them. "When 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). As Private Petitioners note, EPA "implicitly conceded" that it lacks expertise in the "millions of jobs [at risk], the restructuring of entire industries, the Nation's energy independence and relationship with hostile powers, and supply-chain and electric-grid vulnerabilities." Private Pet. Br. 31-32.

But there's more reason to doubt EPA has the required expertise. For example, EPA's authority to regulate tailpipe emissions overlaps

with NHTSA. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) ("EPA has been charged with protecting the public's health and welfare, a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." (cleaned up)); *Delta Const. Co. v. EPA*, 783 F.3d 1291, 1294 (D.C. Cir. 2015) ("EPA's mandate therefore intersects with NHTSA's responsibility to promulgate average fuel efficiency standards for automobile manufacturers."). There would be no reason for another agency to regulate tailpipe emissions if EPA had all the required expertise. And the court should be particularly skeptical that the Electric Vehicle Requirement results from the necessary expertise because EPA broke from past practice when it forwent joint rulemaking with NHTSA. *See* 86 Fed. Reg. at 74,436 ("EPA set previous light-duty vehicle GHG emission standards in joint rulemakings where NHTSA also established CAFE standards. EPA concluded that it was not necessary for this rulemaking to be jointly issued with [NHTSA].").

In short, whether and to what extent electrification should occur in the auto and truck industries is a major question. It's a question of vast

economic significance—it implicates billions of dollars, involves industries that are a significant part of the national economy, and affects millions of Americans. It's a question of vast political significance—Congress has rejected similar policies, States have debated electrification and disagreed on the best course, and the President has intervened on the issue. It's a question Congress wouldn't have intended EPA to answer—EPA lacks much of the required expertise. Taken together, it's "highly unlikely that Congress would leave to agency discretion the decision of how m[any] [internal combustion engines] there should be over the coming decades. The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself." *West Virginia*, 142 S. Ct. at 2613 (cleaned up). The Electric Vehicle Requirement is thus a major question.

B. EPA did not point to clear congressional authorization.

Because the Electric Vehicle Requirement is a major question, EPA must point to a clear statement from Congress. A clear statement requires "something more than a merely plausible textual basis for the agency action." *West Virginia*, 142 S. Ct. at 2609. So EPA must point to something more than "modest words, vague terms, or subtle devices." *Id.*

(cleaned up). As Private Petitioners explain, "EPA is not merely stretching vague statutory language. It is defying clear statutory text." Private Pet. Br. 39.

EPA claims that 42 U.S.C. §7521 (also called Section 202) gives it the authority to require electrification. *See* 86 Fed. Reg. at 74,451-52. That provision provides in relevant part:

> (1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare….
>
> (2) Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

42 U.S.C. §7521(a)(1), (2).

Section 202 has nothing but vague terms, and that's not good enough. EPA's own contentions reflect that Section 202's language is unquestionably vague. *See, e.g.*, 86 Fed. Reg. at 74,499 ("considerable discretion"); *id.* ("significant discretion"); *id.* at 74,452 ("considerable discretion"); *id.* ("great discretion"); *id.* at 74,451 ("sweeping grants of

authority"). And the Supreme Court agrees that Section 202 has vague language. *See Massachusetts*, 549 U.S. at 532 ("broad language of §202(a)(1)"); *id.* (calling Section 202(a)'s terms "capacious"); *id.* at 560 (Scalia, J., dissenting) (calling Section 202 a "malleable statute giving broad discretion").

The "age and focus of the statute the agency invokes in relation to the problem the agency seeks to address" also counsel against finding a clear statement. *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring). "When Congress enacted these provisions [in 1970], the study of climate change was in its infancy." *Massachusetts*, 549 U.S. at 507. And so was electric-vehicle research. Congress did not intend for Section 202 to be used to transform motor vehicles from the internal combustion engine to electric batteries. *See U.S. Telecom Ass'n*, 855 F.3d at 424 (Kavanaugh, J., dissental) (concluding that an Act "amended in 1996" was a "long-extant statute").

Moreover, EPA's past practice underscores the lack of clear authorization. "'[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it,

is equally significant in determining whether such power was actually conferred.'" *West Virginia*, 142 S. Ct. at 2610. EPA has never used Section 202 to mandate electrification; rather, it always "treated electric vehicles as a compliance option or flexibility." Private Pet. Br. 34-35 (internal quotation marks omitted). As in *West Virginia*, before the rule at issue, "EPA had always set emissions limits under Section [202] based on the application of measures that would reduce pollution by causing the regulated [motor] to operate more cleanly." 142 S. Ct. at 2610. EPA's switcheroo strongly suggests there's no clear statement.

Last, courts have already concluded that Section 202 is unclear. After all, they've applied *Chevron* Step 2 for certain statutory-interpretation questions. *See, e.g.*, *Massachusetts*, 549 U.S. at 534 (concluding that EPA's endangerment finding is analyzed under *Chevron* Step 2). Although clear-statement rules require more clarity than *Chevron* Step 1, a court's prior conclusion that a statute is ambiguous under *Chevron* dooms the claim of authority. *See U.S. Telecom Ass'n*, 855 F.3d at 425 (Kavanaugh, J., dissental) ("Rather, under the major rules doctrine, *Brand X*'s finding of statutory ambiguity is a *bar* to the FCC's authority to classify Internet service as a telecommunications service.").

None of EPA's likely counterarguments are persuasive. First, it is no answer to say that unlike *West Virginia*, Section 202 is not an ancillary provision but the principal authorization for EPA to regulate motor vehicles. The Supreme Court noted the "ancillary" and "gap filling" nature of the provision as merely one consideration supporting the lack of clear statement. *West Virginia*, 142 S. Ct. at 2610. It was just a clue. That's why the Court has not hesitated to conclude that a non-ancillary provision violates the major questions doctrine. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Nor should this court hesitate: The language here, as in *West Virginia*, is fatally vague.

Second, it's also no answer to say that unlike in *West Virginia*, Section 202 is written like a statute that left the Executive with the responsibility to fill up the details. Even if true, it's irrelevant. That's because important policy choices must still come from clear delegations. As Chief Justice Marshall explained, "important subjects ... must be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825); *see also West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting the

statement approvingly). The major questions doctrine's clear-statement rule helps "protect against unintentional, oblique, or otherwise unlikely intrusions on … interests," such as "self-government, equality, fair notice, federalism, and the separation of powers." *Id.* at 2620 (Gorsuch, J., concurring) (cleaned up). And there is little as important as the vitality of the auto and truck industries and the Americans that depend on them, so the court must make sure Congress clearly authorized EPA to compel electrification.

In all events, if Section 202's authorization is neither a major question nor an unclear authorization, then the court's interpretation of Section 202 may raise grave nondelegation questions under the Constitution's original public meaning or under the Supreme Court's watered-down nondelegation doctrine. *Compare Gundy v. United States*, 139 S. Ct. 2116, 2121-30 (2019) (plurality op.), *with id.* at 2131-48 (Gorsuch, J., dissenting). Under prevailing nondelegation precedent, Congress must have provided an "intelligible principle to guide the delegee's use of discretion." *Id.* at 2123. For power affecting a significant portion of the national economy, Congress must provide "substantial guidance." *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 475 (2001)

("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred…. [Congress] must provide substantial guidance on setting air standards that affect the entire national economy."). EPA admits that it has free rein on what factors to consider and how to balance the factors. *See* 86 Fed. Reg. at 74,452 ("Although standards under CAA section 202(a)(1) are technology-based, they are not based exclusively on technological capability. EPA has the discretion to consider and weigh various [extra-statutory] factors along with technological feasibility …."); *id.* ("Section 202(a) of the CAA does not specify the degree of weight to apply to each factor, and EPA accordingly has discretion in choosing an appropriate balance among factors."); *id.* at 74,436 (acknowledging that the other factors come from prior rulemaking not the statute: "EPA also may consider other factors and in previous light-duty vehicle GHG standards rulemakings has considered the impacts of potential GHG standards on the auto industry, cost impacts for consumers, oil conservation, energy security and other

energy impacts, as well as other relevant considerations such as safety.").[6]

A conceivable limiting principle Congress provided is technological feasibility. *See* 42 U.S.C. §7521(a)(2). But that principle mainly goes to *when* EPA can make an emission standard effective; it says little on *what* the emission standards should be within the range of options that are technological feasible. *See id.* ("Any regulation … *shall take effect* after such period as the Administrator finds necessary to permit the development and application of the requisite technology …." (emphasis added)). Congress might not have provided substantial guidance on the "what" question. And even if "technological feasibility [could] meaningfully constrain the emission standards," the guidance isn't substantial enough if EPA can "simply decide to require production of fewer internal-combustion vehicles." Private Pet. Br. 58-59. So if Section

[6] EPA's own extratextual factors are no substitute for guidance provided by Congress. *See Whitman*, 531 U.S. at 473 ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.").

202(a) does not violate the major questions doctrine, there are serious nondelegation questions.

Third, *Massachusetts* is not to the contrary. It's true that the Court said that "[t]he broad language of §202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall [the CAA's] obsolescence." 549 U.S. at 532. But the Court's statement referred only to what *air pollutants* unambiguously comes within Section 202 under *Chevron* Step 1—not what *standards and technology* EPA could mandate under any clear-statement test. Any broader reading wrenches *Massachusetts*'s words from context. And "it's never a fair reading of precedent to take … sentences out of context." *United States v. Vargas-Soto*, 35 F.4th 979, 991 (5th Cir. 2022); *see also Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) ("This Court has long stressed that the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." (cleaned up)).

* * *

The Electric Vehicle Requirement significantly affects the Nation's economy and touches on a major political issue. And all EPA can point to for authorization is vague language. "Far less consequential agency

rules" with far more textual support "have run afoul of the major questions doctrine." *NFIB v. OSHA*, 142 S. Ct. 661, 688 (2022) (Gorsuch, J., concurring).

II. The Electric Vehicle Requirement is arbitrary and capricious.

The "arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *see also DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) ("It requires agencies to engage in 'reasoned decisionmaking.'"). The court must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus*, 141 S. Ct. at 1158. The court's "review is not toothless." *Data Mktg. P'ship, LP v. DOL*, 45 F.4th 846, 856 (5th Cir. 2022) (cleaned up). "In fact, it's well-established that after *Regents*, it has serious bite." *Id.* (cleaned up).

EPA failed to "reasonably consider[] the relevant issues and reasonably explain[]" the decision. *Prometheus*, 141 S. Ct. at 1158; *see also Michigan v. EPA*, 576 U.S. 743, 750 (2015) ("[A]gency action is lawful only if it rests on a consideration of the relevant factors" and does not

"entirely fail to consider an important aspect[s] of the problem." (cleaned up)). EPA inadequately considered and explained many issues as Private and State Petitioners explain. *See* Private Pet. Br. 62-69 (arguing that EPA's calculation of the emission of electric vehicles and EPA's cost-benefit analysis are arbitrary); State Pet. Br. 24-27 (arguing that reliance on Interagency Working Group's social cost of greenhouse gases is arbitrary). Those errors render the Electric Vehicle Requirement "arbitrary and capricious, but [they were] not the only defect[s]." *Regents*, 140 S. Ct. at 1896.

TRALA highlights two other inadequately explained considerations: (A) how the affordability and functionality of electric vehicles affect Americans' ability to earn a living in a State and city that best meets their values and needs; and (B) the renting and leasing industry.

A. "Social Equity." EPA repeatedly championed that it considered "social equity." 86 Fed. Reg. at 74,436, 74,445-46. But nowhere did EPA meaningfully consider the effect of electrification on Americans' ability to earn a living in a State and city that best meets their values and needs. The services TRALA's members provide critically help Americans take

advantage of the benefits of federalism and the fundamental right to move. *See City of Chicago v. Morales*, 527 U.S. 41, 54-55 (1999) (discussing the right to travel and "the right to move to whatsoever place one's own inclination may direct" (cleaned up)); *but see* 86 Fed. Reg. at 74,520 ("This action does not have federalism implications."). "Federalism is … the only constitutional protection of liberty that is neutral.… [I]f another state allows the liberty you value, you can move there, and the choice of what freedom you value is yours alone, not dependent on those who made the Constitution." Robert H. Bork, The Tempting of America 53 (1991). Americans have long benefited from this feature. As Judge Bork once explained:

> The geographical areas over which state governments rule are far smaller than that the federal government controls. People who found state regulation oppressive could vote with their feet, and in massive numbers they did.… [For example,] [b]usinesses that found state taxation or regulation too burdensome moved elsewhere. Individuals moved to avoid heavy state income and estate taxes. Of course, this freedom to escape came at a price, but a smaller one than moving away from national regulation, and many found the price worth paying.

Id. at 52-53.

Forced electrification will hinder Americans' ability to benefit from federalism. Indeed, forced electrification will exponentially increase the

cost and time for do-it-yourself rental-truck customers. Rental trucks are the chief source of the Nation's mobility for people to move where the jobs are, to improved housing, to secure an education, or to remedy a health problem. Electrification will increase the price of trucks and in turn the price to rent them. The trucks' performance will also be sacrificed. For example, electric vehicles take hours to charge, while gas-powered vehicles take minutes to refill. And the extra weight from batteries reduces payload on the vehicle. The extra weight leads to reduced cargo capacity and thus requires more trips to move the same amount of cargo. Plus, the battery weight adds stress to the tires and chassis of the vehicle, requiring more maintenance and repair costs for the rental company.

Consider the ramifications for a cross country move. Electrification will force an individual consumer or a moving company to make more stops and for a longer time. And because electrification reduces cargo space, that cross country trip, with long stops every few hours to recharge, may need to be made multiple times or with additional vehicles. Forced electrification will thus likely make moving more costly and burdensome.

If moving becomes more burdensome, as the Electric Vehicle Requirement likely would cause, then ordinary Americans will be forced to choose between their liberty and their livelihood. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (returning a "profound moral question" to the States, thereby allowing "the people and their elected representative" to take different views on the issue). And they will have to do so because an administrative agency—not Congress through bicameralism and presentment, not their own state or local governments, not even the President—said so. Worse, ordinary Americans will have to make this sacrifice without the agency that is inflicting the consequences reasonably addressing the issue.

EPA's failure to consider how electrification will hinder the ability to move is particularly remarkable given recent experiences. During the pandemic, the United States saw an increase in Americans moving. In particular, countless moved from one city or State to another—sometimes across the country—for financial reasons or to live in an area that better fit their values and needs. *See, e.g.*, Annual 2021 United Van Lines

National Movers Study https://bit.ly/3fRKIyn.[7] According to the Biden Administration, the pandemic is still ongoing. *See* HHS, *Renewal of Determination That a Public Health Emergency Exists* (Oct. 13, 2022), https://bit.ly/3WGLEGd (public health emergency from COVID-19 pandemic exists through at least January 2023). So the affordability of moving was (and still is) a relevant issue that EPA should have adequately addressed.[8]

B. Renting and Leasing Industry. EPA failed to meaningfully consider the renting and leasing industry. Rental trucks are intended to be a substitute for private truck ownership, allowing individuals and businesses access to a fleet of trucks that is larger than what they could access on an individual basis. The rental truck sharing concept is one of conscientious management of the Earth's resources. It makes occasional

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[7] *See also, e.g.*, C. Bowman, *Coronavirus Moving Study: People Left Big Cities, Temporary Moves Spiked in First 6 Months of COVID-19 Pandemic*, MyMove (Oct. 31, 2022), https://bit.ly/3fRWXeo ("People are moving out of big cities during the coronavirus, data shows").

[8] Forced electrification also makes areas with less electric-vehicle infrastructure (*e.g.*, suburban and rural areas) less desirable to live in, even if the area suits the person's values and needs better. And without EPA's meddling, recent experience indicates that suburban and rural areas are what more Americans are preferring.

use of a moving truck affordable, while providing incentives to minimize driving and rely on alternative travel options such as public transportation as much as possible. Fewer vehicles on the road means less traffic congestion, less pollution, less fuel burned, and cleaner air to breathe. Rental trucks provide a net positive effect on the environment as it allows for consumers to share the use of a rental truck. The rental industry thus is a relevant consideration that EPA should have reasonably addressed.

Indeed, in 2020, when adopting the standards the Electric Vehicle Requirement is trying to rescind, EPA considered rental vehicles and found that consumers generally use them quite differently than privately owned vehicles. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,720 (Apr. 30, 2020) ("The distribution of trip lengths for rental cars … is generally to the right of trips taken privately-owned vehicles. This is likely because individuals are travelling longer distances when they are on vacation or otherwise out-of-town. It seems likely that individuals renting cars for longer trips will not choose electric vehicles for such temporary travel."). Two years later, EPA disregarded its prior

finding—the hallmark of an arbitrary action. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

In fact, EPA readily admitted that it was focusing only on "private vehicle ownership and use." 86 Fed. Reg. at 74,518. In EPA's own words:

> We acknowledge that vehicles, especially household ownership of vehicles, are only a portion of the larger issues concerning access to transportation and mobility services, which also take into consideration public transportation and land use design. Though these issues are inextricably linked, the following discussion focuses on effects related to private vehicle ownership and use.

Id. But if the issues are "inextricably linked," as EPA says, then the "natural response" is for the agency to reasonably address both issues. *Regents*, 140 S. Ct. at 1916. Otherwise, it's hard to know whether the agency missed something critical because the understanding of one issue (rental and leasing industry) necessarily affects the other (private vehicle ownership).

For the same reasons as Private and State Petitioners, the Electric Vehicle Requirement is arbitrary and capricious. Although petitioners raise many fatal defects, there are even more. EPA also ignored the effect

of electrification on ordinary Americans' ability to make a living in an area that best suits their needs and values and the rental and leasing industry.

CONCLUSION

For these reasons, the court should grant the petitions for review and hold the Electric Vehicle Requirement unlawful and void.

Date: November 10, 2022

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d), because this brief contains 6,188 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

Under Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on November 10, 2022, I electronically filed the foregoing *Brief of Truck Renting and Leasing Association as Amicus Curiae in Support of Petitioners* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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