

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 14, 2023

Via CM/ECF

July 27, 2023

Mark Langer
Clerk of Court
U.S. Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Texas v. EPA, No. 22-1031: Response to Private Petitioners' Rule 28(j) Letter (July 11, 2023; ECF No. 2007296)

Dear Mr. Langer:

Public Interest Respondent-Intervenors agree with EPA (ECF No. 2008389) that—assuming petitioners' statutory-authority arguments were preserved, EPA Br. 34, 38-39—*Biden v. Nebraska*, 600 U.S. ____ (June 30, 2023), does not support them.

Petitioners invoke *Biden* to contend that the Rule's "price tag," which they assert is "well above the threshold for a major rule," triggers extraordinary scrutiny. *Biden*, however, does not suggest that a rule's cost suffices to trigger the major questions doctrine, and relied upon an array of additional factors, Slip Op. 20-23. Were a high "price tag" sufficient, routine agency actions affecting Medicare or Social Security, commonplace military procurement decisions, or run-of-the-mill actions of the Federal Reserve, would trigger heightened skepticism the Court has pointedly reserved only for "extraordinary" cases, *see Biden*, Slip Op. 22 (describing the Secretary's "extraordinary" program); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (doctrine applies in "extraordinary cases") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000)); *West Virginia*, 142 S. Ct. at 2609 ("certain extraordinary cases").

The major questions doctrine requires far more—including a dramatic expansion in the breadth of the agency's authority, evaluated in light of relevant administrative history. *See Biden*, Slip Op. 18 (rule "expand[ed]" agency's authority "dramatically"); *West Virginia*, 142 S. Ct. at 2613 (agency "had never regulated in that manner"); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (statute was "a wafer-thin reed on which to rest such sweeping power").

In contrast, the Rule is another application of one of the Clean Air Act's most central and often-employed provisions. In Section 202 Congress authorized nationwide regulation of a huge industry to safeguard public health and welfare; by its nature, such vehicle emissions regulation involves significant costs and benefits. State-Pub. Interest Br. 24-25. The Rule's price tag reflects the immensity of the national motor vehicle market, and the agency's multi-decade analysis period. *Id.* at 24 & n.9. On a per-vehicle basis, it aligns with prior Section 202 standards, *see* EPA Br. 60, hardly signaling an expansion—dramatic or otherwise—in the agency's authority.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

I certify that, consistent with Fed. R. App. P. 28(j), the body of the foregoing letter contains 349 words.

CERTIFICATE OF SERVICE

I certify that on July 27, 2023, I served the foregoing letter via the Court's CM/ECF system, which will serve electronic copies upon all counsel of record.

/s/

Sean H. Donahue