

ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1140 (and consolidated cases)

AMERICAN LUNG ASSOCIATION, *et al.*,
Petitioners,

v.

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

On Petition for Review of Final Action of the
United States Environmental Protection Agency
84 Fed. Reg. 32,520 (July 8, 2019)

**BRIEF OF ADMINISTRATIVE LAW PROFESSORS AS AMICI CURIAE
IN SUPPORT OF STATE AND MUNICIPAL, PUBLIC HEALTH AND
ENVIRONMENTAL, POWER COMPANY, AND CLEAN ENERGY
TRADE ASSOCIATION PETITIONERS**

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**CERTIFICATE AS TO PARTIES, RULINGS, RELATED
CASES, AND SEPARATE BRIEFING**

All parties, intervenors, and other *amici* appearing in this case are listed in the brief for petitioner American Lung Association.

References to the rulings under review and related cases also appear in the brief for petitioner American Lung Association.

Pursuant to D.C. Circuit Rule 29(d), amici Professors of Administrative Law state that they are aware of other planned amicus briefs in support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners in this case. Separate briefing is necessary because none of the other amicus briefs will address the implications, in this case and on administrative law more generally, of a ruling invoking the Major Questions Doctrine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
IDENTITY & INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
BACKGROUND	4
I. The Clean Air Act.....	4
II. The Clean Power Plan rulemaking and repeal	5
A. The Clean Power Plan rulemaking.....	6
B. The Clean Power Plan repeal	7
III. The Major Questions Doctrine	8
ARGUMENT	9
I. “Major questions” are exceedingly rare, arising only in those “extraordinary cases” in which agencies claim a “transformative expansion” of regulatory authority.	9
A. The Major Questions Doctrine arose in response to unprecedented and unusual claims of agency authority.....	10
B. Critical aspects of the Doctrine remain unsettled.	14
II. This case is unsuitable for applying the Major Questions Doctrine	15
A. The Clean Power Plan raises no “major questions” under any tenable interpretation of the Doctrine.	15
B. Applying the Major Questions Doctrine would not affect the outcome of this case.	19
III. In repealing the Clean Power Plan, EPA advances an unwise and unsupported interpretation of the Major Questions Doctrine.	20
A. EPA misconstrues the Doctrine.....	21

B. The Supreme Court’s approach to numerous major rulemakings forecloses EPA’s interpretation of the Doctrine.23

C. Expanding the Major Questions Doctrine would burden agencies and reviewing courts with an additional threshold inquiry in administrative rulemaking.24

D. Even under EPA’s untenable view of the Major Questions Doctrine, the Doctrine could not apply to the Clean Power Plan.28

CONCLUSION30

APPENDIX A: BIOGRAPHIES OF AMICI32

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>American Elec. Power Co. v. Connecticut</i> , 564 U.S. 410 (1984).....	6, 15-16, 17, 19, 20
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	10, 18
<i>EPA v. EME Homer City Generation L.P.</i> , 572 U.S. 489 (2014).....	24
<i>FERC v. Electric Power Supply Ass’n</i> , 136 S. Ct. 760 (2016), as revised (Jan. 28, 2016).....	24
<i>Food & Drug Admin. v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	8, 9, 10, 11, 14, 15, 16, 17, 19, 21, 22-23,
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006).....	9, 12, 21, 29
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting).....	9 n.3
<i>King v. Burwell</i> , 135 S. Ct. 2480 (2015).....	9, 13, 15, 16, 19,
<i>Lignite Energy Council v. EPA</i> , 198 F.3d 930 (D.C. Cir. 1999).....	19
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	5, 6, 9, 26, 29
<i>Mayo Found. for Med. Educ. & Research v. United States</i> , 562 U.S. 44 (2011).....	24
<i>MCI Telecomm. v. AT&T</i> , 512 U.S. 218 (1994).....	11
<i>Nat. Res. Def. Council v. EPA</i> , 706 F.3d 428 (D.C. Cir. 2013).....	24

<i>Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005).....	20, 24, 27
<i>New York v. FERC</i> , 535 U.S. 1 (2002).....	23
<i>Transmission Access Policy Study Grp. v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000).....	23
<i>U.S. Telecom Ass'n v. FCC</i> , 855 F.3d 381 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).....	8, 21-22
<i>Util. Air Regulatory Grp. v. EPA</i> , 573 U.S. 302 (2014).....	9, 10, 12, 15, 16, 17, 21, 22
<i>Verizon v. FCC</i> , 740 F.3d 623 (D.C. Cir. 2014).....	24
<i>Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.</i> , 435 U.S. 519 (1978).....	24-25

Statutes

Clean Air Act, 42 U.S.C. §§ 7401-7426.....	4
42 U.S.C. § 7411.....	7, 18, 19

Legislative and Regulatory Authorities

116 Cong. Rec. 32,918-19 (1970) (statement of Sen. Cooper)	4
116 Cong. Rec. 32,901-02 (1970) (statement of Sen. Muskie)	4
Affordable Clean Energy Rule, 84 Fed. Reg. 32,520 (July 8, 2019)	7
84 Fed. Reg. at 32,523	8
84 Fed. Reg. at 32,529	8, 16-17, 20, 21-22, 25
84 Fed. Reg. at 32,532-34.....	17
84 Fed. Reg. at 32,535	7
84 Fed. Reg. at 32,555	7

Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015).....	6
80 Fed. Reg. at 64,665	6
80 Fed. Reg. at 64,768	7
80 Fed. Reg. at 64,707	17
80 Fed. Reg. at 64,715-16.....	17
80 Fed. Reg. at 64,727	17-18
80 Fed. Reg. at 64,728-29.....	7, 18
Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925, 52,928 (Sept. 8, 2003).....	9
Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496 (Dec. 15, 2009)	16
Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2,820 (Jan. 16, 2020).....	14
Environmental Protection Agency, <i>Regulatory Impact Analysis for the Clean Power Plan Final Rule</i> ES-22 (2015).....	28
Environmental Protection Agency, <i>Regulatory Impact Analysis for the Final Transport Rule 33</i> (2011).....	28
Environmental Protection Agency, <i>EPA Releases 2018 Power Plant Emissions Demonstrating Continued Progress</i> (Feb. 20, 2019).....	5
<i>Sources of Greenhouse Gas Emissions</i> , EPA.GOV, https://www.epa.gov/ghgemissions/sources-greenhouse-gas- emissions (last visited Apr. 19, 2020)	5
<u>Other Authorities</u>	
Todd S. Aagaard, <i>Energy-Environment Policy Alignments</i> , 90 Wash. L. Rev. 1517, 1568 (2015).....	29-30
Jack M. Beermann, <i>Congressional Administration</i> , 43 San Diego L. Rev. 61 (2006).....	27

Blake Emerson, <i>Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation</i> , 102 Minn. L. Rev. 2019, 2051 (2018)	25-26
Jody Freeman, <i>The Uncomfortable Convergence of Energy and Environmental Law</i> , Harv. Envtl. L. Rev. 339, 411-16 (2017).....	29
Denise A. Grab and Jack Lienke, Institute for Policy Integrity, <i>The Falling Cost of Clean Power Plan Compliance 1</i> (2017)	26, 28-29
Jonas J. Monast, <i>Major Questions about the Major Questions Doctrine</i> , 68 Admin. L. Rev. 445, 448 (2016)	15
Cass R. Sunstein, <i>Chevron Step Zero</i> , 92 Va. L. Rev. 187, 243 (2006)	14

IDENTITY & INTEREST OF AMICI CURIAE

Amici curiae—Todd Aagaard, Blake Emerson, Daniel Farber, Kathryn Kovacs, Richard Lazarus, Ronald Levin, and Nina Mendelson—are distinguished professors of administrative law.¹ Amici have a strong interest in ensuring that the Court’s decision in this case furthers the sound development of the field of administrative law. They therefore file this amicus brief to explain that this case represents a poor vehicle for invoking the Major Questions Doctrine, and that instead the Court can and should rely on settled principles of administrative law to resolve this case.

RULE 29(a)(4) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Administrative Law Professors represent that their counsel drafted this brief. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

¹ Further biographical information is provided in the attached appendix.

SUMMARY OF ARGUMENT

This case concerns EPA's effort to undo regulations on climate-warming pollutants from power plants, known as the Clean Power Plan. We do not opine on the wisdom of EPA's decision. Rather, we write to advise the Court that EPA's reliance on the Major Questions Doctrine to repeal the Clean Power Plan is misplaced.

The Major Questions Doctrine originated in response to an unprecedented claim of regulatory authority: an FDA rule that for the first time ever would have subjected the tobacco industry to FDA regulation and seemingly would have required the agency to ban tobacco altogether, contradicting the clear intent of Congress. In rejecting the agency's action, the Supreme Court observed that such an extraordinary claim of regulatory authority demanded extra judicial skepticism. Following that decision, the Supreme Court has applied the Major Questions Doctrine to reject a handful of similarly unusual and expansive assertions of agency authority.

The FDA's unprecedented effort to regulate tobacco bears no resemblance to the Clean Power Plan rulemaking at issue in this case. In issuing the Clean Power Plan, EPA did not propose to bring an entire industry under its regulatory authority for the first time. Rather, the Clean Power Plan applied only to large power plants—entities already subject to the agency's well-established Clean Air Act

authority to combat air pollution. Moreover, EPA's obligation to regulate climate-warming pollutants is settled law. The Clean Power Plan fulfilled that obligation by interpreting the phrase "best system of emission reduction" to include the most cost-effective measures available.

In rejecting its own interpretation of that phrase, EPA now proposes to transform the Major Questions Doctrine into a presumption against agency authority to issue "major rules." That view has no basis in any of the Supreme Court's major questions precedents and would burden courts with a new suite of legal and factual inquiries in every significant rulemaking. Among other considerations, courts would have to make subjective assessments of economic forecasts and public opposition to evaluate whether a rule qualifies as "major."

The Court need not consider the Major Questions Doctrine to resolve this case. The well-established *Chevron* framework is fully adequate to assess EPA's interpretation of "best system of emission reduction"; *Chevron* itself examined a Clean Air Act interpretation that facilitated an economically efficient regulatory scheme with widespread application, just as the Clean Power Plan's interpretation does. Evaluating EPA's interpretation of ambiguous statutory language does not require this Court to wade into an unusual and unsettled doctrine.

In short, the Court has much to lose and nothing to gain from accepting EPA's invitation to consider the Major Questions Doctrine in this case. The Court should therefore decline to do so.

BACKGROUND

I. The Clean Air Act

The 1970 amendments to the Clean Air Act represented a revolution in the federal government's approach to combatting air pollution. *See* 42 U.S.C. §§ 7401-7426. Describing the Act shortly before its passage, Republican Senator John Cooper explained that the "philosophy of the bill abandons the old assumption of requiring the use of only whatever technology is already proven and at hand" and instead "set[s] out what is to be achieved." 116 Cong. Rec. 32,919 (1970).

To that end, Congress did not prescribe specific approaches to enumerated air pollution problems. *See* 116 Cong. Rec. 32,901-32,902 (1970) (statement of Sen. Muskie) ("[T]he first responsibility of Congress is not the making of technological or economic judgments . . ."). Rather, the Act entrusted EPA with the authority to craft innovative, flexible solutions to such problems. Indeed, as Senator Cooper observed, the Act granted "large powers" over air pollution control to EPA. 116 Cong. Rec. 32,918.

Exercising that authority, EPA has worked with industry, states, and the public to develop the world's most effective regime of air pollution regulation. Under EPA's Clean Air Act rules, "the combined emissions of . . . six key pollutants . . . dropped by 73 percent" between 1970 and 2017. Environmental Protection Agency, *EPA Releases 2018 Power Plant Emissions Demonstrating Continued Progress* (Feb. 20, 2019).²

II. The Clean Power Plan rulemaking and repeal

Of the air pollution problems addressed by EPA over the past fifty years, none presents a greater challenge than climate change. Increasing atmospheric concentrations of carbon dioxide are the principal driver of anthropogenic climate change, and fossil-fuel combustion in power plants is the second largest source of U.S. carbon dioxide emissions. *Sources of Greenhouse Gas Emissions*, EPA.GOV, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Apr. 19, 2020).

The Supreme Court confirmed EPA's authority to regulate emissions of carbon dioxide and other greenhouse gases under the Clean Air Act in a series of decisions that began with *Massachusetts v. EPA*, 549 U.S. 497 (2007). That case involved EPA's denial of a petition for rulemaking to regulate greenhouse gases

² Available at <https://www.epa.gov/newsreleases/epa-releases-2018-power-plant-emissions-demonstrating-continued-progress>.

emitted by automobiles. Overturning that denial, the Court held that greenhouse gases qualified as “air pollutant[s]” under the plain language of the Clean Air Act. *Id.* at 528-29.

While *Massachusetts* concerned automobiles, a subsequent Supreme Court decision confirmed EPA’s authority to regulate greenhouse gas emissions from power plants. In *American Elec. Power Co., Inc. v. Connecticut*, the Court held that Section 111 of the Clean Air Act “provides a means to seek limits on emissions of carbon dioxide from domestic powerplants” and thus displaced any federal common-law cause of action to abate such emissions. 564 U.S. 410, 425 (2011) (“*AEP*”). In so holding, the Court observed that Section 111 “entrusts” EPA to balance “the environmental benefit potentially achievable” from greenhouse gas regulations with “our Nation’s energy needs and the possibility of economic disruption.” *Id.* at 427.

A. The Clean Power Plan rulemaking

Acting pursuant to its authority under Section 111 of the Clean Air Act to regulate greenhouse-gas emissions from power plants, EPA issued the Clean Power Plan in 2015. *See* Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015). Rather than rely on any particular technology, the Plan created a flexible program that encouraged states “to adopt the most effective set of solutions for their circumstances.” *Id.* at 64,665.

Among the solutions available to states under the Clean Power Plan was an option to shift generation away from high-emissions sources toward low-emissions sources. *Id.* at 64,728-29. By allowing for generation shifting, EPA’s system sought to reinforce “actions already being taken by states and utilities to upgrade aging electricity infrastructure with 21st century technologies.” *Id.* at 64,678. That generation-shifting mechanism was a critical part of the Clean Power Plan’s “best system of emission reduction” under section 111 of the Clean Air Act, 42 U.S.C. § 7411.

B. The Clean Power Plan repeal

In July, 2019, EPA repealed the Clean Power Plan and replaced it with a regulation called the “Affordable Clean Energy Rule.” 84 Fed. Reg. 32,520 (July 8, 2019). At the heart of the replacement rule is a reinterpretation of the phrase “best system of emission reduction.” EPA’s new interpretation of that phrase would reverse the Clean Power Plan’s generation-shifting approach and instead rely on a single set of technologies to establish emissions standards. *See id.* at 32,535 (discussing “heat rate improvement” measures). Indeed, the replacement rule specifically *forbids* states from applying several flexible approaches to emissions reductions that were available under the Clean Power Plan. *Id.* at 32,555.

III. The Major Questions Doctrine

EPA's sole justification for repealing the Clean Power Plan is that it lacked legal authority to issue the Plan in the first place. 84 Fed. Reg. at 32,523. EPA maintains that, while it has authority to regulate greenhouse gas emissions from power plants, the Clean Air Act does not allow the interpretation of "best system of emission reduction" put forth in the Clean Power Plan. Among the rationales EPA offers in support of that position is an argument that the Clean Power Plan runs afoul of the "major question doctrine." *Id.* at 32,529.

As described in more detail below, the Major Questions Doctrine is derived from a series of Supreme Court cases involving extraordinary and transformative claims of regulatory authority. In reviewing such claims, the Court has adjusted its treatment of agency rulemakings. *See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

EPA's reliance on the Major Questions Doctrine as a basis to repeal the Clean Power Plan is unusual in two respects. First, rather than applying any of the Supreme Court's decisions, EPA's analysis primarily relies on a dissent from a denial of rehearing *en banc* in this Circuit. 84 Fed. Reg. at 32,529 (citing *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)). And second, until the Clean Power Plan repeal, no federal agency

had ever engaged in its own Major Questions Doctrine analysis to justify a rulemaking, let alone to disavow a prior rulemaking.

EPA has attempted to tie its own hands with the Doctrine once before, however: in rejecting the petition for rulemaking that became the subject of *Massachusetts*, the agency relied extensively on one of the Supreme Court's Major Questions Doctrine decisions. See *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,925, 52,928 (Sept. 8, 2003) (citing *Brown & Williamson*, 529 U.S. 120). After four years of litigation, the Supreme Court squarely rejected EPA's position in *Massachusetts*, 549 U.S. at 531.

ARGUMENT

I. “Major questions” are exceedingly rare, arising only in those “extraordinary cases” in which agencies claim a “transformative expansion” of regulatory authority.

The Major Questions Doctrine is derived from a series of cases in which the Supreme Court has adjusted its approach to agency rulemakings to account for exceptional circumstances. See *King v. Burwell*, 135 S. Ct. 2480 (2015); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) (*UARG*); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Brown & Williamson*, 529 U.S. 120. While each of those cases concerns an unusual and transformative expansion of agency authority, they do not provide a clear or consistent framework for applying the Doctrine. Indeed, the

Court has never defined the contours of the Major Questions Doctrine in a majority opinion.³

A. The Major Questions Doctrine arose in response to unprecedented and unusual claims of agency authority.

Chevron deference is “premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” *Brown & Williamson*, 529 U.S. at 159 (discussing *Chevron*, *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). The Supreme Court’s Major Questions Doctrine cases stand on the principle that in certain “extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Id.* In particular, where an agency interprets ambiguous statutory language to claim an “enormous and transformative expansion” of regulatory authority, the Court applies extra scrutiny to the regulatory and statutory context of the agency’s interpretation. *UARG*, 573 U.S. at 324.

Brown & Williamson, 529 U.S. 120, provides the paradigmatic example of such an extraordinary claim of authority. That case concerned an FDA regulation

³ A recent dissent discussed the Doctrine without applying it. *See Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (describing the Doctrine as “nominally a canon of statutory construction” that the Court applies “in service of the constitutional rule that Congress may not divest itself of its legislative power”).

that would have placed tobacco within the regulatory ambit of the agency for the first time in its 80-year history. FDA's interpretation of the Food, Drug, and Cosmetic Act to apply to tobacco products was particularly unusual because it seemingly would have required the agency to ban tobacco altogether. *Id.* at 137. That outcome conflicted with numerous laws that, taken together, "preclude[d] any role for the FDA" in regulating tobacco. *Id.* at 144. Thus, the FDA's "expansive construction" of the statute "ignore[d] the plain implication of Congress' subsequent tobacco-specific legislation." *Id.* at 160. Stating that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency," *id.* at 133, the Court rejected the FDA's expansive claim of authority, *id.* at 161.

This discussion relied substantially on an earlier case involving long-distance telephone service. *See id.* at 160-61 (discussing *MCI Telecomm. v. AT&T*, 512 U.S. 218 (1994)). In *MCI Telecommunications*, the Court overturned an FCC interpretation of the Communications Act of 1934 because it amounted to "a fundamental revision of the statute." 512 U.S. at 231-32. The FCC's "de-tariffing" policy would have left AT&T as the lone service carrier subject to the Act's rate-filing requirements—effectively waiving "the crucial provision of the statute for 40% of a major sector" of the telecommunications industry. *Id.* Though

the Court did not approach this policy as a “major question,” the reasoning nonetheless presaged the Court’s later major questions decisions in that it rejected an extraordinary claim of agency authority—in *MCI Telecommunications*, the authority to decide *not* to regulate where Congress had required the opposite.

Similarly, the next Supreme Court decision to implicate the Doctrine following *Brown & Williamson* involved a “broad and unusual” claim of authority by the Attorney General. *Gonzales*, 546 U.S. at 267. The *Gonzales* Court considered a policy that would have allowed the Attorney General to prohibit the use of prescription drugs in physician-assisted suicides under the Controlled Substances Act. *Id.* at 248-49. After observing that “[t]he structure of the CSA . . . conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise,” the Court concluded that “the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design.” *Id.* at 266-67.

In *UARG*, decided eight years after *Gonzales*, the Court rejected an “enormous and transformative expansion in EPA’s regulatory authority.” 573 U.S. at 324. In that case, EPA proposed regulating greenhouse gases under Titles I and V of the Clean Air Act. The Court upheld one piece of EPA’s proposed regulations, which applied additional greenhouse gas permitting requirements to power plants already regulated under the Act. *Id.* at 332-33. But another piece of

EPA’s rule created a “newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches.” *Id.* at 328. This “extravagant statutory power” presented “a singular situation” because the agency itself had admitted it could not fully exercise the claimed authority without rendering the Clean Air Act “unrecognizable to the Congress that designed it.” *Id.* at 324 (quotation marks omitted).

In *King* the Court likewise faced a “singular situation”—an instance of “inartful drafting” at the heart of the Affordable Care Act. 135 S. Ct. at 2492. The issue in that case was whether the statute’s tax credits would be available only in states that created their own online healthcare exchanges. *Id.* at 2489-91. As in *Gonzales v. Oregon*, the Court found the agency’s lack of expertise in the area it sought to regulate to weigh strongly against the claim of authority. *See id.* at 2489 (commenting that the IRS “has no expertise in crafting health insurance policy of this sort”). Thus, although the Court ultimately affirmed the agency’s rule, it did so without deferring to the IRS’s interpretation of the Act. *Id.*

In sum, the Supreme Court applies the Major Questions Doctrine only to those exceptional cases in which an agency claims unprecedented authority to extend its regulatory reach into new territory, creating enormous economic and political consequences. Such claims might include regulatory authority over a new industry, as in *Brown & Williamson*; permitting authority over tens of thousands of

previously unregulated entities, as in *UARG*; or authority over an unfamiliar area of policy, as with the IRS regulation at issue in *King*.

B. Critical aspects of the Doctrine remain unsettled.

Precisely because of the extraordinary nature of major questions, the Supreme Court's explication of the Doctrine has been limited. In particular, two important questions regarding the Doctrine remain unresolved: *when* the Doctrine applies and *how* courts must apply it.

First, the Supreme Court has not provided a clear test for determining what constitutes a major question. Although the Court's major questions cases involve transformative and unprecedented claims of regulatory authority, in the context of a policy decision with great "economic and political significance," *Brown & Williamson*, 529 U.S. at 160, the Court has not explained how these factors combine to trigger the Doctrine. The "economic and political significance" factor poses particular challenges, as many agency decisions on even routine issues carry enormous economic and political consequences. *See, e.g.*, Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2,820 (Jan. 16, 2020). Indeed, none of the Supreme Court's cases attempts to distinguish major questions from ordinary questions, and scholars endeavoring to untangle the Doctrine have consistently noted the difficulty of drawing such a line. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 243 (2006) ("[T]he difference between

interstitial and major questions is extremely difficult to administer.”); *see also* Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 Admin. L. Rev. 445, 448 (2016) (“More is unclear than clear about the bounds of the Major Questions Doctrine at this stage.”).

Second, just as the Supreme Court’s cases yield no clear test to distinguish major from ordinary questions, there is no single formula for applying the Doctrine to major questions where they might be found to exist. The Court has variously applied the Doctrine as a tool of statutory interpretation within a *Chevron* step-one analysis, *see Brown & Williamson*, 529 U.S. at 132-33; as an additional factor in a *Chevron* step-two analysis, *see UARG*, 573 U.S. at 315; and as an exception that preempts application of the *Chevron* framework altogether, *see King*, 135 S. Ct. at 2488-89.

II. This case is unsuitable for applying the Major Questions Doctrine.

The interpretative questions EPA resolved in promulgating the Clean Power Plan were not “major questions,” and Congress clearly authorized EPA to answer the “questions” at issue. This case is therefore a poor vehicle for this Court to apply or advance the Major Questions Doctrine.

A. The Clean Power Plan raises no “major questions” under any tenable interpretation of the Doctrine.

“Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants” through Section 111 of the Clean Air

Act. *AEP*, 564 U.S. at 426. In fact, in light of EPA’s 2009 finding that greenhouse gases, including carbon dioxide, endanger public health and welfare, 74 Fed. Reg. 66,496 (Dec. 15, 2009), EPA *must* regulate carbon dioxide pollution from power plants, *see AEP*, 564 U.S. at 424. The remaining “question” in this case concerns EPA’s interpretation of the phrase “best system of emission reduction”—a question that is plainly non-major.

The Clean Power Plan’s interpretation of “system” cannot be a major question because it does not work any “enormous and transformative expansion in EPA’s regulatory authority.” *UARG*, 573 U.S. at 324. In each of the handful of cases in which the Supreme Court has found a “major question,” the interpretation at issue has concerned whether an agency may extend its authority into completely new territory, and that assertion of unprecedented authority impelled the Court to invoke the Doctrine. *See Brown & Williamson*, 529 U.S. at 160; *UARG*, 573 U.S. at 324; *King*, 135 S. Ct. at 2489. The Supreme Court’s jurisprudence thus offers no support for invoking the Major Questions Doctrine in the absence of an agency’s efforts to transgress the bounds of its authority.

However one appraises the wisdom of the Clean Power Plan, its interpretation of the word “system” does not expand EPA’s authority. EPA inaccurately asserts that the Clean Power Plan’s interpretation of “system” would empower the agency to “order the wholesale restructuring of any industrial sector.”

84 Fed. Reg. at 32,529. But the generation-shifting scheme imposes regulatory obligations only on fossil fuel-fired electric generating units—sources that EPA already regulates under the Clean Air Act and that EPA plans to continue regulating even under its new rule. Clean Power Plan, 80 Fed. Reg. at 64,715-16 (defining affected sources); *see AEP*, 564 U.S. at 426; Affordable Clean Energy Rule, 84 Fed. Reg. at 32,532-34. As the Supreme Court observed in upholding permitting requirements for already-regulated power plants in *UARG*, “We are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands EPA . . . can make of entities already subject to its regulation.” 573 U.S. at 332.

Moreover, the Clean Power Plan lacks an interpretative decision with vast economic or political significance, further distinguishing it from the Supreme Court’s major questions cases. *See Brown & Williamson*, 529 U.S. at 160. Interpreting “system” to allow for a generation-shifting scheme did not empower EPA to choose a “system” with greater economic or political effects than other options EPA could have chosen to fulfill its regulatory mandate.

By design, generation-shifting would achieve emission limitation with *less* economic impact than other “adequately demonstrated” systems. Clean Power Plan, 80 Fed. Reg. at 64,707. EPA recognized that some technologies implemented at individual energy-generating units (e.g., co-firing natural gas at

coal plants and implementing carbon capture and storage) could cost-effectively reduce carbon dioxide emissions. *Id.* at 64,727. But the agency determined that shifting generation to natural gas and renewable energy-generating units would be less expensive than requiring power plants to adopt these on-site technologies. *Id.* at 64,728. Given that section 111(a) expressly requires EPA to consider costs in deciding what available system is “best,” 42 U.S.C. § 7411, EPA’s implication that it instead should have chosen a less cost-effective system defies congressional intent and deflates EPA’s “major questions” argument.

This case’s factual similarity to *Chevron* itself further confirms that the questions here are not so “major” as to call for applying the Major Questions Doctrine. *Chevron* considered whether EPA had reasonably interpreted the Clean Air Act as encompassing a facility-wide (rather than device-specific) definition of an air pollution “source.” *Chevron*, 467 U.S. at 840. Like the Clean Power Plan, this broad interpretation granted facilities flexibility in meeting their regulatory obligations. *Id.* at 854. Even though this interpretative decision had significant consequences for the balancing of economic considerations with the Clean Air Act’s overall goal—responding to the “major social issue” of air pollution, *id.* at 848—the Court held that Congress had committed this interpretation to EPA’s expert discretion, *id.* at 866.

Thus, *Chevron* furnishes the appropriate standard for reviewing this ordinary exercise of agency interpretation, and applying the Major Questions Doctrine to the Clean Power Plan is incongruous with *Chevron* itself.

B. Applying the Major Questions Doctrine would not affect the outcome of this case.

As *King v. Burwell* illustrates, the presence of “major questions” within a rule does not automatically render a rule invalid. 135 S. Ct. at 2489-91. To fail under the Major Questions Doctrine, a rule must exploit a “cryptic” delegation of authority that contradicts congressional intent. *See Brown & Williamson*, 529 U.S. at 160. But the Clean Air Act provisions at issue here involve no such cryptic delegation; rather, section 111(a) of the Act expressly delegates broad authority to EPA. 42 U.S.C. § 7411.

The section’s plain text reveals the express nature of Congress’s delegation: the “Administrator determines” the “best system of emission reduction.” *Id.* The statute defines neither the phrase “best system of emission reduction” nor its constituent words. *Id.* Instead, the Act guides design of a “best system of emission reduction” by providing a handful of overarching factors, which EPA has “a great degree of discretion in balancing.” *Lignite Energy Council v. EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999); *see also AEP*, 564 U.S. at 427 (stating that the Act “entrusts” to EPA the “complex balancing” involved in determining the “best system of emission reduction” under section 111).

Far from exploiting cryptic statutory language to contradict Congress's intent, the Clean Power Plan relied on an express delegation of authority that both this Court and the Supreme Court have recognized. The clarity with which Congress gave EPA authority to design a "best system of emissions reduction" offers yet another reason why the Court need not, and should not, consider the Major Questions Doctrine in deciding this case.

III. In repealing the Clean Power Plan, EPA advances an unwise and unsupported interpretation of the Major Questions Doctrine.

EPA's authority to determine a "best system" to reduce carbon dioxide emissions from power plants is settled law. *See AEP*, 564 U.S. at 426. In repealing the Clean Power Plan, EPA therefore does not and cannot claim that the Plan raises any "major questions." Instead, EPA posits a novel reformulation of the Major Questions Doctrine that would prohibit administrative agencies from issuing any "major rule" unless every aspect of the rule is supported by a "clear-statement from Congress." 84 Fed. Reg. at 32,529.

EPA's rigid formula has no basis in the Supreme Court's "common sense" treatment of "major questions." *Brown & Williamson*, 529 U.S. at 133. Indeed, EPA's "major rules" standard directly *conflicts* with the Court's approach to numerous enormously significant rulemakings in recent decades. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (upholding on *Chevron* step-two grounds a major FCC rule issued under

ambiguous statutory provisions). Moreover, EPA’s “major rules” approach would burden courts and agencies with a complex and ill-defined threshold requirement to determine whether any proposed rule qualifies as “major.” The Clean Power Plan itself demonstrates the folly of such an approach: even applying EPA’s unsupported standard, there is no evidence to support the contention that the Plan is a “major rule.”

A. EPA misconstrues the Doctrine.

The Major Questions Doctrine applies to “extraordinary cases,” *Brown & Williamson*, 529 U.S. at 159: “singular situation[s],” *UARG*, 573 U.S. at 324, in which agencies make claims of “extraordinary authority,” *Gonzales*, 546 U.S. at 262. In contrast, EPA’s recharacterization of the Doctrine would restrict agencies from issuing any “major rule” without a “clear-statement from Congress” to support every “interpretative question raised in” the rule. 84 Fed. Reg. at 32,529.

EPA misconstrues the Doctrine in two ways. First, EPA’s standard relies on an illusory distinction between “major rules” and other rulemakings—a distinction that appears nowhere in any of the Court’s major questions cases. Citing to a dissent from a denial of rehearing *en banc* in this Circuit, EPA claims that “a number of factors are relevant in distinguishing major rules from ordinary rules,” including the financial impact of the rule, the “number of people affected, and the degree of congressional and public attention to the issue.” *Id.* (quoting *U.S.*

Telecom Ass'n v. FCC, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)). EPA does not suggest how a Court might weigh these factors, but the new standard would seemingly apply to *any* rule that has substantial economic or political implications. The Court's cases nowhere suggest that the Doctrine has such broad application. A major question arises only when an agency proposes an “enormous and transformative expansion” of its regulatory reach, *UARG*, 573 U.S. at 324, not when an agency acting within familiar regulatory terrain issues a rule that affects a large number of people or attracts substantial public attention.

Second, whereas the Supreme Court's major questions decisions concern whether an agency may extend its regulatory authority into new territory, EPA's novel standard would examine how an agency may regulate, even within the well-established bounds of its authority. According to EPA, upon determining that a rule is “major,” the court must turn its attention to the particulars of the regulation: if *any part* of a “major rule” relies on ambiguous statutory language, then the regulation is unlawful. *See* 84 Fed. Reg. at 32,529 (“Because the CPP is a major rule, the interpretative question . . . (*i.e.*, whether a ‘system of emission reduction’ can consist of generation-shifting measures) must be supported by a clear-statement from Congress.”). But none of the Court's cases performs such an analysis; rather, the major questions inquiry begins and ends with the scope of an agency's regulatory authority. *See, e.g., Brown & Williamson*, 529 U.S. at 160-61

(concluding that Congress has “precluded the FDA from regulating tobacco products”).

B. The Supreme Court’s approach to numerous major rulemakings forecloses EPA’s interpretation of the Doctrine.

Under EPA’s mistaken understanding of the Major Questions Doctrine, any challenge to a “major rule” must be decided within the major questions framework. But the overwhelming majority of challenges to major administrative rulemakings—even those that transform an industry—involve no consideration of the Doctrine. *See, e.g., New York v. FERC*, 535 U.S. 1 (2002).

In *New York v. FERC*, for instance, the Court upheld a set of orders by the Federal Energy Regulatory Commission that literally restructured electricity markets in much of the country. 535 U.S. at 4-5. The order generated substantial controversy on all sides: as explained by the D.C. Circuit panel that initially considered the case, “[a]ll key players in the electricity market have challenged various provisions of” FERC’s orders. *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000), *aff’d sub nom. New York*, 535 U.S. 1. Moreover, FERC’s order proceeded on a new interpretation of decades-old broad statutory authority under the Federal Power Act. *New York*, 535 U.S. at 11. Nonetheless, the Supreme Court did not perform any special “major rules” analysis and instead held that “FERC properly construed its statutory authority.” *Id.* at 5.

New York is but one example of a highly consequential rule upheld by the Supreme Court and lower courts without reference to EPA’s novel “major rules” standard. Other recent cases include:

- *FERC v. Elec. Power Supply Ass’n*: upholding a controversial FERC order that increases compensation for “demand response” resources. 136 S. Ct. 760 (2016), as revised (Jan. 28, 2016).
- *EPA v. EME Homer City Generation L.P.*: upholding under *Chevron* EPA’s “Transport Rule,” which multiple states opposed. 572 U.S. 489 (2014).
- *Mayo Found. for Med. Educ. & Research v. United States*: unanimously upholding Treasury’s “full-time employee rule” under *Chevron*. 562 U.S. 44 (2011).
- *Brand X*: upholding on *Chevron* step-two grounds FCC rule that would transform regulation of broadband internet service. 545 U.S. 967 (2005).
- *Verizon v. FCC*: applying *Chevron* two-step test to controversial net neutrality rule and explicitly rejecting application of *Brown & Williamson*. 740 F.3d 623, 638-40 (D.C. Cir. 2014).
- *Nat. Res. Def. Council v. EPA*: reviewing EPA “Clean Air Fine Particle Implementation Rule” under *Chevron*. 706 F.3d 428 (D.C. Cir. 2013).

None of these important cases applies any special “major rules” analysis to the contested, significant rulemaking at issue—a fact that cannot be reconciled with EPA’s expansive reconfiguration of the Doctrine.

C. Expanding the Major Questions Doctrine would burden agencies and reviewing courts with an additional threshold inquiry in administrative rulemaking.

Courts generally must avoid imposing procedural rulemaking constraints on agencies beyond those required by the Administrative Procedure Act or other

statutes, even for rules that would address “issues of great public import.”

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S.

519, 545 (1978). But adopting EPA’s view of the Doctrine would do just that.

The new procedural burden of determining whether a prospective rule survives a restriction on interpretative choices in “major rules” not only would dramatically raise the stakes of agencies’ internal assessments of ambiguity in the statutes they implement; it would also require them to predict whether a reviewing court might view a proposed rule as “major.”

Assessing whether a rule is “major,” without any clear test for that determination, would thrust agencies and courts into a thicket of new questions. For example, agencies would have to interpret some undefined amount of opposition to a rule as a risk to the rule’s validity. Agencies would also have to determine the requisite thoroughness of a threshold inquiry into whether a rulemaking involves a “major question.” And it is unclear what evidence subsequent administrations might need for recasting such a determination, as EPA attempts to do here in less than a page of bare assertions about the Clean Power Plan’s impacts. *See* 84 Fed. Reg. at 32,529.

Courts, endeavoring to discern major rules, would be thrust into political debates—territory that Congress properly occupies. *See* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of*

Agency Statutory Interpretation, 102 Minn. L. Rev. 2019, 2051 (2018) (noting that keeping courts out of political controversies is a fundamental rationale for *Chevron* deference). Courts would enter these disputes without clarity about the standard of review or the scope of evidence. And, lacking agencies' expertise in regulatory domains, courts would be vulnerable to reaching objectively inaccurate conclusions—especially if, as with the Clean Power Plan, available information about the likely consequences of a rule changes over time. See Denise A. Grab and Jack Lienke, Institute for Policy Integrity, *The Falling Cost of Clean Power Plan Compliance* 1 (2017).⁴ All of this uncertainty would unreasonably burden agencies and courts, and would deny regulated communities the predictability needed to plan for efficient compliance.

Moreover, imposing this new threshold inquiry would keep agencies from effectuating congressional intent where that intent matters most: in confronting economically and politically important problems. For example, EPA's reliance upon its formulation of the Major Questions Doctrine to reject a petition to regulate greenhouse gases from motor vehicles led to unnecessary and protracted litigation, culminating in the Supreme Court rebuking EPA's failure to fulfill a duty that Congress gave it in the Clean Air Act. *Massachusetts*, 549 U.S. at 531. Such

⁴ Available at https://policyintegrity.org/files/publications/Falling_Cost_of_CPP_Compliance.pdf.

wasteful delay illustrates how an expansive reading of the Major Questions Doctrine impairs, rather than protects, the balance of federal powers.

Likewise, EPA's interpretation would undermine congressional intent by strongly privileging the status quo. Under EPA's "major rules" approach, agencies would be unable to effectuate changes to important policies in the face of ambiguous statutory language, regardless of whether the changes would expand or contract regulation. But Congress often uses broad statutory language to provide agencies with flexibility to adjust policies to changing circumstances. *See, e.g., Brand X*, 545 U.S. at 996-97 (upholding major FCC deregulation of internet providers based on ambiguous statutory language).

EPA's sweeping view of the Doctrine offers no advantages that might justify burdening agencies and courts with new responsibilities, because Congress already has tools to prevent agencies from issuing major rules that depart from congressional intent. These tools include the Congressional Review Act, the budget appropriations process, confirmations of executive officers, and congressional oversight hearings. Jack M. Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61 (2006). A doctrine that blocks agencies from using their delegated authority in issuing major rules would interfere with Congress's own functions in overseeing executive agencies.

D. Even under EPA’s untenable view of the Major Questions Doctrine, the Doctrine could not apply to the Clean Power Plan.

EPA’s radical view of the Doctrine would apply the heightened “major rules” standard to any rulemaking with significant political and economic effects. Even under this erroneous test, EPA fails to present sufficient evidence to properly consider the Clean Power Plan a major rule, further demonstrating this test’s unworkability.

Originally projected at \$8.4 billion, the Plan’s annual compliance costs are on the order of those of recent air pollution regulations that have prompted no consideration of the Major Questions Doctrine. Environmental Protection Agency, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* ES-22 (2015).⁵ For example, the air pollutant “Transport Rule” at issue in *Homer*, 572 U.S. 489, initially imposed an annual compliance cost estimated at over \$1 billion. Environmental Protection Agency, *Regulatory Impact Analysis for the Final Transport Rule* 33 (2011).⁶ Moreover, updated cost estimates for the Clean Power Plan reveal that compliance would be far less expensive than originally predicted;

⁵ Available at https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf.

⁶ Available at <https://www.epa.gov/sites/production/files/2017-07/documents/epa-hq-oar-2009-0491-4547.pdf>.

under one scenario using updated fuel price assumptions, costs would be *zero* in 2030. Grab and Lienke, *supra*, at 2.

Although “political significance” has never been defined, the Clean Power Plan satisfies no plausible interpretation of this phrase. “[E]arnest and profound debate” about an issue might suggest that a rule raises “major questions.” *See Gonzales*, 546 U.S. at 267. But while greenhouse gas regulation inspires public controversy, the Supreme Court has already confirmed that Congress required EPA to promulgate such regulations. *Massachusetts*, 549 U.S. at 533.

EPA’s contention that the Clean Power Plan could become a “major rule” by encroaching on states’ and other agencies’ authorities is similarly unconvincing. A rule does not stray beyond EPA’s authority to protect public health and welfare simply because it affects matters normally subject to another agency’s regulation. For example, *Massachusetts*, 549 U.S. at 531-32, established that EPA could harmonize its regulation of vehicle emissions with NHTSA’s regulation of fuel economy. And EPA’s regulation of power-plant pollution has existed for decades alongside FERC’s regulation of the energy industry. Jody Freeman, *The Uncomfortable Convergence of Energy and Environmental Law*, 41 Harv. Envtl. L. Rev. 339, 411-16 (2017). Nor does the Clean Power Plan displace state authorities; its “building blocks” approach fulfills EPA’s obligation to require pollution reductions, while leaving states flexibility to select strategies based on

their own energy policy priorities. Todd S. Aagaard, *Energy-Environment Policy Alignments*, 90 Wash. L. Rev. 1517, 1568 (2015). The Clean Power Plan simply does not have major political implications.

CONCLUSION

Any political or economic significance of the Clean Power Plan arises from Congress's clear and uncontested delegation of authority to regulate air pollutants including greenhouse gases—*not* from the design of the Plan itself, which is at issue in this litigation. Accordingly, the Court can evaluate the questions presented here using ordinary *Chevron* review and established canons of statutory construction, without relying on the Major Questions Doctrine. Moreover, expanding the Doctrine to encompass a rulemaking like the Clean Power Plan would burden courts and agencies with a host of new and poorly defined analytical responsibilities, producing uncertainty and wasteful litigation. The Court should leave this Doctrine for a different case.

Respectfully submitted,

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April 22, 2020

APPENDIX A

BIOGRAPHIES OF AMICI ADMINISTRATIVE LAW PROFESSORS

Todd Aagaard is Professor of Law at the Villanova University Charles Widger School of Law. His teaching and research interests include administrative law, environmental law, energy law, and property. Prior to joining the Villanova faculty, he worked as an appellate attorney in the U.S. Department of Justice.

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Daniel Farber is the Sho Sato Professor of Law at the University of California, Berkeley. He is also the Faculty Director of the Center for Law, Energy, and the Environment. Professor Farber serves on the editorial board of Foundation Press. He is a member of the American Academy of Arts and Sciences and a Life Member of the American Law Institute. He teaches and researches in diverse fields that include environmental law, administrative law, constitutional law, torts, energy law, and disaster law.

Kathryn Kovacs is Professor of Law at Rutgers Law School. She teaches and writes in the fields of administrative law, natural resources law, and property.

Professor Kovacs joined the Rutgers faculty after serving as an attorney at the U.S. Department of Justice where she wrote more than 100 appellate and Supreme Court briefs and argued more than 60 appeals. She also served as Senior Advisor in the Department of the Interior.

Richard Lazarus is the Howard and Katherine Aibel Professor of Law at Harvard University, where he teaches environmental law, natural resources law, administrative law, Supreme Court advocacy, and torts. Professor Lazarus has represented the United States, state and local governments, and environmental groups in the United States Supreme Court in 40 cases and has presented oral argument in 14 of those cases. His primary areas of legal scholarship are environmental and natural resources law, with particular emphasis on constitutional law and the Supreme Court.

Ronald Levin is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. He specializes in administrative law and has published widely in that field, particularly on judicial review issues. He is a senior fellow of the Administrative Conference of the United States and has chaired its

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Nina Mendelson is the Joseph L. Sax Collegiate Professor of Law at the University of Michigan Law School. She teaches and conducts research in the areas of administrative law, environmental law, statutory interpretation, and the legislative process. She is a senior fellow of the Administrative Conference of the United States.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point font and contains 6,491 words exclusive of the certificate as to parties, rulings, related cases, and separate briefing; table of contents; table of authorities; signature lines; biographical appendix; and certificates of service and compliance.

CERTIFICATE OF SERVICE

I hereby certify that, on April 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which served a copy of the document on all counsel of record in the case.

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