

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**  
**No. 24-1129 (and consolidated cases)**

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

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**STATE OF NEBRASKA, et al.,**

*Petitioners,*

v.

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

*Respondents,*

**ALLIANCE OF NURSES FOR HEALTHY ENVIRONMENTS, et al.,**

*Intervenors.*

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On Petition for Review from the United States Environmental Protection  
Agency (No. EPA-HQ-OAR-2022-0985)

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**BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION  
OF WHOLESALE-DISTRIBUTORS  
IN SUPPORT OF PETITIONERS**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and District of Columbia Circuit Rule 26.1A, counsel for *amicus curiae* certifies that the National Association of Wholesaler-Distributors (NAW) is a 501(c)(6) non-profit trade association. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock. NAW is not a subsidiary or affiliate of any publicly owned corporation, and neither organization issues shares or debt securities to the public.

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**Regulations**

FINAL RULE: GREENHOUSE GAS EMISSIONS AND FUEL EFFICIENCY STANDARDS FOR MEDIUM- AND HEAVY-DUTY ENGINES AND VEHICLES— PHASE 2, 81 Fed. Reg. 73 (Oct. 25, 2016) .....	9
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## IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>

National Association of Wholesaler-Distributors (NAW) is a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct member companies and a federation of national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than ***\$8 trillion*** in annual sales volume providing stable and well-paying jobs to ***more than 6 million workers***.

NAW and its members have a significant interest in the outcome of this case. The Environmental Protection Agency’s (EPA) Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3 (the Rule or

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<sup>1</sup>No person other than *amicus curiae* and its counsel assisted with or made a monetary contribution for preparing or submitting this brief.

Phase 3 Rule) will have a severe and direct impact on the operations and profitability of wholesaler-distributors nationwide. By dramatically increasing the costs of heavy-duty trucks, a critical part of the distribution industry's fleet, the Rule threatens to erode already thin profit margins and disrupt the efficient flow of goods through the supply chain. These impacts will be felt not only by NAW's members, but also by the millions of retailers and consumers who depend on the timely and cost-effective delivery of products. And as NAW's members know too well, this case presents yet another situation in which a small group of federal regulators have supposed that they can decide major questions that they never have had the authority to decide, with devastating results for NAW's members and for free enterprise in this Nation. Given the wholesale distribution industry's vital role in the Nation's economy, NAW offers a unique perspective on the Rule's far-reaching consequences.

### **SUMMARY OF ARGUMENT**

EPA's Rule imposing stringent greenhouse gas emissions standards on heavy-duty vehicles (HDVs) presents an existential threat to the wholesale distribution industry. By effectively mandating a rapid

transition to electric trucks, the Rule will inflict severe economic harm on wholesaler-distributors. Additionally, rising costs and the limitations of *electric* HDVs will impede the flow of goods from manufacturers to retailers, leading to inevitable product shortages and potentially catastrophic economic turmoil.

Moreover, in promulgating the Rule, EPA has violated the major questions doctrine. Forcing the electrification of an industry that generates \$8 trillion annually and employs over 6 million workers is precisely the type of sweeping policy change that requires clear legislative authorization, which is wholly lacking here. *West Virginia v. EPA*, 597 U.S. 697 (2022). The federal regulators do not have legal authority to impose an EV mandate. *See id.*; *see also* 5 U.S.C. § 706(2)(C).

Finally, the Rule is arbitrary and capricious. EPA has failed to adequately consider the unique economic realities imposed by the Rule, including the impact of increased costs on profit margins and the operational feasibility of electric HDVs for distributors. The agency's analysis is riddled with unrealistic assumptions about the capabilities and infrastructure supporting electric trucks—and is simply

unreasonable. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also* 5 U.S.C. § 706(2)(A).

## ARGUMENT

### **I. The Rule Has Severe Economic Impact on Wholesale Distributors and the Broader Supply Chain.**

EPA's Phase 3 Rule presents an unprecedented economic threat to the wholesale distribution industry and the U.S. supply chain as a whole. By imposing stringent greenhouse gas emissions standards that can only be met through widespread adoption of electric HDVs, the Rule will saddle wholesaler-distributors with crippling costs while simultaneously disrupting the operating models on which the industry relies.

The scale of this economic impact cannot be overstated. Take just one of NAW's 19 commodity lines as an example: According to the International Foodservice Distributors Association, the U.S. foodservice industry alone operated a fleet of 168,300 vehicles in 2022. *See* INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, *2023 Foodservice Distribution Industry Economic Impact Study*, February 2024, at 5.<sup>2</sup> Given these numbers, converting even 25% (42,075) of these

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<sup>2</sup><https://www.ifdaonline.org/wp-content/uploads/2024/02/2023-IFDA-Foodservice-Distribution-Industry-Economic-Impact-Study-web-1.pdf>.

vehicles to electric would cost billions of dollars. And because electric batteries significantly reduce cargo capacity in heavy-duty vehicles, foodservice distributors would need to expand their fleets just to maintain current shipping volumes. And, as NAW and others have pointed out, the United States does not have the charging infrastructure to even fuel these vehicles. The foodservice industry currently employs 135,000 drivers—6% of all truck drivers in the United States. *Id.* This number would need to increase substantially as routes take longer due to charging times and reduced range. This represents just one sector of the distribution network—NAW also represents healthcare, industrial supply, electrical, container, textile, pet industry, beer, wine, and countless other distribution sectors that would face similar challenges.

The wholesale distribution industry operates on razor-thin margins, with the average distributor realizing net profits of just 1%. WORLDLOCITY, LLC, *Wholesale Company Comparisons*, (2022).<sup>3</sup> With these kinds of margins, even a modest increase in operating costs would put a significant portion of distributors at risk of going out of business

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<sup>3</sup>[https://www.worldlocity.com/\\_files/ugd/f1386f\\_bf375ffdfdd4460ea878944cd525c9d0.pdf?index=true](https://www.worldlocity.com/_files/ugd/f1386f_bf375ffdfdd4460ea878944cd525c9d0.pdf?index=true)

within a year. The cost increases brought about by the Phase 3 Rule would likely lead to a wave of bankruptcies and consolidation across the industry, with devastating consequences for businesses, workers, and consumers.

Electric HDVs, which will be a practical necessity under the Rule, are significantly more expensive than their diesel counterparts, with industry analysts estimating that a typical electric tractor costs approximately two to three more than an equivalent diesel model. AM. TRUCKING ASS'NS, *New Report Pegs Cost of Electrifying U.S. Commercial Truck Fleet at \$1 Trillion* (Oct. 12, 2023).<sup>4</sup>

Moreover, the transition to electric HDVs will create substantial operational challenges for wholesaler-distributors. The massive batteries required to power electric HDVs significantly reduce payload capacity and increase charging times, which will lead to lower efficiency and higher costs. ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, *Fact Sheet: The Future of the Trucking Industry – Electric Semi-Trucks* (Aug. 24,

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<sup>4</sup><https://www.trucking.org/news-insights/new-report-pegs-cost-electrifying-us-commercial-truck-fleet-1-trillion>.

2023).<sup>5</sup> The charging infrastructure necessary to support a fleet of electric HDVs can cost millions of dollars to install and maintain, a prohibitive expense for many distributors. AM. TRUCKING ASS'NS, *New Report Pegs Cost of Electrifying U.S. Commercial Truck Fleet at \$1 Trillion* (Oct. 12, 2023).

The wholesale distribution industry plays a vital role in the efficient movement of goods from manufacturers to retailers and end users. Disruptions caused by the Phase 3 Rule will have cascading effects throughout the economy, leading to shortages, delays, and higher prices. Retailers and manufacturers will be forced to increase inventory levels and potentially face production disruptions, leading to higher costs and reduced competitiveness.

Previous supply chain disruptions, such as those caused by the COVID-19 pandemic, have significantly impacted the U.S. economy, with even small reductions in supply chain efficiency leading to substantial losses in GDP. The potential disruptions caused by the Phase 3 Rule could be even more severe and longer-lasting.

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<sup>5</sup><https://www.eesi.org/papers/view/fact-sheet-the-future-of-the-trucking-industry-electric-semi-trucks-2023#2>.

The Rule’s negative effects will be most acutely felt in rural and underserved areas, which are often served by smaller, regional wholesaler-distributors who lack the scale and resources to absorb the higher costs and operational challenges associated with electric HDVs. This could exacerbate existing supply chain challenges and leave many communities without reliable access to essential goods and services.

By imposing a uniform electric HDV mandate without considering the unique challenges faced by different regions and sectors, the Phase 3 Rule threatens to undermine the stability and resilience of the U.S. supply chain, with potentially devastating economic consequences.

## **II. The Rule Violates the Major Questions Doctrine.**

Even if EPA had adequately considered the economic impact of the Phase 3 Rule on the wholesale distribution industry (which it has not), the agency would still lack the statutory authority to promulgate such a transformative regulation. This is because the Rule implicates the “major questions doctrine,” which requires clear congressional authorization for agency actions that have vast economic and political significance. *West Virginia v. EPA*, 597 U.S. 697 (2022).

There can be no doubt that EPA’s Phase 3 Rule qualifies as a major question under this doctrine. The Rule’s *de facto* electric HDV mandate will have far-reaching economic consequences for the wholesale distribution industry and the broader U.S. economy. By imposing billions of dollars in compliance costs and fundamentally disrupting the operations of a critical sector, the Rule threatens to cause widespread job losses, reduced economic output, and higher prices for consumers. These are precisely the kinds of “vast economic and political significance” that the Supreme Court has said trigger the major questions doctrine. *West Virginia*, 597 U.S. at 716.

Moreover, the Phase 3 Rule represents a drastic expansion of EPA’s regulatory authority over a major sector of the U.S. economy. Historically, EPA’s vehicle emissions standards have focused on incremental improvements to existing technologies, not mandating the wholesale adoption of an entirely new type of vehicle. *See, e.g.*, FINAL RULE: GREENHOUSE GAS EMISSIONS AND FUEL EFFICIENCY STANDARDS FOR MEDIUM- AND HEAVY-DUTY ENGINES AND VEHICLES—PHASE 2, 81 Fed. Reg. 73,478 (Oct. 25, 2016). By using its emissions authority to effectively require the replacement of diesel HDVs with electric trucks, EPA is

asserting a novel and transformative power over the transportation sector—one with vast implications for the wholesale distribution industry and the millions of businesses and consumers that depend on it.

This dramatic expansion of regulatory reach, into a field far outside of EPA’s traditional expertise, raises serious questions about the agency’s statutory authority. The Supreme Court has repeatedly instructed that courts must not lightly presume that Congress has authorized agencies to make decisions of such “vast economic and political significance” in “cryptic” or “ancillary provisions.” *West Virginia*, 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Rather, the Court has said, there must be “clear congressional authorization” for an agency to exercise such expansive powers. *Id.*

Here, there is no such clear authorization. The Clean Air Act provisions on which EPA relies for the Phase 3 Rule—42 U.S.C. §§ 7521(a) and 7543(a)—contain no mention of electric vehicles, let alone a specific directive to mandate their widespread adoption in the heavy-duty trucking sector. Instead, these provisions simply grant EPA general authority to set emissions standards for new motor vehicles and engines and to waive preemption of certain state standards. This kind of broad,

generic language cannot be read as a clear statement authorizing EPA to unilaterally transform an entire industry and impose hundreds of billions of dollars in compliance costs.

The Supreme Court rejected a very similar claim of expansive EPA authority just two years ago in *West Virginia v. EPA*. There, the Court rejected EPA’s attempt to use a general “gap fill[ing]” provision to claim the power to force a nationwide shift in electricity generation from coal to supposedly or so-called “cleaner sources.” *West Virginia*, 597 U.S. at 724. As the Court explained, it would have delegated this power explicitly—not hide it in vague or minor provisions. *Id.* The principle is straightforward: agencies cannot use broad, general statutory language to claim dramatic new powers over major sectors of the economy. *See Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468, (2001) (“[Congress] does not, one might say, hide elephants in mouseholes.”).

The same reasoning applies here. The Clean Air Act’s vehicle emissions provisions were designed to address tailpipe pollution from cars and trucks, not to give EPA the power to mandate a wholesale shift to electric vehicles. If Congress had intended to grant EPA such far-reaching authority, it would have done so expressly, not through a subtle

inference from general statutory language. Put simply: the federal regulators do not have legal authority to impose an EV mandate. *See id.*; *see also* 5 U.S.C. § 706(2)(C).

The fact that Congress has considered, but never adopted, legislation specifically authorizing EPA to set electric vehicle mandates only underscores this point. In recent years, numerous bills have been introduced that would have granted EPA new powers to promote or require the adoption of electric vehicles. *See, e.g.*, American Energy Innovation Act, S. 2657, 116th Cong. § 5001 (2020) (proposing new EPA authority to set “zero-emission vehicle standards” for passenger cars). However, none of these bills has been enacted into law. This legislative history strongly suggests that Congress has not yet reached a consensus on whether or how to mandate the electrification of the transportation sector, and that it has not authorized EPA to make that decision unilaterally.

In short, the Phase 3 Rule exceeds EPA’s statutory authority under the Clean Air Act and violates the major questions doctrine. By attempting to use a decades-old vehicle emissions law to force the adoption of electric HDVs, EPA has asserted a transformative new power

that Congress never clearly granted. This Court should not allow such a dramatic expansion of agency authority without a clear statement from Congress authorizing it to do so.

### **III. The Rule is Arbitrary and Capricious.**

Even assuming—for the sake of argument—that EPA has the statutory authority to issue the Phase 3 Rule (which it does not), the regulation is still unlawful because it is arbitrary and capricious. The Administrative Procedure Act requires agencies to engage in “reasoned decisionmaking” and to adequately consider all relevant factors when promulgating new rules. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also* 5 U.S.C. § 706(2)(A). EPA’s rulemaking process falls far short of this standard.

To start, EPA has failed to adequately consider the Rule’s devastating economic impact on the wholesale distribution industry. The costs of transitioning to an all-electric HDV fleet will be crippling for wholesaler-distributors, who operate on thin margins and lack the financial resources to quickly electrify their vehicles. EPA’s cost-benefit analysis and feasibility studies largely ignore these industry-specific factors, instead relying on broad generalizations and unrealistic

assumptions about the ability of businesses to absorb massive new costs. *See* GREENHOUSE GAS EMISSIONS STANDARDS FOR HEAVY-DUTY VEHICLES—PHASE 3, 89 Fed. Reg. at 29,542-29,543. This failure to meaningfully engage with the economic realities of the wholesale distribution sector renders EPA’s analysis arbitrary and capricious. *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

For example, EPA’s analysis assumes that the costs of electric HDVs will rapidly decline over the next decade, making them cost-competitive with diesel trucks on a total cost of ownership basis by 2027. 89 Fed. Reg. at 29,563. However, the agency provides little support for this assumption, particularly in the face of upfront costs alone totaling nearly \$1 trillion. AM. TRUCKING ASS’NS, *New Report Pegs Cost of Electrifying U.S. Commercial Truck Fleet at \$1 Trillion* (Oct. 12, 2023).

Moreover, even if EPA’s cost projections prove accurate, they fail to account for the significant upfront capital costs associated with electric HDVs, which will pose a major barrier to adoption for many wholesaler-distributors. As explained *supra*, the average electric semi-truck costs approximately 2.8 times more than an equivalent diesel model—an enormous premium that most distributors will struggle to afford, even if

the total cost of ownership is lower over the vehicle's lifetime. By focusing solely on long-term cost savings and ignoring the near-term financial hurdles, EPA has "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

The real-world data from just one sector illustrates how divorced EPA's analysis is from reality. The foodservice distribution industry alone operates over 168,300 vehicles and employs 135,000 drivers. EPA's analysis fails to grapple with how this massive existing fleet—just one of 19 commodity sectors NAW represents—could feasibly transition to electric vehicles given current technological limitations and the complete absence of necessary charging infrastructure. *See International Foodservice Distributors Association, 2023 Foodservice Distribution Industry Economic Impact Study*, February 2024, at 5. The agency's cursory treatment of these implementation challenges renders its analysis arbitrary and capricious.

EPA's feasibility analysis is also fundamentally flawed because it rests on unrealistic assumptions about the current state of electric HDV technology and charging infrastructure. The agency's modeling assumes, for example, that electric trucks will be able to match the range and

payload capacity of diesel trucks within the Rule’s aggressive implementation timeline. 89 Fed. Reg. at 29,568. However, significant barriers remain before electric HDVs will be a viable replacement for diesel trucks in most commercial applications. By basing its feasibility analysis on an overly optimistic assessment of current electric HDV capabilities, EPA has again failed to “examine the relevant data” and draw a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43.

Similarly, EPA’s analysis of charging infrastructure fails to adequately grapple with the enormous challenges of building out a nationwide network capable of supporting a large fleet of electric HDVs. The agency’s discussion of this critical issue is cursory at best, merely noting that some private companies and state governments have announced plans to invest in charging stations. 89 Fed. Reg. at 29,566.

However, EPA provides no detailed assessment of the scope and scale of infrastructure that would be needed to support the Rule’s aggressive electrification targets, nor does it meaningfully consider the logistical and financial barriers to deploying such infrastructure, particularly in rural and underserved areas. For instance, to support the

power demands of just commercial vehicles, utilities providers would need to invest \$370 billion in solely grid network upgrades to support the move. AM. TRUCKING ASS'NS, *New Report Pegs Cost of Electrifying U.S. Commercial Truck Fleet at \$1 Trillion* (Oct. 12, 2023). That kind of development does not occur overnight. This superficial treatment of a key factor affecting the feasibility of the Rule is a textbook example of arbitrary and capricious decisionmaking. *See Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (agency action is arbitrary and capricious if it “entirely fail[s] to consider an important aspect of the problem”).

Perhaps most troublingly, EPA appears to have completely ignored evidence showing that the Phase 3 Rule will likely have perverse environmental consequences. As noted *supra*, EPA’s authority to regulate vehicle emissions under the Clean Air Act is premised on the need to protect public health and welfare from the harmful effects of air pollution. *See* 42 U.S.C. § 7521(a)(1). However, the record before the agency includes studies and comments from many parties, including distributors, manufacturers, and state environmental agencies, demonstrating that transitioning to electric HDVs will actually increase

net greenhouse gas emissions in the near- to medium-term due to the carbon intensity of the U.S. electricity grid.

Despite this evidence, EPA's discussion of the Rule's environmental impacts does not mention grid emissions at all, instead focusing solely on the potential reductions in tailpipe emissions from electric HDVs. 89 Fed. Reg. at 29,560-29,561. This failure to consider a crucial factor that goes to the heart of the agency's statutory mandate is the epitome of unreasoned decisionmaking. *See Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (agency action is arbitrary and capricious if it "entirely fail[s] to consider an important aspect of the problem").

Finally, EPA's rulemaking is arbitrary and capricious because the agency failed to meaningfully consider less burdensome alternatives to the Phase 3 Rule. The Supreme Court has long held that agencies have an obligation to consider "obvious alternatives" to their proposed actions, particularly when those alternatives would achieve the same regulatory objectives at lower cost. *State Farm*, 463 U.S. at 46-47. Here, commenters presented EPA with a range of alternative approaches that could reduce HDV emissions without imposing the massive costs and disruptions of an inflexible electrification mandate. These alternatives included more

gradual phase-in schedules, flexible compliance mechanisms, and targeted incentives for clean technologies. *See, e.g.*, Truck & Engine Manufacturers Association, Comments on EPA’s Proposed Rule, at 87-89 (July 1, 2023).

However, EPA gave these proposals short shrift, effectively dismissing them in a few cursory paragraphs of the final rule preamble. 89 Fed. Reg. at 29,582. The agency’s explanation for rejecting these alternatives—that they would not achieve the same level of emissions reductions as quickly as the Phase 3 Rule—is entirely conclusory and ignores the potential long-term benefits of a more flexible and collaborative approach. *Id.*

In sum, EPA’s Phase 3 Rule is the product of a deeply flawed rulemaking process that failed to adequately consider the real-world impacts of the agency’s electric HDV mandate. From its overly optimistic assessment of electric truck capabilities to its cursory dismissal of less burdensome regulatory alternatives, EPA’s analysis is shot through with unrealistic assumptions and conclusory reasoning. These defects, coupled with the agency’s failure to meaningfully engage with the economic

realities of the industries it seeks to regulate, render the Rule arbitrary and capricious.

### **CONCLUSION**

For the foregoing reasons, NAW respectfully urges this Court to grant the petitions for review and vacate the Phase 3 Rule.

October 23, 2024

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29 because it contains 3,480 words, excluding the exempted portions. This brief complies with the typeface and type style requirements of Federal Rules Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook and 14-point font.

/s/ Ivan L. London  
Ivan L. London

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of this Court by using the CM/ECF system, which will serve all parties automatically.

*/s/ Ivan L. London*  
Ivan L. London