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July 5, 2022

To: Sarah J. Reboli Esq.
National Propane Gas Association

From: John A. Hodges

Re: Potential Implications of *West Virginia v. EPA* for Propane Industry

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This responds to your request for a concise memorandum on the potential implications for the propane industry of the Supreme Court's recent decision in *West Virginia v. Environmental Protection Agency*.[1]

West Virginia is an important precedent for use in determining the scope of an administrative agency's authority in rulemaking. Hence, it should be taken into account in relation to the highly-regulated propane industry. *West Virginia* provides a potential basis—the "major questions doctrine"—for court challenges to an agency's rule. That is particularly where the agency is being aggressive and/or pushing the regulatory envelope. Conversely, *West Virginia* is a weaker precedent to the extent that an agency's rule is run-of-the-mill and fits within well-recognized statutory boundaries.

For nearly forty years, a federal agency's interpretation of a statute to support a rule has been reviewed by a court under the deferential *Chevron* doctrine.[2] Under *Chevron*, a court reviewing an agency's rulemaking is generally required to uphold the agency's reading of ambiguous statutory language so long as the agency's interpretation is reasonable. Under *West Virginia*, however, the court should first determine whether the agency's interpretation involves a "major question." If so, the court should require "clear congressional authorization" for the agency's regulation.

What is a "major question," which would bring the major questions doctrine into play? The Supreme Court in *West Virginia* said that there are "extraordinary cases" in which the history and breadth of the authority that the agency has asserted and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer such authority. In such a situation, the agency must point to "clear congressional authorization" for the authority it claims. Applying the doctrine, the Court said that it was not plausible that Congress gave EPA the authority, in Section 111(d) of the Clean Air Act,[3] to adopt on its own a regulatory scheme to control carbon dioxide emissions such as the Clean Power Plan. That is even though capping such emissions at a level that will force a nationwide transition away from the use of coal

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1 587 U.S. ___, 2022 WL 2347278.

2 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

3 42 U.S.C.A. § 7411(d).

to generate electricity may be a sensible solution to the crisis of the day. "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."

West Virginia has significant implications for industry. If a rule has substantial impacts, the major questions doctrine might be used to challenge the rule. In addition, agencies may well be more cautious in regulating—thereby seeking to reduce the risk of having a rule overturned on the basis of the doctrine. The doctrine embodies a weakening of federal agencies and a strengthening of reviewing courts, which have less reason to defer to an agency's rulemaking. In addition, where the doctrine cuts back on federal authority to regulate, authority may be asserted by states. At the same time, while *West Virginia* is a federal decision, the major questions doctrine could well be adapted for use by state courts as a principle of interpretation of state statutes. Also, if an agency is hampered in regulating where the major questions doctrine applies, it may increase regulatory efforts using more conventional methods.

It can be seen from the above discussion that *West Virginia* has implications for the propane industry. Most importantly, the major questions doctrine is an additional tool in the industry's toolbox. The industry should give a careful look at statutes being used as purported authority for propane-related agency actions, to see if they are vulnerable under the doctrine. Of substantial potential significance is that the Supreme Court was concerned in *West Virginia* about EPA's effort to force a nationwide transition away from one fuel to another. Thus, any rule that would be seen as an effort by an agency as anti-propane could be a candidate for the major questions doctrine. Of course, whether the doctrine indeed applies would turn on a close analysis of the particular statute and rule involved.

While not comprehensive, we note the following examples as potential candidates for use of the major questions doctrine:

- Propane is subject to regulation by EPA. Having been burned by the Supreme Court in *West Virginia*, the agency should be sensitive to criticism that it is otherwise running afoul of the major questions doctrine—particularly to the extent that any rule would be seen as forcing a transition away from propane.

- NPGA is involved in rulemaking at the U.S. Department of Energy (DOE) on energy efficiency standards, currently including a proceeding for residential gas furnaces. The governing statute, the Energy Policy and Conservation Act (EPCA),[4] contains a substantial grant of authority to DOE to issue standards, but it is not without limit. For example, NPGA succeeded in a challenge to DOE's interpretation of decorative fireplaces as being within EPCA's term "direct heating equipment."[5]

- NPGA has been actively engaged in challenging purported overreach by the Occupational Safety and Health Administration (OSHA). It succeeded in getting a stay in the Supreme

[4] 42 U.S.C.A. § 6291 *et seq.*

[5] *Hearth, Patio & Barbecue Ass'n, et al. v. U.S. Dep't of Energy*, 706 F.3d 499 (D.C. Cir. 2013).

Court of an OSHA COVID-related rule.[6] The Court believed that the rule exceeded the scope of OSHA authority over "occupational" safety. NPGA is also participating in rulemaking that seeks to expand a regulation[7] to more industries with a minimum of 100 or more, and the creation of a publicly accessible, searchable website case-specific, company-specific injury and illness information. NPGA has challenged the proposal as beyond OSHA's general rulemaking authority. The major questions doctrine could bear on such issues.

- The Consumer Product Safety Commission (CPSC) has authority under the Consumer Product Safety Act[8] to set safety standards and take regulatory action in relation to "consumer products." The major questions doctrine could come into play in a situation where, for example, CPSC seeks to regulate products arguably not within the scope of the statutory term "consumer product."

- NPGA opposes efforts to subject propane or propane dealers to the jurisdiction of state public utility commissioners. It argues that doing so would fundamentally change the nature of the propane industry and how it relates to its customers. The major questions doctrine could support NPGA's position that propane is not within the scope of a state's statutory authority to regulate public utility service.

- NPGA also asks how *West Virginia* might affect propane-related "backdoor anti-gas building codes, pro-tax electric policies, state energy law overhauls, and municipal bans." As discussed above, the major questions doctrine is a useful tool where there are rules or proposals with significant effects on the propane industry—particularly where an agency's efforts are anti-propane. The regulatory efforts cited by NPGA could well be candidates for application of the doctrine.

Please let us know if there is any further way we can be of assistance in this matter.

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6 *National Fed'n of Independent Business v. Dep't of Labor, Occupational Safety and Health Admin*., 595 U.S. ___ (2022), 142 S. Ct. 661.

7 29 C.F.R. § 1904.41(a).

8 15 U.S.C.A. § 2051 *et seq.*