

## **Section 211(c) of the Clean Air Act: Controlling the sale of gasoline**

The Clean Air Act provides the Environmental Protection Agency (EPA) with a number of tools to reduce air pollution. One powerful provision is Section 211(c), which authorizes the EPA to “control or prohibit” the manufacture and sale of any motor vehicle fuel (or fuel additive) if resulting emissions will endanger public health or welfare (or impair emissions control devices). Under this authority, more stringent regulations on vehicle fuels — for example, requiring certain gas stations or national brands to install electric vehicle charging infrastructure — could both reduce deadly air pollution (such as nitrogen oxides and particulate matter) and incentivize the use of zero emissions transportation.

Section 211(c) offers an alternative regulatory mechanism to the primary focus of fuels regulation in recent years, the Renewable Fuels Standard (RFS), established in Section 211(o) of the Clean Air Act. The RFS attempts to regulate vehicle fuels by establishing a credit-trading system, which incentivizes gasoline producers, in aggregate, to blend gasoline with a certain quantity of renewable fuel each year. The program aims to reduce the nation's reliance on foreign oil as well as reduce the negative environmental impacts associated with combusting gasoline. However, in the years since its enactment, the RFS has failed to secure sufficient vehicle emissions reductions. Evergreen has recently [recommended reforms](#) to the RFS program to more fully realize the Clean Air Act’s potential to reduce deadly air pollution from vehicles.

This memo offers a primer on Section 211(c), another means of achieving those goals. It will explain the statutory scheme, recount how the EPA has previously deployed its § 211(c) authority, and explore how the EPA could use it moving forward. More work needs to be done to identify viable policies for § 211(c) rulemaking. Our hope is that this primer will empower advocates and policymakers to take those next steps.

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## The statutory scheme

Section 211 of the Clean Air Act (CAA) consists of several provisions granting the EPA the authority to regulate fuels and fuel additives in certain circumstances. This primer concerns § 211(c), which enables the EPA to “control or prohibit” the manufacture and sale of any motor vehicle fuel, subject to certain conditions. This section will:

- (I) describe the overarching statutory scheme;
- (II) explore the definition of “control,” according to D.C. Circuit precedent as well as legislative and regulatory history; and
- (III) explain Section 211(c)’s idiosyncratic preemption provision.

In brief, we show that § 211(c) offers policymakers a potentially versatile regulatory tool when it comes to regulating gasoline. But because of the preemption provision, advocates and policymakers might prefer use § 211(c) to target various criteria pollutants,<sup>1</sup> rather than greenhouse gasses (GHGs).

### **I. Section 211(c) overview**

Section 211(c) empowers the EPA to “control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive,” if either of two preconditions is met:

- (1) if the “fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare”<sup>2</sup>; or
- (2) if “emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.”<sup>3</sup>

The statute instructs the EPA Administrator to consider certain factors when contemplating action under this authority:

- In order to issue any control or prohibition of a fuel or additive, the Administrator must consider “all relevant medical and scientific evidence available ... including consideration of other technologically or economically feasible means of achieving emission standards” (including the CAA’s § 202 new vehicle emission control program).<sup>4</sup>
- When regulating under the second (“emission control device or system”) prong of § 211(c), the Administrator must additionally consider “available scientific and economic data,” including “a cost benefit analysis comparing emission control devices or systems which are or will be in

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<sup>1</sup> One of the CAA’s flagship programs requires the EPA to establish National Ambient Air Quality Standards (NAAQS) for certain “criteria air pollutants.” The EPA currently regulates six pollutants under the NAAQS program: ozone, particulate matter, carbon monoxide, lead, sulfur dioxide, and nitrogen dioxide. “Criteria Air Pollutants,” Environmental Protection Agency (last accessed Aug. 18, 2022), <https://www.epa.gov/criteria-air-pollutants>. It does not regulate GHGs under the program, although it does regulate those emissions through other CAA authorities.

<sup>2</sup> 42 U.S.C. § 7545(c)(1).

<sup>3</sup> Id. § 7545(c)(1)(B).

<sup>4</sup> 42 U.S.C. § 7545(c)(2)(A).

general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition.”<sup>5</sup> Certain industry stakeholders may, within 10 days of a notice of proposed rulemaking, request a public hearing and published findings about an agency’s determinations under this subsection.<sup>6</sup>

- And should the Administrator seek to prohibit (rather than simply control) a fuel or additive, they may only do so if they find that “such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.”<sup>7</sup>

Section 211(c) also includes an unusual preemption provision, described below.<sup>8</sup>

## II. The scope of § 211(c) “control” authority

The statute offers no definition of “control,” leaving some question as to the precise scope of the EPA’s regulatory authority under § 211(c). (The meaning of “prohibit” is self-evident.)<sup>9</sup> Fortunately, regulatory and judicial precedent offer some helpful guidance, as does the provision’s legislative history.

### A. Regulatory history and litigation

The EPA has invoked § 211(c) authority to regulate the formulation and use of gasoline on multiple occasions, as described below. Notably, only the use of § 211(c) to regulate gasoline lead content in the 1970s generated substantial litigation.<sup>10</sup> In those cases, the D.C. Circuit upheld the EPA’s regulations, and in doing so offered useful guidance on how policymakers might use § 211(c) moving forward.

#### 1. *Lead*

The most prominent use of the EPA’s authority under § 211(c) was its effort in the 1970s to regulate lead content in gasoline. In 1973, the EPA issued a rule requiring gasoline manufacturers to gradually reduce the amount of lead contained in leaded gasoline.<sup>11</sup> That same year it issued another regulation, mandating that gas stations of a certain size offer unleaded gasoline (“the affirmative marketing requirement”), under the legal theory that requiring stations to add new, unleaded pumps counted as a “control” of *leaded* gasoline under § 211(c).<sup>12</sup>

Industry groups filed lawsuits challenging both rules. In particular, the affirmative marketing requirement for unleaded gasoline threatened to pose a financial burden for industry groups.<sup>13</sup> Distributing unleaded gasoline to the nation’s major gas stations required cleaning or replacing the vast network of pipes, containers, and tankers that transported gasoline from refiner to consumer—an expensive endeavor.

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<sup>5</sup> 42 U.S.C. § 7545(c)(2)(B).

<sup>6</sup> 42 U.S.C. § 7545(c)(2)(B).

<sup>7</sup> 42 U.S.C. § 7545(c)(2)(C).

<sup>8</sup> See Section III.

<sup>9</sup> See Section VI.

<sup>10</sup> The sulfur, benzene, and E15 regulations described below did not lead to additional legal precedent concerning the application of 211(c).

<sup>11</sup> See 38 Fed. Reg. 33734, 33741 (Dec. 6, 1973).

<sup>12</sup> See 38 Fed. Reg. 1254, 1256 (Jan. 10, 1973).

<sup>13</sup> *Amoco Oil Co. v. EPA*, 501 F. 2d 722, 726-27 (D.C. Cir. 1974).

Nonetheless, both lead regulations were upheld by the D.C. Circuit Court of Appeals in separate challenges. And by upholding the affirmative marketing requirement,<sup>14</sup> the D.C. Circuit affirmed that, at least in certain circumstances, § 211(c) allows the EPA to “control” the availability of one fuel source by requiring gas stations to offer an alternative source.

The cases established other informative legal principles about the exercise of § 211(c) authority, namely:

- That the “will endanger” inquiry is “precautionary in nature and does not require proof of actual harm before regulation is appropriate,” and is intended to allow the EPA “flexibility” to “protect[] the health and welfare of people, even in areas where certainty does not exist”<sup>15</sup>;
- that regulation of a fuel or fuel additive is permissible even when the use of the fuel or fuel additive is not *alone* responsible for endangering health and welfare, but merely contributes to it<sup>16</sup>;
- that the risk analysis the EPA undertakes may utilize the principle that “the magnitude of risk sufficient to justify regulation is inversely proportional to the harm to be avoided”<sup>17</sup>; and
- that the EPA must strive to consider the most up-to-date scientific information available as part of the statutory requirement to consider “all relevant medical and scientific evidence available.”<sup>18</sup>

## 2. Sulfur

In 2000, the EPA used § 211(c) to issue motor vehicle emission standards for sulfur in gasoline. The standards, which set caps on the sulfur content of gasoline that could be marketed by gasoline refiners or imported for sale, cited two rationales: (1) sulfur in gasoline contributed to a number of criteria pollutants already found to endanger public health and welfare under § 211(c)(1)(A); and (2) sulfur negatively impacted catalytic converters as well as emissions control technology systems in general use (and on the verge of being widespread), per § 211(c)(1)(B).<sup>19</sup>

## 3. Benzene

In 2007, the EPA finalized regulations that set an upper limit on the average benzene content of each gasoline refiner’s annual gasoline production.<sup>20</sup>

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<sup>14</sup> *Amoco Oil Co. v. EPA*, 501 F. 2d 722, 744-45 (D.C. Cir. 1974); see also *American Petroleum Institute v. EPA*, 52.

<sup>15</sup> *Ethyl Corp. v EPA*, 541 F.2d 1, 17, 24 (D.C. Cir. 1976) (en banc), cert.denied, 426 U.S. 941 (1976).

<sup>16</sup> *Ethyl Corp.*, 541 F. 2d at 12, 29-31 (upholding the Administrator’s judgment that auto emissions, combined with all other human exposure to lead, “raises the body lead burden to a level that will endanger health” and that auto emissions were “the most readily reduced significant source of environmental lead.”); see also *Coal. for Responsible Reg., Inc. v. EPA*, 684 F. 3d 102, 331-32 (D.C. Cir. 2012), rev’d on other grounds sub. nom. *Util. Air Reg. Group v. EPA*, 573 U.S. 302 (2014) (“Nothing in *Ethyl* implied that EPA’s authority to regulate was conditioned on evidence of a particular level of mitigation; only a showing of significant contribution was required.”).

<sup>17</sup> *Ethyl Corp.*, 541 F. 2d at 19; see also *id.* at 25-26 (because significant exposure to lead is toxic, “decency and morality limit the flexibility of experiments on humans that would otherwise accelerate lead exposure from years to months, and measure those results.”).

<sup>18</sup> *Ethyl corp.*, 541 F. 2d at 51-52.

<sup>19</sup> Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emission Standards and Gasoline Sulfur Control Requirements, 65 Fed. Reg. 6,698, 6,702-703 (Feb. 10, 2000).

<sup>20</sup> Control of Hazardous Air Pollutants From Mobile Sources, 72 Fed. Reg. 8,427, 8,427, 8,432 (Apr. 27, 2007).

#### 4. E15 Labeling

In 2011, the EPA issued regulations concerning the sale of E15 gasoline, a type of blended fuel containing between 10 and 15 percent ethanol, referred to as the “Misfueling Mitigation Rule” (MMR).<sup>21</sup> After previously authorizing the use of E15 fuels in vehicles newer than model year 2001,<sup>22</sup> the EPA issued the MMR because, while E15 fuel was cleared for use in 2001 and newer vehicles, its use in older model vehicles created risks of “catalyst deterioration or catalyst failure as well as material compatibility issues that could lead to extremely elevated exhaust and evaporative emissions.”<sup>23</sup>

The EPA invoked its authority under § 211(c) “to adopt appropriate controls or prohibitions on the distribution and sale of fuels and fuel additives to avoid emissions increases,” and took a variety of steps to avoid misfueling older cars with E15, including prohibitions on producers, distributors, retailers, and consumers from making, distributing, or selling E15 for older model cars. The EPA also issued an affirmative labeling requirement that gasoline pumps dispensing E15 include a warning label against using the fuel in inappropriate vehicles.<sup>24</sup>

#### B. Legislative history

Congress self-consciously added the term “control” to § 211(c) in order to offer the EPA additional regulatory flexibility. Originally, the House version of § 211(c) in the 1970 CAA amendments only empowered the Administrator to “prohibit” fuels or fuel additives.<sup>25</sup> The Senate pushed, successfully, to include the word “control.” The chamber’s committee report on the legislation explained why:

The Committee decided that such authority should also be extended to the “control” of a fuel’s introduction into commerce. This authority to ‘control’ the use of fuels is intended to give the Secretary greater flexibility than the authority to ‘prohibit.’ For instance, the Committee expects that the Secretary may find it advisable to permit the continued sale of leaded gasolines to allow for the efficient and economic operation of automobiles presently on the highway, even if he finds it necessary to control fuels to assure the availability of non-leaded gasolines for other purposes.<sup>26</sup>

(That the Committee clearly envisioned the word “control” to include “assuring the availability” of unleaded gasoline was an important consideration for the D.C. Circuit when it upheld the affirmative marketing requirement in 1974).<sup>27</sup>

### III. Preemption

Perhaps the most important consideration prior to regulating any fuel or fuel additive under § 211(c) is the preemptive effect any such action would have on state-level regulation of fuels or fuel additives.<sup>28</sup> Section 211(c) includes an unusual preemption scheme, in which the specific goal of a given rulemaking determines which state policies would be nullified. As a result, using § 211(c) to regulate greenhouse gas (GHG) emissions could invalidate some existing Low Carbon Fuel Standard programs at the state level

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<sup>21</sup> Regulation To Mitigate the Misfueling of Vehicles and Engines With Gasoline Containing Greater Than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs, 76 Fed. Reg. 44,405 (July 25, 2011) (“MMR”).

<sup>22</sup> See 74 Fed. Reg. 68,094 (Nov. 4, 2010), 76 Fed. Reg. 4662 (Jan. 26, 2011).

<sup>23</sup> MMR, 76 Fed. Reg. at 44,409.

<sup>24</sup> MMR, 76 Fed. Reg. at 44,407, 411, 418.

<sup>25</sup> *Amoco Oil*, 501 F.2d at 744-45.

<sup>26</sup> S.Rep. No. 91-1196, 91st Cong., 2d Sess. (Committee on Public Works), at 34-35 (Sept. 17, 1970).

<sup>27</sup> *Amoco Oil*, 501 F.2d at 745.

<sup>28</sup> See 42 U.S.C. § 7545(c)(4)(A).

(in Washington and Oregon, but not California). Policymakers hoping to avoid this outcome could instead use the provision to regulate the kinds of criteria pollutants traditionally understood to fall within the CAA’s core ambit. We explain below.

Section 211(c) substantially limits the flexibility of states to deploy their own fuel regulations once the EPA has made an *affirmative* determination about the necessity of regulating a particular “characteristic or component” of a fuel or fuel additive.<sup>29</sup> The statute requires that:

- If the EPA has affirmatively found (i.e., published a finding in the Federal Register) that no control or prohibition of a particular characteristic or component of a fuel or fuel additive is necessary under § 211(c), then no state may impose its own controls or prohibitions on that characteristic of a fuel or fuel additive for the purpose of emission control;<sup>30</sup> and
- If the EPA has decided that a control or prohibition of a characteristic/component of fuel or fuel additive is necessary under § 211(c), then no state may impose its own controls or prohibitions on that characteristic of a fuel or fuel additive unless they are identical to the federal regulations.<sup>31</sup>

So long as the EPA does not make findings one way or the other about fuels or fuel additives, individual states retain control of their own regulations over those substances; but once the EPA takes action in either direction, the scope for independent state regulation quickly diminishes.

These preemption provisions do have some exceptions and limitations:

- They do not apply to preempt regulation by the state of California, which is the only state eligible for (and which has been granted) a waiver from the preemption provisions of the CAA by the EPA;<sup>32</sup>
- A state may continue to regulate a fuel or fuel additive if the state is subject to an implementation plan under the Clean Air Act’s national ambient air quality standards that has found that the state’s regulation of the fuel or fuel additive is necessary to achieving the national primary or secondary ambient air quality standards;<sup>33</sup>
- A state may continue to regulate a fuel or fuel additive so long as it is regulating a different “characteristic or component” of the fuel or fuel additive than the EPA’s regulation.<sup>34</sup>

Navigating this “characteristic or component” limitation — which, to our knowledge, has never been directly litigated — requires thoughtfulness. For example, suppose the EPA found that GHG emissions from gasoline powered vehicles contributed to air pollution that reasonably endangered the public welfare by exacerbating climate change. Under § 211(c), the EPA could impose a “control” on the sale of gasoline: e.g., requiring labeling warnings at gas pumps explaining the climate impacts of gasoline use. Yet even that relatively minimal regulation would likely trigger § 211(c)’s preemption of *any* non-identical state level regulation on the sale of gasoline *for the purposes of controlling GHG emissions*.

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<sup>29</sup> 42 U.S.C. § 7545(c)(4)(A).

<sup>30</sup> 42 U.S.C. § 7545(c)(4)(A)(i).

<sup>31</sup> 42 U.S.C. § 7545(c)(4)(A)(ii).

<sup>32</sup> 42 U.S.C. § 7545(c)(4)(B); *see also, e.g., Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1106 (9th Cir. 2013) (finding that California’s Low Carbon Fuel Standard was insulated from a preemption challenge because of this provision).

<sup>33</sup> 42 U.S.C. § 7545(c)(4)(C)(i).

<sup>34</sup> 42 U.S.C. § 7545(c)(4)(A).

That would, for example, likely invalidate low-carbon fuel standard programs in Oregon and Washington (though not in California, which is exempt) that also seek to control the same characteristic of burning gasoline: the resulting GHG emissions. However, that regulation would likely *not* preempt state regulation of other characteristics, such as criteria pollutants.

If it hopes to avoid undermining state-level GHG regulations, the EPA should invoke § 211(c) to target other harmful pollutants, like criteria pollutants, emitted by gasoline-powered cars. Attempting to reduce these pollutants might well result in policy outcomes with a positive climate effect (e.g., requiring certain gas stations to install EV fast-chargers).<sup>35</sup>

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<sup>35</sup> Importantly, even in conducting its benefit-cost analysis and explaining its justification for taking action, the agency could not rely on lowered GHG emissions, or risk triggering the preemption clause. *See* discussion *infra* Part V for a description of the EV charging infrastructure proposal.

## Section 211(c) in application

This section explores how § 211(c) could operate in practice. It covers:

- (IV) issuing an endangerment finding, including the crucial choice, given the statute's preemption provision, of which characteristic or component of gasoline to regulate;
- (V) potential policy interventions the EPA could deploy as § 211(c) controls;<sup>36</sup> and
- (VI) caveats concerning § 211(c)'s prohibition authority.

### **IV. Preliminary endangerment finding**

Any action under § 211(c) would begin with the EPA issuing a finding that gasoline emissions cause or contribute to pollution that can reasonably be anticipated to endanger the public health or welfare.

If the EPA were to issue an endangerment finding concerning gasoline, it would need to decide which characteristics of the fuel to target. Broadly, the EPA could consider issuing an endangerment finding either that:

- (1) combusting gasoline generates emissions that contribute to climate change, which endangers the public health and welfare through the attendant sea level rise, storm intensification, heat waves etc.; or
- (2) combusting gasoline generates (non-GHG) criteria pollutants that directly threaten public health.

The approach most likely to offer any § 211(c) regulation the strongest shield against legal challenge would be for the EPA to cite *both* rationales as independently sufficient to justify control or prohibition on gasoline. But the cost of that approach would be to give any § 211(c) regulations wide preemptive effect, because it would be regulating multiple different characteristics or components of gasoline, all of which would diminish the scope of state regulation.

Alternatively, the EPA could choose one characteristic to regulate. Each path has benefits and drawbacks, outlined below.

#### *a. Gasoline's GHG emissions and effects*

The EPA could issue a finding that, because gasoline's GHG emissions are an air pollutant and contribute to global warming, and because global warming creates a variety of threats to public health and welfare, gasoline can be reasonably anticipated to endanger the public health and welfare within the meaning of § 211(c).

Interestingly, the EPA has probably already made this finding (albeit implicitly). In 2009, the EPA determined that, for the purposes of CAA § 202(a) (authorizing the EPA to set emission standards for new motor vehicles), "the combined emissions of [] greenhouse gases [sic] from new motor vehicles and new motor vehicle engines contribute to [] greenhouse gas air pollution that endangers the public health and welfare."<sup>37</sup> This endangerment finding was upheld at the D.C. Circuit,<sup>38</sup> and the Supreme Court

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<sup>36</sup> These solutions require further study and are offered in the spirit of encouraging additional brainstorming.

<sup>37</sup> *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009).

<sup>38</sup> *Coal. for Responsible Reg.*, 684 F. 3d at 117-126.



declined to review it.<sup>39</sup> However, any § 211(c) action would require a new, updated endangerment finding, given the provision’s requirement that controls or prohibitions be based on “all relevant medical and scientific evidence available” to the Administrator.<sup>40</sup> Thanks to the Inflation Reduction Act of 2022, which explicitly envisions the EPA regulating GHGs under § 211, there should be little doubt as to the agency’s legal authority on this point.<sup>41</sup>

One main caveat applies.<sup>42</sup> As noted in the preemption section above, predicating § 211(c) regulation on GHG emissions also risks invalidating low-carbon fuel standard programs in states outside of California. As a result, policymakers might decide against using § 211(c) to regulate gasoline’s GHG emissions.

*b. Gasoline’s smog emissions and effects*

Instead, the EPA could issue an endangerment finding that (non-GHG) criteria pollutant emissions from combusting gasoline directly endanger the public health or welfare (rather than endangering public health and welfare via the effects of climate change) in the types of ways envisioned by Justice Scalia in his dissent in *Massachusetts v. EPA*.<sup>43</sup>

Similar to GHG emissions, above, the EPA has arguably already made the factual determinations necessary to support such findings. Since 1971, the EPA has regulated six different emissions under § 202(a) of the Clean Air Act, judging them to “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare,”<sup>44</sup> and therefore regulable under the National Ambient Air Quality Standards program.<sup>45</sup> These pollutants — ground-level ozone, particulate matter, carbon monoxide, lead, sulfur dioxide, and nitrogen dioxide — are already the subject of extensive and regularly-updated EPA analysis about their effects on public health. Arguably, in each of the most recent decisions to update or continue the current standards for those six criteria emissions, the EPA made the requisite finding for regulating gasoline via § 211(c) because of criteria emissions. This is particularly true for the five classes of emissions — nitrogen oxide, non-methane organic gasses, carbon monoxide, particulate matter, and formaldehyde — that are already the subject of new vehicle emission standards.<sup>46</sup>

Whether the EPA makes new findings or not, regulating (non-GHG) criteria pollutant emissions from gasoline neither carries the risk that the Supreme Court could overturn *Mass v. EPA* nor would preempt state regulatory regimes. Importantly, criteria pollutant emissions could justify some policy interventions that will also have a beneficial climate effect (e.g., boosting EV infrastructure).<sup>47</sup>

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<sup>39</sup> See *Util. Air Reg. Group v. EPA*, 573 U.S. 302, 313-14 (2014) (*UARG*) (explaining that the Court declined to review that portion of the D.C. Circuit’s decision).

<sup>40</sup> 42 U.S.C. § 7545(c)(2)(A).

<sup>41</sup> See IRA (2022), Section 30106(a)(2) (“\$50,000,000 shall be to carry out, with respect to greenhouse gases, sections ... 211 ... and other sections of the Clean Air Act”).

<sup>42</sup> Until the passage of the IRA, the agency might have worried that any § 211(c) regulation targeting GHGs would offer the Supreme Court the opportunity to revisit its decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). However, the IRA included a provision that codifies GHGs as broadly regulable under the CAA. See IRA (2022), Section 30106(a)(2).

<sup>43</sup> See *id.* at 559-60 (Scalia, J., dissenting).

<sup>44</sup> 42 U.S.C. § 7408(a)(1)(A).

<sup>45</sup> See e.g., *National Primary and Secondary Ambient Air Quality Standards*, 36 Fed. Reg. 8,186 (Apr. 30, 1971) (EPA’s first issuance of NAAQS standards); see also *Criteria Air Pollutants*, U.S. EPA, available at <https://www.epa.gov/criteria-air-pollutants>.

<sup>46</sup> See, e.g., *Light Duty Vehicle Emissions*, U.S. EPA, available at <https://www.epa.gov/greenvehicles/light-duty-vehicle-emissions#standards>.

<sup>47</sup> See discussion *infra* Part V.

One possibility is that the EPA could issue an endangerment finding *without* immediately using that finding as the basis for imposing new controls or prohibitions on gasoline. The statutory scheme under § 211(c)(1) is an unusual one that does not explicitly require the Administrator (or any other party) to take any additional action to accompany an endangerment finding, providing simply that if the Administrator finds that a fuel or fuel additive endangers the public, “[t]he Administrator *may* ... control or prohibit” its manufacture or sale. This intermediate step could allow the EPA to take a definitive step forward while still soliciting final ideas from advocates, industry and other stakeholders. However, any subsequent controls would still need to be based on the latest available data, and so the endangerment finding might need to be updated before final promulgation.

## V. Potential controls on gasoline

Our hope is that this primer will help environmental experts and policymakers develop potential uses for the EPA’s Section 211(c) authority. In that spirit, we gesture towards two illustrative use-cases below, although each requires further study as to their technical feasibility or worthiness.

As a preliminary matter, either of the following controls issued pursuant to § 211(c) authority would need to be accompanied by evidence that the EPA considered “all relevant medical and scientific evidence available” at the time of the determination that controls were needed, as well as consideration of “other technologically or economically feasible means of achieving emission standards,” including under the EPA’s new vehicle emission standards.<sup>48</sup>

### a. Requiring EV infrastructure

One possible “control” of gasoline under 211(c) could be to facilitate the expansion of infrastructure to power electric vehicles, for example by requiring gas stations to install EV fast-chargers on their premises. Surveys suggest that questions about EV-charging capacity remain a top concern for consumers.<sup>49</sup> And EV usage is expected to grow quickly: according to a recent report by BloombergNEF, over half of all U.S. car sales will be electric vehicles by 2030.<sup>50</sup>

The details of the program could vary. For example, like the unleaded gasoline regulation, a carefully-crafted 211(c) rule would probably only target a specific subset of gas stations, perhaps along interstate travel centers. And the EPA could probably mandate that EV infrastructure deployed pursuant to the regulation accept accessible forms of payment rather than operate on a private membership model.

Concerns over the cost of implementing the regulation could be mitigated by pairing the regulation with various existing federal subsidies, including grants from the Infrastructure Investment and Jobs Act of 2021 and the refurbished Section 30C EV-charging tax credit in the Inflation Reduction Act. The EPA could also consider allowing gas stations short on space to fulfill their EV-charging obligations by helping to finance charging infrastructure off-site, through co-benefit agreements with nearby businesses like grocery stores.

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<sup>48</sup> 42 U.S.C. § 7545(c)(2)(A).

<sup>49</sup> Byron Hurd, “Report: Charging, cost remain highest barriers to EV adoption,” AutoBlog (July 7, 2022), <https://www.autoblog.com/2022/07/07/consumer-reports-ev-interest-survey/>.

<sup>50</sup> Ira Brouday, “More Than Half of US Car Sales Will be Electric by 2030,” Bloomberg (Sep. 20, 2022), <https://www.bloomberg.com/news/articles/2022-09-20/more-than-half-of-us-car-sales-will-be-electric-by-2030?leadSource=verify%20wall>.

An alternative program might slightly shift the object of regulation from individual gas stations to national brands like Sunoco, BP, Shell etc., which are more likely to have the financial resources to comply with an EV-charging regulation.<sup>51</sup> A regulation could establish some sort of formula to determine the precise EV-charging obligation that would fall on each company.

Per our discussion above, any “control” could aim to reduce harmful emissions of either GHG or criteria pollutants, or both, depending on policymakers’ willingness to tolerate the subsequent preemptive effects.

i. Precedent

The EPA’s affirmative marketing requirement for unleaded gasoline provides the inspiration for this proposal. The 1973 regulation, upheld by the D.C. Circuit in *Amoco Oil*, required gas stations that sold more than 200,000 gallons of gasoline to add new unleaded gasoline pumps as a control on *leaded* gasoline. In affirming the regulation, the court reasoned that conditioning the sale of a polluting fuel on the offering for sale of a cleaner alternative was “surely one way to ‘control’” the sale of that polluting fuel.<sup>52</sup> The court also found support in the legislative history of the Clean Air Act, explaining that in the process of drafting § 211(c) Congress had purposely expanded the EPA’s powers from merely “prohibiting” the sale of fuels to “controlling” them, and reasoning that that power to control included the power to impose an affirmative marketing requirement.<sup>53</sup> Finally, the court also found that the agency had adequately justified the 200,000 gallon cutoff threshold, which was tailored “to ensure availability of unleaded fuel at about 45 per cent of the nation’s service stations, selling about two thirds of the nation’s gasoline, while sparing small retailers the investment costs required to provide unleaded gasoline.”<sup>54</sup> This precedent should provide strong support for an EV-charging regulation, especially considering that the Supreme Court has held that the principle of *stare decisis* holds extra force in the context of statutory interpretation cases.<sup>55</sup>

An EV-infrastructure rule could build off this foundation. It would, as an affirmative “control” on gasoline, require some subset of gas stations to install fast-charging EV infrastructure (perhaps, for example, at interstate service plazas). Technically, an EV infrastructure rule and the affirmative marketing requirement for unleaded gasoline would be justified using distinct prongs of § 211(c). An EV rule would be predicated on the fact that gasoline criteria pollutant emissions contribute to air pollution that endangers the public health and welfare, under § 211(c)(1)(A); the affirmative marketing requirement was pitched as a control on “emission control devices” — specifically, catalytic converters — per § 211(c)(1)(B). But it shouldn’t matter which prerequisite the EPA uses to justify its action: under the statute, the definition of “control” remains the same no matter which trigger the EPA invokes. If an affirmative marketing requirement counted as a “control” for unleaded gasoline, other affirmative marketing requirements should fall under the definition as well.

In summary, the EPA’s argument for an EV-infrastructure rule would go something like this: because gasoline is a motor vehicle fuel that emits various criteria pollutants that “may reasonably be anticipated

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<sup>51</sup> While EPA’s unleaded gasoline regulation did not operate at the franchise level, these companies are indisputably engaged in the “manufacture . . . offering for sale, or sale” of gasoline, and so should fall under the statute’s reach.

<sup>52</sup> *Amoco Oil*, 501 F.2d at 744.

<sup>53</sup> *Amoco Oil*, 501 F.2d at 745.

<sup>54</sup> *Id.* at 745.

<sup>55</sup> See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (“[S]tare decisis carries enhanced force when a decision, . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring) (“In statutory cases, stare decisis is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation.”)

to endanger the public health or welfare,” § 211(c) grants the EPA the authority to “control or prohibit” its “sale.”<sup>56</sup> Much like in its 1973 unleaded gasoline rule, an EV-infrastructure rule would “control”<sup>57</sup> the sale of gasoline by affirmatively requiring certain gas stations to offer an alternative motor vehicle fuel source (in this case, electricity).

ii. Legal risk

As is the case with any meaningful regulation these days, an EV-infrastructure rule would probably face legal challenge.

Most likely, opponents would challenge the regulation under the Supreme Court’s “major questions doctrine,” outlined in *West Virginia v. EPA* (2022), arguing that the Congress which enacted § 211(c) did not anticipate the existence of electric vehicles.<sup>58</sup>

The *West Virginia* Court deployed the major questions doctrine to invalidate the EPA’s Clean Power Plan, an Obama-era greenhouse gas regulation that was based on a rarely-used section of the Clean Air Act. The Court first explained that its “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and the 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.’”<sup>59</sup> In these “major questions” cases, “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”<sup>60</sup>

Although much about the doctrine remains nebulous, an EV-charging regulation could survive scrutiny under the major questions doctrine, particularly if the agency shapes it in such a way as to avoid implicating the doctrine in the first place. In any proposed rule, the agency could point to the legislative history and analogize to past regulatory actions taken under § 211(c) to demonstrate that the history and breadth of the authority asserted does not merit invoking the doctrine. The legislative history shows that Congress clearly intended for “controls” on a sale of vehicle fuel to include affirmative marketing requirements. Moreover, both the object of regulation in an EV-charging rule (gasoline) and the method of control (an affirmative marketing requirement) remain the same as in the leaded gasoline context.

The agency could also compellingly make the case that the EV-charging proposal does not rise to the level of political salience or economic significance required to trigger a major questions inquiry. Requiring EV chargers certainly is not as politically controversial as other actions invalidated under the doctrine—such as the Centers for Disease Control’s Covid-19 eviction moratorium, the Occupational Safety & Health Administration’s vaccine-or-test program, and the Obama administration’s Clean Power Plan. Meanwhile, the economic significance of the action would, of course, depend on how many stations the EPA targeted in its rule, a fact the agency could keep in mind when deciding the subset of gas stations or national brands to which the rule would apply.

Besides, even if a court found that the regulation posed a “major question,” the regulation could still satisfy the second step of the doctrine’s test: whether there is “clear congressional authorization for the

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<sup>56</sup> 42 U.S.C. § 7545(c)(1)(A).

<sup>57</sup> There is, of course, a strong textualist argument for this interpretation too. The first definition of the verb “control” listed in the Merriam-Webster Dictionary is: “to exercise restraining or directing influence over.” “Control,” Merriam-Webster Dictionary (last accessed Aug. 18, 2022), <https://www.merriam-webster.com/dictionary/control>.

<sup>58</sup> *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587 (2022).

<sup>59</sup> *Id.* at 2608 (2022)(internal citations omitted).

<sup>60</sup> *Id.* at 2609.

power [the agency] claims,” which requires “something more than a merely plausible textual basis.”<sup>61</sup> The EPA would have more than mere plausibility on its side: it has the Senate committee report; past agency action very close to the date of enactment<sup>62</sup>; and a D.C. Circuit opinion upholding the affirmative marketing requirement.

Finally, any challenge to a Section 211(c) regulation must be filed in the D.C. Circuit, where *Amoco Oil* provides the EPA with strong precedent, and where the odds of drawing a panel likely to defer to precedent remain reasonable.<sup>63</sup> And even were a D.C. Circuit panel, or eventually the Supreme Court, to ultimately invalidate the regulation, the effects should remain limited to § 211(c); other provisions of the CAA, as well as their attendant regulations, shouldn’t be implicated by an adverse decision.<sup>64</sup>

#### b. *Labeling*

The EPA could potentially use § 211(c) to require gas stations to affix labels warning consumers about the detrimental health impacts that accrue from exposure to criteria pollutants emitted by combusting gasoline. While the policy benefits of such a policy may be relatively marginal, it might be wise for the EPA to build § 211(c)’s regulatory record incrementally. There may, however, be First Amendment restrictions on what the government can compel private companies to post.

## VI. Prohibition

The most aggressive step the federal government could take would be to outright prohibit the sale of gasoline under § 211(c). This authority has never been exercised. In addition to the other findings § 211(c) requires of *controlling* the sale or manufacture of gasoline, *prohibiting* gasoline under the statute requires the Administrator to find that the prohibition “will not cause the use of any other fuel . . . which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel” being prohibited.<sup>65</sup>

For many reasons, we do not recommend prohibiting the sale or manufacture of gasoline. And were a future administration to invoke this authority, it is possible that despite the clear text of the statute, the Supreme Court would hold that a total ban on petroleum-based fuels violates the nondelegation doctrine.<sup>66</sup>

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<sup>61</sup> *Id.* at 2609

<sup>62</sup> “A ‘contemporaneous’ and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute’s original charge to an agency.” *Id.* at 2623 (J. Gorsuch, concurring).

<sup>63</sup> 42 U.S.C. § 7607(b).

<sup>64</sup> So long, of course, as the EPA is exclusively regulating gasoline for its non-GHG emissions.

<sup>65</sup> 42 U.S.C. § 7545(c)(2)(C).

<sup>66</sup> *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).