

July 5, 2023

Submitted via www.regulations.gov

William Charmley
Director, Assessment and Standards Division
Office of Transportation and Air Quality
Environmental Protection Agency

Re: Comment Regarding NPRM “Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles,” EPA-HQ-OAR-2022-0829

Dear Mr. Charmley:

Evergreen Action and Governing for Impact (“GFI”) submit this comment on the Environmental Protection Agency’s (“EPA”) notice of proposed rulemaking, “Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles” (“the Proposed Rule”).¹ Evergreen Action is a climate policy organization focused on advancing ambitious, actionable policies to confront the climate crisis and support good jobs to build a thriving, just and inclusive clean energy economy.² GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.³ We appreciate the opportunity to comment and we write in support of the Proposed Rule.

Our comment explains why the Proposed Rule, if finalized, would not implicate the Major Questions Doctrine (“MQD”) under *West Virginia v. E.P.A.*, the doctrine’s landmark case.⁴ Some opponents to the regulation have argued otherwise, pointing in particular to the Proposed Rule’s projected impact on electric vehicle (“EV”) sales.⁵ However, such claims rest on mischaracterizations of the Proposed Rule’s effects and mistaken readings of *West Virginia* (and related cases).

Much has been made of the EPA’s projection that, under the Proposed Rule, EV sales will increase to 67 percent of new vehicle sales by model year (“MY”) 2032.⁶ Pointing to this projection, commentators have described the proposal as “a major step toward a ban on the vehicles Americans rely on,” “nothing short of a complete transformation of the automotive industrial base,” and “requiring nothing short of a revolution.”⁷

¹ 88 Fed. Reg. 29184 (2023).

² Evergreen Action, <https://www.evergreenaction.com/mission>.

³ Governing for Impact, www.governingforimpact.org.

⁴ See generally, *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022).

⁵ See, e.g., Press Release, “The EPA Is At It Again: Attorney General Merrick Garland Blasts Biden Rule Forcing EV on American Consumers,” West Virginia Attorney General’s Office (April 12, 2023) (“the EPA likely doesn’t have the statutory authority to do what it proposes to do, and the whole exercise may run afoul of the major-questions doctrine recognized in *West Virginia v. E.P.A.*”), <https://mailchi.mp/2c52bdb49f71/the-epa-is-at-it-again-wva-agblasts-biden-rule-forcing-ev-on-american-consumers-713977>; Texas Public Policy Foundation, “RE: Docket Numbers EPA-HQ-OAR-2022-0985 and EPA-HQ-OAR2022-0829; Comments,” 2 (June 15, 2022) (available here: <https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0829-0510>).

Opponents, including the West Virginia attorney general, to the most recent greenhouse gas emissions tailpipe rule, finalized in December 2021, have already challenged that regulation on MQD grounds. See, e.g., Private Petitioners’ brief, *Texas v. E.P.A.*, D.C. Cir. No. 22-1031.

⁶ Proposed Rule at 29329.

⁷ Jennifer Hijazi, “Biden Tailpipe Emission Rules Face ‘Major Questions’ Legal Wave,” *Bloomberg Law* (April 14, 2023), <https://news.bloomberglaw.com/environment-and-energy/biden-tailpipe-emission-rules-face-major-questions-legal-wave>; Coral Davenport, “E.P.A. Is Said to Propose Rules Meant to Drive Up Electric Car Sales Tenfold,” *N.Y. Times*

Yet it is important to appreciate that, according to both the EPA and outside analysts, the primary drivers of projected EV growth are market trends and the Inflation Reduction Act's (2022) new tax incentives—not the Proposed Rule.⁸ For example, according to a new analysis of EPA modeling data by the Institute for Policy Integrity, the rule would only boost the EV-share of the total auto fleet by 6 percentage points in 2032.⁹ Nor is the Proposed Rule's compliance burden out of step with past tailpipe emissions rules.¹⁰

An accurate accounting of the Proposed Rule's EV impacts and compliance costs will favor the agency in any forthcoming MQD legal challenge. Indeed, a survey of the Supreme Court's MQD cases reveals a number of distinctions between the regulatory schemes at issue in those cases, including the Clean Power Plan, and the Proposed Rule.

In short, and as this comment will demonstrate, the Proposed Rule's legal vulnerabilities under the MQD have been grossly exaggerated—mostly due to misunderstandings about the rule's impact and the doctrine's contours.

I. Background: the Proposed Rule & the Major Questions Doctrine

The EPA's Proposed Rule, covering light and medium duty vehicle emissions of both greenhouse gases ("GHGs") and criteria pollutants for MYs 2027-2032, appropriately fulfills the statutory obligation under Section 202(a) of the Clean Air Act ("CAA") to issue standards for motor vehicle emissions that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."¹¹ It also marks a positive and necessary step towards reducing carbon emissions in line with current domestic and international climate commitments, as well as addressing environmental justice concerns. This administration has committed to reducing GHG pollution by 50-52 percent by 2030 (relative to 2005 levels)—and policies to address pollution from the transportation sector will be critical to achieving this goal.¹² The transportation sector accounts for the largest share of domestic GHG pollution (29 percent); and light duty vehicles are responsible for the largest share of greenhouse emissions within the transportation sector (58 percent).¹³ Despite the EPA's previous GHG regulations under Section 202(a), transportation emissions in the United States continue to grow,¹⁴ demonstrating that greater action is needed to fulfill the CAA's statutory goals and achieve this administration's climate targets.

In addition to contributing to the climate crisis, light and medium duty passenger vehicles are responsible for emitting harmful pollutants including carbon monoxide, particulate matter, and nitrogen oxides, which can

(April 8, 2023), <https://www.nytimes.com/2023/04/08/climate/biden-electric-cars-epa.html?smid=nytcore-ios-share&referringSource=articleShare>; Coral Davenport, "E.P.A. Lays Out Rules to Turbocharge Sales of Electric Cars and Trucks," *N.Y. Times* (April 12, 2023), <https://www.nytimes.com/2023/04/12/climate/biden-electric-cars-epa.html>.

⁸ See discussion *infra* at 7–10. Specific Infrastructure Investment and Jobs Act (2021) funding programs for EV charging also contribute to expected growth.

⁹ See *infra* at 9.

¹⁰ See discussion *infra* at 10–12.

¹¹ 42 U.S.C. §7521(a)(1).

¹² "FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies," The White House, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/> (April 22, 2021).

¹³ "Fast Facts on Transportation Greenhouse Gas Emissions," U.S. Enviro. Prot. Agency, <https://www.epa.gov/greenvehicles/fast-facts-transportation-greenhouse-gas-emissions> (last visited June 15, 2023).

¹⁴ See "Inventory of U.S. Greenhouse Gas Emissions and Sinks," U.S. Enviro. Prot. Agency, <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks> (last visited June 15, 2023).

cause or contribute to significant negative public health outcomes such as lung and heart diseases.¹⁵ These harmful health outcomes disproportionately affect low income populations and communities of color, who are exposed to greater amounts of vehicle pollution.¹⁶ Unfortunately, these same communities are at the greatest risk of harm from the impacts of climate change, and often lack sufficient resources or support to protect themselves from these harmful impacts.¹⁷ Strong transportation emissions standards — for both GHGs and criteria pollutants — will limit the present and imminent public health threats that vulnerable populations face due to vehicle pollution.

The Proposed Rule, contrary to some public commentary,¹⁸ simply follows the course laid by decades of CAA §202(a) emissions standards for new motor vehicles and motor vehicle engines.¹⁹ Since the 1970s, the EPA has used this authority to set standards for passenger vehicles that reduced deadly emissions such as lead, carbon monoxide, particulate matter, and nitrogen oxide. In the wake of the Supreme Court’s 2007 decision in *Massachusetts v. E.P.A.*, which held that carbon dioxide and other greenhouse gas emissions as air pollutants under the CAA,²⁰ the EPA released its first Section 202(a) standard targeting GHG emissions from light duty vehicles in 2010, covering MYs 2012-2016.²¹ As new data about the urgency of the climate crisis and its ensuing public health impacts, especially to environmental justice communities, have emerged over the last decade, the EPA has further tightened those standards in a series of subsequent rulemakings.

Fortunately, technological solutions to combat the rising emissions have become more abundant and more affordable.²² Electric vehicles represent the most promising technology to reduce vehicle emissions at the scale needed, as major automakers and fleet owners are aware. Many have made commitments to transition to exclusively manufacturing or buying EVs by the end of the next decade, as noted in the Proposed Rule.²³ These automaker commitments come at a time when clear market demand — the number of EVs sold in the US jumped from 1.7% of new car sales in 2020 to a startling 5.7% in 2022²⁴ — is supported by an abundance of new federal funding incentives, thanks to the Infrastructure Investment and Jobs Act and the Inflation Reduction Act (“IRA”). So far in 2023, EV demand continues to grow: EVs made up 7% of new cars sales in the first quarter.²⁵

¹⁵ See U.S. Dep’t of Transp., “Cleaner Air,” <https://www.transportation.gov/mission/health/cleaner-air#:~:text=Vehicle%20emissions%20contribute%20to%20the,illnesses%2C%20including%20pneumonia%20and%20bronchitis> (last visited June 15, 2023).

¹⁶ See, e.g., Maria Cecilia Pinto de Moura and David Reichmuth, “Inequitable Exposure to Air Pollution from Vehicles in the Northeast and Mid-Atlantic,” Union of Concerned Scientists (Jun 21, 2019), <https://www.ucsusa.org/about/news/communities-color-breathe-66-more-air-pollution-vehicles>.

¹⁷ See generally, EPA “Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts,” 430-R-21-003 (2021), available at: <https://www.epa.gov/cira/social-vulnerability-report>.

¹⁸ See *supra* at 1.

¹⁹ See EPA, “Timeline of Major Accomplishments in Transportation, Air Pollution, and Climate Change,” <https://www.epa.gov/transportation-air-pollution-and-climate-change/timeline-major-accomplishments-transportation-air> (last visited June 15, 2023).

²⁰ 549 U.S. 497.

²¹ “Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule,” 75 Fed. Reg. 25324 (May 2010), <https://www.govinfo.gov/content/pkg/FR-2010-05-07/pdf/2010-8159.pdf>.

²² Jack Ewing, “Electric Vehicles Could Match Gasoline Cars on Price This Year,” N.Y. Times, <https://www.nytimes.com/2023/02/10/business/electric-vehicles-price-cost.html> (Feb. 10, 2023).

²³ Proposed Rule at 29296 (citing International Energy Agency, “Global EV Outlook 2022,” p. 107, May 2022, <https://iea.blob.core.windows.net/assets/e0d2081d-487d-4818-8c59-69b638969f9e/GlobalElectricVehicleOutlook2022.pdf>).

²⁴ Zachary Shahan, “US Electric Car Sales Increased 65% in 2022,” CleanTechnica, <https://cleantechnica.com/2023/02/25/us-electric-car-sales-increased-65-in-2022/> (Feb. 25, 2023).

²⁵ Mark Kane, “US: All-Electric Car Sales Increased in q1 2023: 257,000 registrations,” INSIDEEVS, <https://insideevs.com/news/667516/us-electric-car-sales-2023q1/> (May 16, 2023).

The Proposed Rule meets the moment. It carefully balances current technological capacities, market trends, and the need to reduce emissions on the most accelerated timeline possible in order to protect public health and welfare, as the CAA demands. Because the average vehicle lifespan is 10 years, and Section 202(a) rules only apply to *new* vehicles, it is rational for GHG standards to become iteratively more stringent so that we can achieve our climate and pollution (and therefore our public health and welfare) goals on an adequate timeline and in response to the latest scientific data—as the Proposed Rule does. While we are also supportive of the proposed Alternative I — as we believe the statute, ambitious automaker commitments, and scientific data robustly support an even stronger standard — this comment narrowly focuses on the Proposed Rule’s central proposal, which has been the subject of MQD criticism.²⁶

A. The Major Questions Doctrine

The Major Questions Doctrine (“MQD”) traces its lineage to a pair of cases at the turn of the millennium, but has taken on a more aggressive (and controversial²⁷) form in recent years—culminating in last summer’s landmark decision, *West Virginia v. E.P.A.*²⁸

According to *West Virginia*, the MQD operates by subjecting “certain extraordinary cases” to a more demanding legal standard, in which regulations must demonstrate “something more than a merely plausible textual basis” in a statute in order to avoid invalidation.²⁹ In *West Virginia*, the majority refers to this heightened legal bar as “clear congressional authority”—but whatever its name, it marks a break from the past several decades of judicial practice. Under the once-regnant *Chevron* Doctrine,³⁰ courts deferred to agency legal interpretations about ambiguous statutes so long as those interpretations were reasonable. In other words, demonstrating “a merely plausible textual basis” was once all that an agency needed to do in order to survive legal challenge; now, if a court deems a rule to be a “major question,” that is no longer true.³¹

²⁶ See *supra* at 1.

²⁷ See, e.g., Jody Freeman and Matthew Stephenson, “The Anti-democratic Major Questions Doctrine,” *The Supreme Court Review* (forthcoming) (explaining that “the new MQD is more likely to weaken democratic accountability by shifting power from the elected branches to the courts, undermining transparency, and exacerbating the already excessive tendency toward minoritarian obstruction in Congress”) (available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4409630); Dan Deacon and Leah Litman, “The New Major Questions Doctrine,” *Virginia Law Rev.* (forthcoming) (“The Court’s new approach allows political parties and political movements more broadly to effectively amend otherwise broad regulatory statutes outside of the formal legislative process by generating controversy surrounding an agency policy... It supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. And it operates as a powerful deregulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective.”) (available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724). Criticism of the doctrine has spanned the political spectrum, and includes those sympathetic to the doctrine’s apparent goals. See *infra* at fn. 37.

²⁸ See *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022); and *West Virginia*. For a thorough review of the MQD up until *West Virginia*, see Natasha Brunstein & Donald L. R. Goodson, “Unheralded and Transformative: The Test for Major Questions After *West Virginia*,” 47 *Wm. & Mary Env’t L. & Pol’y Rev.* (forthcoming 2023) (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4300622).

²⁹ *W. Virginia* at 2609.

³⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court may limit or overturn *Chevron* in a case it will consider next term, *Loper Bright Enterprises v. Raimondo*. And even though *Chevron* formally remains good law, the Supreme Court has declined to invoke the doctrine for several years. See Thomas W. Merrill, “The Major Questions Doctrine: Right Diagnosis, Wrong Remedy,” 3 (January 2023) (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332).

³¹ As noted above (see *supra* at fn. 28), many have criticized this development for effectively shifting core policy making functions from the politically accountable branches — Congress and the presidency — to the unelected judiciary.

Specifically, Chief Justice John Roberts, who authored the *West Virginia* majority opinion, articulated a two-step test for resolving MQD cases. First, a court will determine whether a given exercise of regulatory power poses a “major question”—a task accomplished by assessing “the history and breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion.”³² Put differently: a “major question” exists, the Court suggested, when an agency (a) claims “to discover in a long-extant statute an unheralded power” that (b) represents “a transformative expansion in its regulatory authority.”³³ Second, and only if a court decides the first inquiry in the affirmative, an agency regulation will only survive if the government can point to “clear congressional authorization” for its interpretation.³⁴

With a single exception, noted below, every regulation that the Supreme Court has deemed to be a “major question” has also failed to meet the “clear congressional authority” standard (and so has been invalidated).³⁵ As a consequence, most MQD challenges hinge primarily on the first inquiry: whether the regulation at issue poses a “major question.”

Given the MQD’s infancy,³⁶ a degree of uncertainty remains about how future courts will conduct that threshold inquiry.³⁷ However, Natasha Brunstein and Donald L. R. Goodson have persuasively argued that “major question” status under *West Virginia* depends on a court concluding that both of two features are present: (1) the agency is effecting a “transformative expansion in its regulatory authority,”³⁸ in a manner reminiscent of past MQD cases; and (2) the agency is deploying its authority in an “unheralded”³⁹ or “unprecedented”⁴⁰ manner that strays from the agency’s own past practice.⁴¹

As to the first, “transformative expansion” prong, the Supreme Court’s MQD line of cases provide a sense of the relevant indicia for concluding that an agency has overstepped, including: whether the agency is acting outside of its traditional area of expertise;⁴² whether the agency is seeking to exert control over a new or

³² *W. Virginia* at 2608 (internal citations omitted).

³³ *Id.* at 2610 (internal citations omitted).

³⁴ Which, as noted above, requires “something more than a merely plausible textual basis.” *Id.* at 2609 (internal citations omitted).

³⁵ That exception came in *King v. Burwell*, 576 U.S. 473 (2015). Of the twenty-one lower court decisions to grapple with the doctrine since last June, only one upheld the agency action at issue under the second, “clear congressional authorization” step of the MQD inquiry. See Natasha Brunstein, “Taking Stock of West Virginia on its One-Year Anniversary,” *Yale J. Reg.*, <https://www.yalejreg.com/nc/taking-stock-of-west-virginia-on-its-one-year-anniversary-by-natasha-brunstein/> (June 18, 2023).

³⁶ No Supreme Court majority opinion had ever used the phrase “Major Questions Doctrine” until *West Virginia*.

³⁷ Even some sympathetic to the doctrine’s apparent goals have criticized Roberts’s *West Virginia* opinion for articulating a “problematic” standard. See, e.g., Merrill at 24; Randolph J. May, “A Critique of the ‘Congressional Dysfunction’ Critique of the Major Questions Doctrine,” *The Federalist Society* (Jan. 23, 2023), <https://fedsoc.org/commentary/fedsoc-blog/a-critique-of-the-congressional-dysfunction-critique-of-the-major-questions-doctrine> (“I admit there are many aspects of the major questions doctrine worthy of debate, including, perhaps foremost, the feasibility of distinguishing, on a principled basis, between major and non-major questions”).

³⁸ *W. Virginia* at 2610.

³⁹ *Ibid.*

⁴⁰ *Id.* at 2611.

⁴¹ See Brunstein & Goodson, “Unheralded and Transformative: The Test for Major Questions After West Virginia,” 47 *Wm. & Mary Env’t L. & Pol’y Rev.* (forthcoming 2023) (working paper available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4300622).

⁴² See *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (“The Government’s interpretation of the prescription requirement also fails under the objection that the Attorney General is an unlikely recipient of such broad authority, given the Secretary’s primacy in shaping medical policy under the CSA, and the statute’s otherwise careful allocation of decisionmaking powers”); *NFIB* at 665 (“The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures... And no provision of the Act addresses public health more generally, which falls outside of OSHA’s sphere of expertise”); *W. Virginia* at 2612–13 (“There is little reason to think Congress assigned such decisions to the Agency.

greatly expanded class of private entities or persons;⁴³ whether the agency is relying on a little-used statutory provision;⁴⁴ whether the rule creates a program that Congress has “conspicuously and repeatedly declined to enact itself”;⁴⁵ and whether the regulation at issue is of vast “economic and political significance.”⁴⁶

The second feature that determines a regulation’s “major question” status, as various legal commentators have observed, is its novelty relative to past agency practice.⁴⁷ For example, the Supreme Court invalidated the Centers for Disease Control’s Covid-19 eviction moratorium under the MQD partly because “no regulation premised on [the statutory provision] has even begun to approach the size or scope of the eviction moratorium,” since that provision’s enactment.⁴⁸ By contrast, a past pattern of analogous agency conduct — in which the agency has previously deployed comparable regulatory mechanisms or imposed similar compliance costs on private entities — weighs in the agency’s favor under the MQD.

It is also important to appreciate what *West Virginia* (and its predecessors) did not say—especially about the role of a rule’s “economic and political significance” in the MQD analysis. As one forthcoming law review article keenly observes, “in no case has economic significance or political controversy *alone* been enough to trigger application of the MQD.”⁴⁹ Justice Gorsuch perhaps argues for such a standard in his *West Virginia* concurrence, but that opinion was joined by only one other justice (and so does not constitute binding legal precedent).⁵⁰ Rather, the case law makes clear that in order to implicate the doctrine, a rule must be of vast economic and political significance *and* meet the MQD’s other “contextual factors,” described above.⁵¹

Nor did *West Virginia* hold that any regulation touching on climate change constitutes a major question.⁵² In fact, that decision never suggested that the EPA lacks the power to regulate carbon emissions from power

For one thing, as EPA itself admitted when requesting special funding, ‘Understand[ing] and project[ing] system-wide ... trends in areas such as electricity transmission, distribution, and storage’ requires ‘technical and policy expertise *not* traditionally needed in EPA regulatory development.’ ... ‘When [an] agency has no comparative expertise’ in making certain policy judgments, we have said, ‘Congress presumably would not’ task it with doing so’).

⁴³ See *Utility Air Regulation Group v. E.P.A.*, 573 U.S. 302, 322 (2014).

⁴⁴ *W. Virginia* at 2609–10.

⁴⁵ *W. Virginia* at 2610.

⁴⁶ See, e.g., Alabama Assoc. at 2489; *W. Virginia* at 2608. Some commentators prefer to conceive of this as a third prong in the “major question” status inquiry. See Merrill at 6.

⁴⁷ See, e.g., Dan Deacon and Leah Litman, “The New Major Questions Doctrine,” *Virginia Law Rev.* (forthcoming) 49 (available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724); Richard L. Revesz and Max Sarinsky, “Regulatory Antecedents and the Major Questions Doctrine,” *Gtown Enviro. L. Rev.* (forthcoming) (available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4291030).

⁴⁸ Alabama Assoc. at 2489.

⁴⁹ Brianna J. Gorod et al., “Major Questions Doctrine: An Extraordinary Doctrine for ‘Extraordinary’ Cases,” 19 *Wake Forest L. Rev.* (forthcoming) 19 (available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4419602) (emphasis added).

⁵⁰ *W. Virginia* at 2620–21 (Gorsuch, J., concurring) (“*First*, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great ‘political significance,’ ... *Second*, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate ‘a significant portion of the American economy’”).

⁵¹ See Gorod et al. at 18.

⁵² Commentators have suggested as much across various regulatory proposals. See e.g., Letter from Attorney General Patrick Morrisey, West Virginia, et al. to Chair Rostin Behnam, CFTC, re: Comments on the CFTC’s “Climate-Related Financial Risk RFI” by the Attorneys General of the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming (Oct. 7, 2022), [comments.cftc.gov/PublicComments/ViewComment.aspx?id=70868&SearchText=](https://www.comments.cftc.gov/PublicComments/ViewComment.aspx?id=70868&SearchText=). In comments to a Federal Acquisition Regulatory Council proposal requiring certain large federal contractors to make limited disclosures about carbon emissions, the Washington Legal Foundation cited *West Virginia* for the proposition that “climate policy is the exclusive prerogative of Congress”—concluding that executive action touching on the issue therefore poses a “major question.” Comment of Washington Legal Foundation, “FEDERAL ACQUISITION REGULATION: DISCLOSURE

plants under the relevant section of the CAA—it merely held that the Clean Power Plan’s particular method for doing so was impermissible.⁵³

Finally, note that even if a court concludes that an agency action constitutes a “major question,” the court’s work is not complete. The regulation can still survive if the agency can demonstrate “clear congressional authority” for its interpretation that goes beyond “a merely plausible textual basis.”⁵⁴ To date, most regulations that the Supreme Court has characterized as “major questions” have failed to meet this standard. But in *King v. Burwell*, a majority of the Court led by Chief Justice Roberts upheld an Internal Revenue Service interpretation concerning Affordable Care Act tax credits, even after finding that the action effectively qualified as a major question.⁵⁵

II. The Proposed Rule, if finalized, will survive scrutiny under the Major Questions Doctrine.

As explained below, the Proposed Rule does not pose a major question under the Supreme Court’s MQD precedents. But even if a court found otherwise, the Proposed Rule should still survive because the EPA can demonstrate “clear congressional authority” for its proposal.

A. The Proposed Rule does not pose a “major question” under *West Virginia*.

Above we explained that whether a rule poses a major question hinges on two main inquiries: (1) whether the action seeks to transform the nature of the agency’s regulatory power; and (2) whether the action represents a stark departure from past regulatory practice. Here, both inquiries weigh against a finding of “major question” status.

1. *The Proposed Rule does not seek to transformatively expand the EPA’s authority.*

A likely source of MQD objections to the Proposed Rule stems from the EPA’s projections about EV uptake in the rule’s wake.⁵⁶ According to the agency, if the Proposed Rule were to go into effect, EVs could comprise 67 percent of new light- and medium-duty vehicle production for Model Year (“MY”) 2032, based on the EPA’s modeling of automakers’ possible cost-effective compliance pathways.⁵⁷

But it is crucial to recognize that projection does not attribute this uptick exclusively (or even primarily) to the Proposed Rule. In fact, according to the EPA and outside analysts, most of the projected progress on EV uptake will result from market demand and the IRA’s historic set of tax incentives, which are already catalyzing private sector action.⁵⁸ Consequently, any claim that the Proposed Rule’s impact on future EV sales

OF GREENHOUSE GAS EMISSIONS AND CLIMATE-RELATED FINANCIAL RISK,” 1 (Feb. 13, 2023), <https://www.regulations.gov/comment/FAR-2021-0015-0158>.

⁵³ See *W. Virginia* at 2615 (“the only interpretive question before us, and the only one we answer, is more narrow: whether the ‘best system of emission reduction’ identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no”).

⁵⁴ *W. Virginia* at 2609.

⁵⁵ *King* at 485 (“In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation... This is one of those cases”) (internal citations omitted).

⁵⁶ See Jennifer Hijazi, “Biden Tailpipe Emission Rules Face ‘Major Questions’ Legal Wave,” *Bloomberg Law* (April 14, 2023), <https://news.bloomberglaw.com/environment-and-energy/biden-tailpipe-emission-rules-face-major-questions-legal-wave> (quoting a statement from the American Petroleum Institute that the “deeply flawed proposal is a major step toward a ban on the vehicles Americans rely on”).

⁵⁷ Proposed Rule at 29329.

⁵⁸ As discussed below, predictable technological adoption dynamics will also contribute.

will qualify it for MQD scrutiny must contend with the fact that most of the likely boost to EV sales described in the rule is due mainly to factors beyond the forthcoming regulation.

According to EPA estimates, if the agency declines to finalize any new tailpipe emissions regulations at all — under what the agency calls its *central* “No Action” baseline — EV sales will nonetheless comprise approximately 39 percent of new car sales by MY 2032.⁵⁹ As the EPA itself acknowledges, this may prove a conservative estimate of IRA and other non-rule impacts on EV adoption.⁶⁰ For example, a synthesis of automakers’ public EV commitments to date compiled by the International Energy Agency, which the EPA declined to incorporate into its projections, suggested that EVs would comprise 50 percent of new car sales by 2030 (again, even in the Proposed Rule’s absence).⁶¹ Nor, in reaching its central No Action baseline, did the EPA take into account certain new state level policies, like California’s, which may drive EV penetration even further.⁶²

Moreover, as other advocates have noted elsewhere, adoption of innovative technologies does not follow a linear trajectory, but rather “an S-shaped curve, with the adoption rate increasing more rapidly once a critical mass is reached—as we are now seeing with electric vehicles.”⁶³ As a result, now that the United States has crossed the EV “tipping point,”⁶⁴ we would expect steep growth over the next several years regardless of the EPA’s regulatory path.

Outside analyses pre-dating the Proposed Rule have also proved more bullish than the EPA’s central No Action scenario. In 2021 — prior to the IRA’s passage — IHS Markit “predicted a nearly 40 percent U.S. [Private] EV share” of car sales in 2030, according to the Proposed Rule’s literature review.⁶⁵ (In other words, what the EPA projects will occur after accounting for generous IRA tax credits, IHS Markit estimated would take place even without those historic incentives.) Post-IRA, Bloomberg New Energy Finances estimates the 2030 EV share of new car sales at 52 percent by 2030.⁶⁶ The International Council on Clean Transportation and Energy Innovation concluded that share will reach between 56-67 percent by 2032.⁶⁷ Indeed, the Proposed Rule acknowledges the inherent uncertainty involved in projecting into the future.⁶⁸ As a result, the

⁵⁹ Proposed Rule at 29329, “Fleet BEV Penetration Rates, by Body Style, Under the No Action Case,” Table 81. As discussed below, the EPA also conducted alternate No Action sensitivity cases.

⁶⁰ Proposed Rule at 29296.

⁶¹ See Proposed Rule at 29296 (“[F]or purposes of this proposal we have not integrated manufacturer announcements directly into our modeling of the No Action baseline”) (citing International Energy Agency, “Global EV Outlook 2022,” p. 107, May 2022, <https://iea.blob.core.windows.net/assets/e0d2081d-487d-4818-8c59-69b638969f9e/GlobalElectricVehicleOutlook2022.pdf>).

⁶² Proposed Rule at 29296 (“[O]ur analysis does not include the effect of state-level policies whereas projections from other sources may include those policies. We did not include these policies because many are still not in effect; however, we do anticipate that in the next decade, state level policies may play an important role in driving BEV penetration.”).

⁶³ See Proof Brief of the Institute for Policy Integrity, *Texas v. E.P.A.*, D.C. Cir. No. 22-1031 8 (Mar. 3, 2023), [https://policyintegrity.org/documents/Amicus Brief of the Institute for Policy Integrity 4.pdf](https://policyintegrity.org/documents/Amicus%20Brief%20of%20the%20Institute%20for%20Policy%20Integrity%204.pdf) (citing Everett M. Rogers, *Diffusion of Innovations* 344 (5th ed. 2003) and Tom Randall, *US Crosses the Electric-Car Tipping Point for Mass Adoption*, Bloomberg (July 9, 2022), <https://www.bloomberg.com/news/articles/2022-07-09/us-electric-carsales-reach-key-milestone> (discussing the S-shaped technology adoption curve and noting that the United States has crossed the 5% market share “tipping point” that triggers “rapidly accelerating demand”)).

⁶⁴ See Randall.

⁶⁵ Proposed Rule at 29189 (citing IHS Markit, “US EPA Proposed Greenhouse Gas Emissions Standards for Model Years 2023–2026; What to Expect,” August 9, 2021. Accessed on March 9, 2023 at <https://www.spglobal.com/mobility/en/research-analysis/us-epa-proposed-greenhouse-gas-emissions-standards-my2023-26.html>).

⁶⁶ Proposed Rule at 29189 (citing Bloomberg New Energy Finance (BNEF), “Electric Vehicle Outlook 2022,” Long term outlook economic transition scenario).

⁶⁷ Proposed Rule at 29189 (citing International Council on Clean Transportation, “Analyzing the Impact of the Inflation Reduction Act on Electric Vehicle Uptake in the US,” ICCT White Paper, January 2023. Available at <https://theicct.org/wp-content/uploads/2023/01/ira-impact-evs-us-jan23.pdf>).

⁶⁸ Proposed Rule at 29296.

agency conducted several sensitivity cases beyond the central No Action baseline, modeling various alternate “No Action” assumptions (for example, likely forthcoming state policies) that predicted a range of EV shares—in one of these alternate No Action cases, EV penetration reached as high as 66 percent in MY 2032.⁶⁹

Isolating the Proposed Rule’s contribution to EV penetration projections reveals that the Proposed Rule follows a well-marked trail. Past GHG tailpipe standards have also projected boosts to EV uptake. The 2012 GHG tailpipe regulations, for example, were projected to boost EV production from 0 percent to 2 percent.⁷⁰ And the EPA estimated that the 2021 GHG emissions rule for passenger vehicles would yield an increase of 11 points for EV production as a share of overall auto manufacturing by MY 2026 (from a “no action” projection of 6 percent penetration to a projected 17 percent under the standards).⁷¹

Other metrics offer a fuller sense of the Proposed Rule’s relative modesty. New York University School of Law’s Institute for Policy Integrity (“IPI”) used the data presented in Figures 9–1 and 9–2 of the draft Regulatory Impact Assessment to calculate how the proposal will affect the makeup of the total motor vehicle fleet on the road (as opposed to just that of new car sales in a given model year).⁷² The analysis concludes that under a No Action baseline, EVs will comprise 15 percent of automobiles on the road in 2032; by comparison, a finalized version of the Proposed Rule, IPI calculates, will result in EVs comprising 21 percent of the on-road fleet that year—an increase of just 6 points.⁷³

In short, the Proposed Rule hardly represents the harbinger of revolution that its critics claim. This is true beyond the headline-grabbing EV-growth estimates as well. Recall that the Supreme Court’s MQD jurisprudence has identified a set of characteristics that suggest an agency is impermissibly seeking to expand its regulatory authority, including: straying outside of the agency’s sphere of expertise; seeking to exert agency authority over a new class of regulated entities; or relying on a little-used statutory provision.⁷⁴ None of those features apply to the Proposed Rule, which concerns a subject of core EPA expertise (vehicle emissions standards, which Congress has tasked the agency with setting since the 1970s), applies to a traditional set of regulated entities (automakers), and is premised on one of the landmark provisions of the Clean Air Act (Section 202(a)).

Finally, suggestions by some opponents that the EPA must promulgate its emissions standards in coordination with the National Highway Traffic Safety Administration (“NHTSA”),⁷⁵ which sets fuel-economy standards but is prohibited from taking EVs’ fuel economy into account in setting those standards, are wrong. While it is true that the two agencies have jointly promulgated GHG and fuel economy regulations in the past, there is no statutory requirement that they do so—and the agencies did not do so in 2021 when

⁶⁹ *Ibid.*

⁷⁰ EPA, “Regulatory Impact Analysis: Final Rulemaking for 2017–2025 Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards,” 3-48 tbl.3.5-19, 3-54 tbl.3.5-25 (Aug. 2012), <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100EZ11.PDF?Dockey=P100EZ11.PDF> (hereafter “2012 Final Rule RIA”).

⁷¹ EPA, “Regulatory Impact Analysis: Final Rulemaking for Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards,” 4–29, Table 4-31 (2021), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1013ORN.pdf> (hereafter “2021 Final Rule RIA”).

⁷² The full analysis will be available in the Institute for Policy Integrity’s forthcoming comment to the rulemaking docket; *see also* EPA, “Draft Regulatory Impact Analysis: Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles,” 9–2, Figures 9–1, 9–2 (April 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2022-0829-0360> (hereafter “Proposed Rule RIA”).

⁷³ *Ibid.*

⁷⁴ *See* discussion *supra* at 5–6.

⁷⁵ *See, e.g.*, Private Petitioners’ brief, *Texas v. E.P.A.*, D.C. Cir. No. 22-1031.

the EPA promulgated 202(a) GHG regulations for MYs 2023-2026.⁷⁶ In fact, the Supreme Court has described the EPA’s authority to regulate carbon emissions from motor vehicles as “a statutory obligation wholly independent” from NHTSA’s energy efficiency mandate regarding mileage requirements.⁷⁷

2. *The Proposed Rule does not mark a novel use of the EPA’s regulatory authority.*

A review of the agency’s past actions also weighs in the agency’s favor under the MQD. The EPA has deployed the same suite of regulatory mechanisms — for example, its reliance on fleetwide averages — for decades.⁷⁸ As the Proposed Rule does for zero emission vehicles, past Section 202(a) standards have encouraged automakers to develop and deploy cutting edge technologies that fulfill the statute’s “public health and welfare” mandates.⁷⁹ And as noted above, the Proposed Rule’s modest effects on EV growth find ample precedent in previous 202(a) GHG regulations.⁸⁰

Perhaps most importantly, the Proposed Rule’s projected compliance costs fall well-within the historical norms for 202(a) GHG standards. The EPA estimates that the Proposed Rule will cost automakers approximately \$15 billion on an annualized basis.⁸¹ Those costs closely track the annualized automaker costs of the 2021 GHG tailpipe rule, which fall between \$13.5-14.6 billion (adjusted for inflation).⁸² An apples-to-apples comparison with the agency’s 2010 and 2012 GHG rules is difficult because those regulatory impact analyses report cost estimates differently; still, a rough-hewn sense of the 2012 rule’s compliance burden can be drawn from the agency’s *overall* cost estimates on an annualized basis, between \$7.7-12.9 billion (adjusted for inflation).⁸³ Finally, as the following table shows, the Proposed Rule’s projected industry average per vehicle cost increase actually falls below similar estimates from past GHG rules.

Note that previous GHG rules only encompassed carbon emissions (the Proposed Rule additionally sets criteria pollutant standards) and targeted a narrower class of vehicles (light-duty, whereas the Proposed Rule also targets medium-duty vehicles). That a multi-pollutant rule like the Proposed Rule nonetheless manages to closely track previous compliance cost figures suggests the EPA — far from charting a newly ambitious course — is diligently attempting to meet its statutory obligations without straying from its historical approach.

⁷⁶ “Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards,” 86 Fed. Reg. 74434 (Dec. 2021), <https://www.federalregister.gov/documents/2021/12/30/2021-27854/revised-2023-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-standards>.

⁷⁷ *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007). *See also* *Coal. for Responsible Regul., Inc. v. E.P.A.*, 684 F.3d 102, 127 (D.C. Cir. 2012) (explaining why NHTSA’s regulatory obligations do not affect the EPA’s obligations under the CAA); Proposed Rule at fn. 388; Dan Farber, “The Car Rule and the Major Questions Doctrine,” *Legal Planet* (April 24, 2023), <https://legal-planet.org/2023/04/24/the-car-rule-and-the-major-questions-doctrine/>; Proof Brief of the Institute for Policy Integrity at 10–11.

⁷⁸ *See* Proposed Rule at 29233 (“Congress also directed EPA to phase-in certain section 202(a) standards, *see* CAA section 202(g), which confirms EPA’s authority to promulgate standards, such as fleet averages, phase-ins, and averaging, banking, and trading programs, that are fulfilled through compliance over an entire fleet, or a portion thereof, rather than through compliance by individual vehicles”). *See also* EPA’s Proof Answering Brief, *Texas v. E.P.A.*, D.C. Cir. No. 22-1031 10–18 (Feb. 24, 2023), <https://www.edf.org/sites/default/files/2023-02/Texas%20-%20EPA%20Opening%20Brief.pdf>; Proof Brief of State and Public Interest Repondent-Intervenors, *Texas V. E.P.A.*, D.C. Cir. 22-1031 6–19 (Mar. 21, 2023), <https://www.edf.org/sites/default/files/2023-03/Texas-%20NGO%20and%20State%20brief.pdf>; Proof Brief of the Institute for Policy Integrity at 8–10.

⁷⁹ *See infra* at 13.

⁸⁰ *See supra* at 9.

⁸¹ Proposed Rule RIA at xlvii, Table 5.

⁸² 2021 Final Rule RIA at 6–2, Table 6–1.

⁸³ 2012 Final Rule RIA at ii, Table 1. The 2010 rule’s regulatory impact analysis does not appear to report either total or vehicle technology cost estimates on an annualized basis.

CAA §202(a) passenger vehicles GHG emissions rules ⁸⁴	Vehicle technology costs, equivalent annualized values (2020 dollars) ⁸⁵	Annual industry average per vehicle cost increase (2020 dollars) ⁸⁶
2023 Proposed Rule ⁸⁷	\$15 billion ⁸⁸	\$1,164 in 2032 ⁸⁹
2021 GHG Final Rule ⁹⁰	\$13.5-14.6 billion ⁹¹	\$1,207 in 2026 ⁹²
2012 GHG Final Rule ⁹³	— ⁹⁴	\$2,535 in 2025 ⁹⁵
2010 GHG Final Rule ⁹⁶	— ⁹⁷	\$1,401 in 2016 ⁹⁸

Given the importance that the MQD places on regulatory antecedents,⁹⁹ the agency might consider including in its final rule a more sophisticated version of the above chart (or an analogous qualitative description), which compares the agency’s GHG tailpipe rules (and perhaps its criteria pollutant rules) across a range of

⁸⁴ The table does not include deregulatory GHG rules, namely “The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,” 85 Fed. Reg. 24174 (April 2020), <https://www.govinfo.gov/content/pkg/FR-2020-04-30/pdf/2020-06967.pdf>, which the EPA has since rescinded. Because the SAFE Rule would have relaxed emissions standards, it would have reduced automaker compliance costs. NHTSA-EPA, “Final Regulatory Impact Analysis: The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021-2026 Passenger Cars and Light Trucks,” 9 (March 2020), https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/final_safe_fria_web_version_200701.pdf.

⁸⁵ To facilitate comparison across rules, we have adjusted figures from past rules for inflation.

⁸⁶ To facilitate comparison across rules, we have adjusted figures from past rules for inflation.

⁸⁷ 88 Fed. Reg. 29184 (April 2023).

⁸⁸ Proposed Rule RIA at 10–1, Table 10–1.

⁸⁹ Proposed Rule RIA at xlvi, Table 6; 13–25, Table 13–45 (cars and trucks).

⁹⁰ “Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards,” 86 Fed. Reg. 74434 (Dec. 2021), <https://www.federalregister.gov/documents/2021/12/30/2021-27854/revised-2023-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-standards>.

⁹¹ 2021 Final Rule RIA at 6–2, Table 6–1.

⁹² 86 Fed. Reg. at 74483 (tbl. 30).

⁹³ “Final Rule for Model Year 2017 and Later Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards,” 77 Fed. Reg. 62623 (Oct. 2012), <https://www.federalregister.gov/documents/2012/10/15/2012-21972/2017-and-later-model-year-light-duty-vehicle-greenhouse-gas-emissions-and-corporate-average-fuel>.

⁹⁴ See *supra* at fn. 83 and preceding text.

⁹⁵ 77 Fed. Reg. at 62865 (tbl. III-34).

⁹⁶ “Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule,” 75 Fed. Reg. 25324 (May 2010), <https://www.govinfo.gov/content/pkg/FR-2010-05-07/pdf/2010-8159.pdf>.

⁹⁷ See *supra* at fn. 83 and preceding text.

⁹⁸ 75 Fed. Reg. at 25463 (tbl. III.D.6–4).

⁹⁹ Revesz and Sarinsky at 2 (“[T]he concept of regulatory novelty plays an important role in the doctrine under both Supreme Court precedent and lower-court application. If an action represents a marked and substantial departure from anything the agency has done before (i.e., is “unheralded”), then this could favor the application of the major questions doctrine to strike down the challenge action—so long as the doctrine’s other prongs are met. If, however, the agency can point to analogous exercises of authority in the past, such a showing could strongly support the agency’s statutory authority for the challenged action”).

metrics. Such an analysis would help demonstrate to a non-expert reviewing court that the Proposed Rule does not pose an impermissibly “unheralded” or “unprecedented” exercise of agency authority.

B. Even if the Proposed Rule does pose a “major question,” Congress has provided clear authorization affirming the EPA’s action.

For all the above reasons, the Proposed Rule does not pose a “major question.” But even if a court found otherwise, the Proposed Rule would still survive scrutiny at the final step of the MQD inquiry: whether the agency can demonstrate “clear congressional authority” that goes beyond a “merely plausible textual basis.”¹⁰⁰

As a preliminary matter, the plain text of the CAA appears to unambiguously suggest that the EPA can rely on electrification in setting Section 202(a) regulations for “new motor vehicles.”¹⁰¹ The statute defines “motor vehicle,” as “any self-propelled vehicle designed for transporting persons or property on a street or highway.”¹⁰² Note that definition omits any reference to a specific type of technology, like the internal combustion engine. Section 202 also makes clear that the standards are to apply to vehicles whether they are “designed as complete systems or incorporate devices to prevent or control” pollution—language that clearly anticipates vehicles, like EVs, designed as complete systems to prevent pollution.¹⁰³ Indeed, given Section 202(a)’s charge to protect the “public health and welfare,” it would arguably be arbitrary (and therefore unlawful) for EPA to *fail* to facilitate the adoption of zero-emission technology.

In addition to this plain-faced textual basis for EPA’s authority, Congress has provided clear authorization affirming the EPA’s action in at least two additional ways.

First, legislative history from the 1970 CAA amendments suggests Congress anticipated that the EPA would use its authorities to reduce air quality hazards, including by encouraging the development and adoption of technologies beyond the internal combustion engine.¹⁰⁴ As the agency notes in its Proposed Rule, the Senate Report accompanying those amendments explained that the EPA “is expected to press for the development and application of improved technology rather than be limited by that which exists.”¹⁰⁵ That report further added that motor vehicle emissions standards should be “a function of the degree of [emission] control required, not the degree of technology available today.”¹⁰⁶ And so Congress also eventually granted the EPA the power to fund “low emission alternatives to the present internal combustion engine.”¹⁰⁷ It additionally, in Section 202(e), permitted the EPA to certify new types of motor vehicles based on “new power source[s] or propulsion system[s].”¹⁰⁸ Indeed, electric vehicles, which had proved popular among early car consumers during the first years of the 20th century, were a topic of renewed national interest (thanks to oil price spikes and resulting gas shortages) during the period that Congress was debating the CAA.¹⁰⁹ As a D.C. Circuit panel summarized in 1973, “[i]t is clear from the legislative history that Congress expected the Clean Air Amendments to force the industry to broaden the scope of its research—to study new types of engines and new control systems.”¹¹⁰

¹⁰⁰ W. Virginia at 2609.

¹⁰¹ See 42 U.S.C. §7521.

¹⁰² 42 U.S.C. §7550(2).

¹⁰³ 42 U.S.C. §7521(a)(1).

¹⁰⁴ See generally, EPA’s Proof Answering Brief at 7–10.

¹⁰⁵ S. Rep. No. 91–1196, at 24–27 (1970); see also Proposed Rule at 29233.

¹⁰⁶ S. Rep. No. 91–1196, at 24.

¹⁰⁷ 42 U.S.C. §7404(a)(2)(B).

¹⁰⁸ 42 U.S.C. §7521(e).

¹⁰⁹ U.S. Dep’t of Energy, “The History of the Electric Car,” <https://www.energy.gov/articles/history-electric-car> (last accessed May 25, 2023).

¹¹⁰ *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 634–35 (D.C. Cir. 1973) (citing 116 Cong. Rec. 32,906 (1970) (Sen. Muskie); H.R.Rep. No. 91-1146, 91st Cong., 2d Sess. 6 (1970)).

As a result, 202(a) standards have historically served a technology-forcing function, pushing the market to develop and adopt innovative technologies that will better serve the public health and welfare. In the 1970's and 1980's, for example, the EPA used its Section 202(a) authority to facilitate uptake of a then-nascent technology: catalytic converters, now commonplace.¹¹¹ The fact that, some forty-plus years later, the innovation has shifted to zero emissions engines does not change the fundamental tenor of the legal analysis or EPA's core statutory responsibilities.

Second, as the EPA also notes in its Proposed Rule, the IRA includes language reaffirming the core holding of *Massachusetts v. E.P.A.* and the agency's subsequent scientific conclusions: that the EPA is obligated to regulate GHGs as air pollutants under the CAA, and specifically to regulate such emissions from mobile sources.¹¹² In the IRA, Congress appropriated funds for states "to adopt and implement greenhouse gas and zero-emission standards for mobile sources pursuant to §177 of the Clean Air Act (42 U.S.C. 7507)."¹¹³ The CAA cross-reference in this IRA provision holds important implications. CAA §177 allows states, which are normally preempted from setting their own motor vehicle emissions standards under the CAA, to adopt California's standards (for which the EPA must waive pre-emption unless specific findings are made).¹¹⁴ So to expressly fund "greenhouse gas and zero emission" activities under §177 necessarily implies that these are the types of standards states would normally be preempted from pursuing because the CAA reserves their regulation to EPA. The IRA, then, necessarily implies that GHGs are regulable under the CAA.¹¹⁵ Indeed, during consideration and passage of the IRA, key drafters explicitly stated on the record their understanding that the IRA's provisions statutorily affirmed the Supreme Court's *Mass v. EPA* decision.¹¹⁶

¹¹¹ See "Timeline of Major Accomplishments in Transportation, Air Pollution, and Climate Change," U.S. Enviro. Prot. Agency, <https://www.epa.gov/transportation-air-pollution-and-climate-change/timeline-major-accomplishments-transportation-air> (last visited June 15, 2023).

¹¹² See generally, Greg Dotson and Dustin J. Maghamfar, "THE CLEAN AIR ACT AMENDMENTS OF 2022: CLEAN AIR, CLIMATE CHANGE, AND THE INFLATION REDUCTION ACT," 53 Enviro. L. Rep. 10017, 10030 (2023), <https://www.eli.org/sites/default/files/files-pdf/53.10017.pdf>.

¹¹³ IRA, Pub. L. No. 117-169, §60105(g), 136 Stat. 1818 (2022).

¹¹⁴ See 42 U.S.C. §7507.

¹¹⁵ See Dotson and Maghamfar at 10030 ("If GHGs were not considered to be air pollutants or EPA could not regulate GHGs from motor vehicles pursuant to the CAA, then §177 would not apply to state GHG and zero emission standards because such standards for motor vehicles would not be preempted by §209(a)").

¹¹⁶ See Lisa Friedman, "Democrats Designed the Climate Law to Be a Game Changer. Here's How," *N.Y. Times*, <https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html> (Aug. 22, 2022) (quoting Senate Environmental and Public Works Chairman Tom Carper, a lead drafter, explaining that "[t]he language, we think, makes pretty clear that greenhouse gases are pollutants under the Clean Air Act"). See also Proposed Rule at 29233 (quoting House Energy and Commerce Chairman Frank Pallone explaining that the IRA "reinforces the longstanding authority and responsibility of [EPA] to regulate GHGs as air pollutants under the Clean Air act" and "the IRA clearly and deliberately instructs EPA to use" this authority by "combin[ing] economic incentives to reduce climate pollution with regulatory drivers to spur greater reductions under EPA's CAA authorities"); 168 Cong. Rec. E868-02 (daily ed. Aug. 12, 2022) (statement of Rep. Pallone); 168 Cong. Rec. E879-02, at 880 (daily ed. Aug. 26, 2022) (statement of Rep. Pallone).

III. Conclusion

Suggestions that the Proposed Rule, if finalized, will pose a “major question” are misguided. The Proposed Rule’s impact on the motor vehicle fleet, especially as concerns projected EV uptake, has been overblown. And its compliance costs and regulatory mechanisms closely follow in the footsteps of past 202(a) rulemakings. As a result, we urge the EPA, at minimum, to finalize the rule as proposed.

Sincerely,

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