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Putting the Brakes on California's Emissions Standards: An Analysis of the Legal Challenges California's Advanced Clean Cars II Standards Will Face

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ABSTRACT

This Note discusses the legal implications of California's Advanced Clean Cars II vehicle-emissions standards. These standards, which would affect vehicle model years 2026 through 2035, seek to eliminate the sale of new gasoline-powered vehicles in favor of only selling electric, zero-emission vehicles. In light of the Supreme Court's recent decision in *West Virginia v. EPA*, this type of "generation-shifting" plan stands on broken ground due to the applicability of the Major Questions Doctrine. The agency action here—EPA approval of a Clean Air Act §7543 waiver—is exactly the type of "extraordinary case" that the Court must strike down in order to ensure the separation of powers and protect Congress' policy-making authority from administrative overreach. Further, such an action by the EPA would violate the scope of the agency's authority as already outlined by the Supreme Court in the landmark case of *Massachusetts v. EPA*. This Note recommends that California, and ultimately all states, look to alternative ways to reach climate-change goals; one such way being the implementation of a sin tax on the sale of gasoline-powered vehicles. By enacting a more creative solution to reducing vehicle emissions, states can avoid the significant legal concerns and, more importantly, reduce their carbon footprint to reach their climate change goals.

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I. INTRODUCTION

California's Advanced Clean Cars II ("ACCII") Program, an extraordinary set of new vehicle emissions standards for vehicle model years 2026 through 2035,[1] creates more problems than it proposes to solve. The standards aim to address the effects of climate change and global warming by reducing the amount of carbon emissions that come from cars.[2] In furtherance of this goal, the ACCII standards call for an

[1] *Advanced Clean Cars II Regulations: All New Passenger Vehicles Sold in California To Be Zero Emissions by 2035*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-ii (last visited Nov. 5, 2023) ("The Advanced Clean Cars II regulations will rapidly scale down light-duty passenger car, pickup truck and SUV emissions starting with the 2026 model year through 2035.").

[2] *See Final Environmental Analysis for the Advanced Clean Car II Program*, CAL. AIR RES. BD. (Aug. 24, 2022), https://ww2.arb.ca.gov/rulemaking/2022/advanced-clean-cars-ii (select

expeditious reduction in the amount of new gasoline-powered cars sold in California from 2026 through 2034.[3] Then, in the final year (2035), just a short ten years after the standards would theoretically be enacted, the ACCII standards call for the complete prohibition on the sale of new gasoline-powered cars in California.[4]

Both the public and the media have overwhelmingly praised the ACCII standards as California's latest innovative attempt to combat climate change and global warming,[5] but this coverage ignores the legal implications of the ACCII standards. This Note describes precisely what these legal consequences are. Although California's attempt to combat global warming and climate change is laudable, the State's chosen course of action creates legal issues that cannot be ignored.

The Environmental Protection Agency ("EPA" or "Agency") must grant a waiver for California to enact these standards. So, at the heart of the issue is whether the EPA should grant this waiver. Because of the legal implications, the answer must be no. Although the complete prohibition contemplated by the ACCII standards may combat the environmental issues that California purports to face, that does not give the State free reign to regulate however it pleases.

There are two main legal reasons why the EPA is limited in its authority and, therefore, must deny the waiver for the ACCII standards. First, the agency power required to approve such an extraordinary waiver would violate the Major Questions Doctrine. And second, approving a waiver for the ACCII standards would exceed the scope of the EPA's statutory authority as interpreted by the Supreme Court in *Massachusetts v. EPA*.

II. BACKGROUND

A. The Clean Air Act and the Regulation of Greenhouse Gas Emissions

1. The EPA's Authority to Regulate Greenhouse Gas Emissions Under the Clean Air Act

While the Clean Air Act is now the authority that permits the federal regulation of vehicle emissions, it did not always do so—at least in the mind of the EPA. Congress enacted the Clean Air Act ("the Act" or "CAA") in 1970 during the height of the national environmental movement and in response to significant pollution events

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"Final Environmental Analysis for the Advanced Clean Car II Program" under the "Second Public Hearing" heading) ("[O]bjectives of the Advanced Clean Cars II Program . . . include the following: 1. Accelerate the deployment of vehicles that achieve the maximum emissions reductions possible from light- and medium-duty vehicles to assist in the attainment of national ambient air quality standards for criteria pollutants . . . .").

[3] *See id.* (Table 2: ZEV Percent Requirements for 2026 and Subsequent Model Years).

[4] *Advanced Clean Cars II Regulations*, *supra* note 1 ("[The ACCII standards] support Governor Newsom's 2020 Executive Order N-79-20 that requires all new passenger vehicles sold in California to be zero emissions by 2035.").

[5] *See, e.g.*, Adam Beam, *California Is Ready to Pull the Plug on Gas Vehicles*, WASH. POST (Sept. 23, 2020, 1:35 PM), https://www.washingtonpost.com/business/technology/california-moves-to-end-sales-of-new-gas-powered-cars/2020/09/23/22eda7e0-fdc3-11ea-b0e4-350e4e60cc91_story.html (stating that California is already extremely progressive in terms of climate laws, including the State's plan to ban the sale of new gasoline-powered cars).

throughout the country.[6] The Act serves as the Agency's authority for regulating air pollution.[7] And in the landmark case of *Massachusetts v. EPA*, the Supreme Court clarified the extent of the EPA's power under the Clean Air Act.[8]

a. The Clean Air Act

The Clean Air Act is the EPA's source of authority for regulating air pollution, but the extent of that authority was not entirely clear when it came to vehicle emissions. Under the Act, the EPA was tasked with creating a list of pollutants that are harmful to the public health or welfare and to subsequently establish air quality criteria to control those pollutants.[9] The list the EPA generated did not include greenhouse gases—the air pollutants emitted from vehicles.[10] The Act also required the EPA to prescribe standards for emissions of any air pollutant from new motor vehicles that may be deemed dangerous to public health.[11] Citing section 7521 of the Act as statutory authority, several private institutions petitioned the EPA to regulate the emissions of greenhouse gases from new motor vehicles, but the EPA still denied having the authority to do so.[12]

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6 *Clean Air Act Requirements and History*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history (last visited Nov. 3, 2023); Arnold W. Reitze, Jr., *Overview and Critique: A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENV'T L. 1549, 1590–91 (1991). One of these pollution events took place in Donora, Pennsylvania, a steel-mill town in the early to mid 1900s that was just outside of Pittsburgh. Devra Lee Davis & Carrie Forrester, *Past and Present Environmental Health Challenges in Southwestern Pennsylvania: Some Comments on the Right to a Clean Environment*, 30 AM. J.L. & MED. 305, 307–08 (2004). In 1948, a temperature inversion led to serious problems, as the fumes from the burning of coal and coke were unable to rise above the hilltops and instead filled up the town's homes and streets with a blinding fog of air pollution. *Id.* at 309. People were unable to drive because they could not see the street, firemen went to each house delivering whiffs of oxygen from tanks to stranded residents, and twenty people in the town ended up dying. *Id.* at 309–10, 312.

7 *See Clean Air Act Requirements and History*, *supra* note 6.

8 Massachusetts v. EPA, 549 U.S. 497 (2007).

9 42 U.S.C. § 7408.

10 *Clean Air Act Requirements and History*, *supra* note 6; *see also* Reitze, Jr., *supra* note 6, at 1593; R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 39 (1983); *Carbon Pollution From Transportation*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/transportation-air-pollution-and-climate-change/carbon-pollution-transportation (May 19, 2022).

11 42 U.S.C. § 7521.

12 Perry W. Payne, Jr. & Sara Rosenbaum, Massachusetts Et Al. v Environmental Protection Agency*: Implications for Public Health Policy and Practice*, 122 PUB. HEALTH REPS. 817, 817 (2007) ("The case began with a group of 19 private organizations that petitioned the Environmental Protection Agency . . . the EPA denied the petition. The agency first asserted that the Clean Air Act did not allow the EPA to promulgate regulations that focused on global climate change.").

b. Massachusetts v. EPA

The EPA's attempt to skirt its statutory duties was met with a swift decision by the Supreme Court in *Massachusetts v. EPA*.[13] To determine whether the EPA had the authority to regulate greenhouse gases emitted from vehicles, the Court first looked to the text of the statute. In relevant part, the CAA states that the EPA "shall by regulation prescribe . . . standards applicable to the emissions of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[14] The Court then looked to the definition of "air pollutant" which includes "*any* air pollution agent, or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."[15] The Court found that greenhouse gases "without a doubt" fit within this definition.[16] Further, the Court was persuaded by the repeated use of the word "any" within the statute, which signaled that it was Congress' intent to be more inclusive than exclusive, and thus, greenhouse gases fit within the definition of "air pollutant."[17] Therefore, it was well within the EPA's constitutional authority to regulate greenhouse gas emissions and was, in fact, the Agency's statutory duty to do so.

While the EPA's authority to regulate greenhouse gas emission from vehicles was announced in *Massachusetts v. EPA*, the Supreme Court simultaneously limited that authority when it mentioned that the EPA regulations could not reach the level of a ban.[18] The EPA attempted to support its argument against having regulatory authority by using the decision in *FDA v. Brown & Williamson Tobacco Corp.* where the Supreme Court held that the FDA did not have the authority to regulate tobacco as a "drug."[19] The Court explained that it so held because it was unlikely that Congress' intent was to ban tobacco products from circulation—a result that the *Brown & Williamson* Court thought would have occurred if the FDA had that authority.[20] In distinguishing *Brown & Williamson*, the *Massachusetts* Court explicitly stated that "EPA jurisdiction [over the regulation of greenhouse gas emissions from vehicles] would lead to no such extreme measures."[21] Even when empowering the EPA to regulate these emissions, the *Massachusetts* Court did not foresee the controversy that could come.

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[13] *Massachusetts*, 549 U.S. at 534.

[14] 42 U.S.C. § 7521(a)(1); *Massachusetts*, 549 U.S. at 528.

[15] 42 U.S.C. § 7602 (emphasis added); *Massachusetts*, 549 U.S. at 528–29.

[16] *Massachusetts*, 549 U.S. at 529.

[17] *Id.*

[18] *Id.* at 531.

[19] *Id.* at 530.

[20] *Id.* at 531.

[21] *Id.*

2. State Power to Regulate Greenhouse Gas Emissions Under the Clean Air Act Pursuant to a Waiver

The general rule for state regulation of vehicle emissions is straightforward. Section 209 of the Clean Air Act, codified in title 42, section 7543 of the United States Code, discusses this general rule.[22] Subsection (a) prohibits any state from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."[23] So, the CAA has a general ban on state-level emission regulations.

a. Exception in CAA Allowing States to Regulate Greenhouse Gas Emissions

Before any controversy at the federal level, and even before the enactment of the CAA, California was pioneering regulations on greenhouse gas emissions from vehicles at the state level.[24] In 1966, California enacted the nation's first-ever tailpipe emissions standards.[25] One year later, the California legislature established the California Air Resources Board to continue addressing the State's then-significant problem of air pollution.[26] Because California's emissions standards predated any federal legislation, the CAA carved out an exception allowing the State to continue to set its own vehicle emissions standards, subject to a few conditions.[27]

This exception is explained in section 7543 of the CAA. Subsection (b) requires that the Administrator of the EPA grant a state's application for waiver of federal preemption if such state (1) "adopted standards . . . for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966," and (2) "has determined that the State standards will be, in the aggregate, at least as protective

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[22] 42 U.S.C. § 7543.

[23] *Id.* § 7543(a); *see, e.g.*, Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 343 n.50 (D. Vt. 2007) (finding that § 209(a) of the Clean Air Act preempted Vermont's attempt to establish regulations on greenhouse gas emissions).

[24] *See History*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/about/history (last visited Nov. 5, 2023).

[25] *Id.*; *see also* Thomas C. Austin et al., *The California Vehicle Emission Control Program—Past, Present and Future*, 90 SAE TRANSACTIONS 3824, 3826–27 (1981). In 1959, the California Legislature ordered the State's Department of Public Health to set air quality and vehicle emission standards. The following year, California's Motor Vehicle Pollution Control Act created the Motor Vehicle Pollution Control Board within the State's Department of Public Health. The Motor Vehicle Pollution Control Board was the entity that established the nation's first vehicle emission control requirements. But because the Board lacked the enforcement power necessary to coordinate pollution control activities at the state and local level, it recommended its own dissolution in favor of creating a more powerful agency. *Id.*

[26] *History*, *supra* note 24; *see also* Austin et al., *supra* note 25, at 3827.

[27] Nicholas Bryner & Meredith Hankins, *Why California Gets to Write its Own Auto Emissions Standards: 5 Questions Answered*, THE CONVERSATION (Apr. 6, 2018, 6:46 AM), https://theconversation.com/why-california-gets-to-write-its-own-auto-emissions-standards-5-questions-answered-94379; *see also History*, *supra* note 24 ("Just three years later the federal Clean Air Act . . . recognized California's earlier efforts, and authorized the State to set its own separate and stricter-than-federal vehicle emissions regulations . . . .").

of public health and welfare as applicable Federal standards."[28] The only state that satisfies the first prong of the test in section 7543(b) is the state of California.[29]

But this exception does not give California free reign to adopt any regulation it sees fit so long as it satisfies the second prong of that test. Subsection (b) also states that the Administrator will not grant a waiver if: (1) the determination by the State that the State standards will be at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious, (2) such State does not need its own standards to meet compelling and extraordinary conditions, or (3) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.[30] Consequently, California can constitutionally enforce its state standards for vehicle emissions only when these three circumstances do not apply.[31]

While California is the only state that can satisfy the requirements of section 7543, other states still have an alternative to following the federal standards set by the EPA. Title 42, section 7507 of the United States Code is a secondary exception to the general prohibition under section 7543(a). Section 7507 allows other states to adopt standards other than those set by the EPA if: (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and (2) California and such State adopt such standards at least two years before commencement of such model year . . . ."[32]

So, there are really three requirements: (1) California must be granted a waiver from the EPA for its standards, (2) the other state must adopt California's standards identically, and (3) the standards must be adopted by both California and the other state at least two years before they go into effect.[33] If all three of these elements are met, then any state may follow California's standards rather than the federal standards promulgated by the EPA.

b. Political Controversy with the §7543 Waiver

California's emission standards waiver has been a controversial topic since the George W. Bush administration.[34] In the year following the *Massachusetts v. EPA*

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28 42 U.S.C. § 7453(b).

29 *Id.*; Bryner & Hankins, *supra* note 27.

30 § 7453(b).

31 *Id.*; *see also* Cen. Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151, 1190 (E.D. Cal. 2007) ("[S]hould California's AB 1493 Regulations be granted waiver of preemption by EPA pursuant to section 209 of the Clean Air Act, enforcement of those regulations by California . . . shall not be prevented by the doctrine of conflict preemption . . . .").

32 42 U.S.C. § 7507.

33 So, if the California standards begin in vehicle model year 2026, the standards must be adopted by both California and the other state by Dec. 31, 2023.

34 *See* Nathan Richardson, *The Rise and Fall of Clean Air Act Climate Policy*, 10 MICH. J. ENV'T & ADMIN. L. 69, 92–93 (2020); *see also* Chiara Pappalardo, *What a Difference a State Makes: California's Authority to Regulate Motor Vehicle Emissions Under the Clean Air Act and the Future of State Autonomy*, 10 MICH. J. ENV'T & ADMIN. L. 169, 184, 197–98 (2020).

decision, the Bush administration EPA denied California's section 7543 waiver.[35] The EPA Administrator denied the waiver on the grounds that the State did not have any "compelling and extraordinary circumstances" that would permit the state standards.[36] While the EPA based its denial in statutory authority, the Administrator's comments after the decision indicate some bias against California's policy and may have influenced his final determination.[37] The Administrator's statement that "[t]he Bush administration is moving forward with a clear national solution—not a confusing patchwork of state rules—to reduce America's climate footprint from vehicles"[38] bears a striking resemblance to the Government's argument in *Massachusetts v. EPA*—which the Supreme Court rejected.[39] The question left unanswered is whether the decision was motivated by the political interest of the presidential administration or a legitimate legal analysis.

Feelings toward California's waiver changed with the start of the Obama administration. The Obama EPA reversed the Bush EPA's denial of the section 7543 waiver, allowing California to set its own state standards for vehicle emissions.[40] The Obama administration took the additional initiative to negotiate with the state of California to create standards at the federal and state levels that were more harmonized than ever before.[41] Further, the Obama EPA granted a second waiver to California in 2013 for a program planned to cover vehicle model years 2015 through 2025.[42]

Following the actions of the subsequent Republican administration with President Trump, the animosity surrounding California's waiver seemed to be more political than anything else. The Trump EPA controversially decided to revoke the 2013 waiver granted under the Obama administration.[43] In doing so, the Trump EPA revived the argument used under the Bush administration and further argued that attempting to

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[35] Richardson, *supra* note 34, at 92; Pappalardo, *supra* note 34, at 195.

[36] Pappalardo, *supra* note 34, at 195.

[37] Jesse Greenspan, *EPA Denies California's Emissions Waiver*, LAW360 (Dec. 19, 2007), https://www.law360.com/articles/42870/epa-denies-california-s-emissions-waiver.

[38] *Id.*

[39] Massachusetts v. EPA, 549 U.S. 497, 533–34 (2007) ("EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. For example, EPA said that . . . curtailing motor-vehicle emissions would reflect 'an inefficient, piecemeal approach to address the climate change issue.'").

[40] ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL AND CLIMATE CHANGE MITIGATION LAW 501 (2010); *see also* Pappalardo, *supra* note 34, at 196; Richardson, *supra* note 34, at 93.

[41] Richardson, *supra* note 34, at 93; *see also* REITZE, JR., *supra* note 40, at 501–02.

[42] ROY S. BELDEN & ANGELA R. MORRISON, CLEAN AIR ACT ESSENTIALS 265 (2021); *see also* Pappalardo, *supra* note 34, at 197.

[43] Richardson, *supra* note 34, at 136; *see also* Pappalardo, *supra* note 34, at 197 ("The standoff between California and the Administration was 'resolved' when EPA decided in September 2019 to revoke California's 2013 waiver. This withdrawal has no precedent in Administration practice since the passage of the CAA in 1967, and many scholars believe EPA has no statutory authority to revoke it.").

solve climate change through vehicle emissions standards was contrary to the original purpose of the CAA.[44] Some commentors have said that this action was influenced by President Trump's personal vendetta against the state of California rather than an objective legal challenge to the waiver's legitimacy.[45]

Most recently, the Biden administration EPA has joined the revolving door of California's vehicle emission standards waiver. As of March 2022, the Biden EPA reinstated California's waiver for its 2013 Advanced Clean Cars Program and set a new standard for reviewing a prior waiver determination.[46] Although these new procedures provide more stability regarding California's section 7543 waiver, there is still reason to be concerned about the long-term viability of any future waivers because their sustainability seems to largely hinge on the political party of the president.[47]

3. State Vehicle Emissions Regulations Pursuant to EPA Waiver Under the CAA

a. Advanced Clean Cars I & States that Follow these Standards

California's Advanced Clean Car Program started with the Advanced Clean Car I standards. The standards were granted a waiver by the EPA in 2013 and set emissions standards for vehicle model years 2015 through 2025.[48] The Advanced Clean Car I standards were a two-prong approach to climate change. In the first prong, the standards called for a 34% reduction in greenhouse gas emissions from new

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[44] Pappalardo, *supra* note 34, at 197–98, 200 ("EPA has resuscitated the argument used by the Bush administration back in 2008 to deny California its waiver: climate change caused by CO_2 emissions is not a local air pollution problem . . . . Attempting to solve climate change, even in part, through the Section 209 waiver provision is fundamentally different from that section's original purpose of addressing smog-related air quality problems.").

[45] Richardson, *supra* note 34, at 136 ("The revocation of the waiver was motivated by Trump administration antipathy toward California rather than the claimed principled stand in favor of centralized standards (and against federalism)."); *see also* Pappalardo, *supra* note 34, at 197.

[46] *EPA Restores California's Authority to Enforce Greenhouse Gas Emission Standards for Cars and Light Trucks*, CAL. AIR RES. BD. (Mar. 9, 2022), https://www.epa.gov/newsreleases/epa-restores-californias-authority-enforce-greenhouse-gas-emission-standards-cars-and; Lia Cattaneo, *EPA's Revived Clean Cars Waiver for California*, HARV. L. SCH. (Apr. 6, 2022), https://eelp.law.harvard.edu/2022/04/epas-revived-clean-cars-waiver-for-california/ ("[T]he Biden EPA issued a notice of decision to reinstate California's Clean Air Act waiver for its Advanced Clean Car program . . . . The agency noted that any waiver reconsideration should be grounded and constrained through the three statutory waiver criteria in section 209(b) . . . .").

[47] Richardson, *supra* note 34, at 136, 142–43 ("And even if repeal-and-replace strategy is less radical, it is more cynical, suggesting Clean Air Act climate policy is politically malleable, untethered from serious consideration of climate harms.").

[48] California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2112, 2145 (Jan. 9, 2013).

combustion-engine vehicles by 2025.[49] In the second prong, the Advanced Clean Car I standards required that 15% of new vehicle sales in the state be electric vehicles by 2025.[50] This secondary requirement still allowed citizens to decide what type of car (gasoline or electric) they wanted to buy.[51] But the ACCII standards do not allow for the same.

California's standards have been a popular alternative to the federal standards. Currently, seventeen other states follow California's standards,[52] and those seventeen states together with California make up approximately 40% of the car market in the nation.[53] So, California's alternative standards have had a significant implication beyond the state's borders.

b. Advanced Clean Cars II & States that Plan to Follow these Standards

Similar to Advanced Clean Cars I, the ACCII standards are a two-prong plan, but the second prong in ACCII calls for an unprecedented expansion of agency power; therefore, the EPA should not grant a waiver for such standards. The first prong of the ACCII standards abides by the EPA's historic exercise of authority by calling for more stringent emissions standards for gasoline-powered vehicles.[54] However, the second prong does not follow the Agency's historic practices. The second prong calls for the EPA to completely ban the sale of new gasoline-powered vehicles in California and, subsequently, any state that has adopted California's standards—a far-reaching power the Agency has never exercised or even claimed to have in the past.[55] Unlike the Advanced Clean Car I standards, the ACCII standards confine a citizen's new car purchase options to electric vehicles only—they no longer have the ability to choose

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[49] *Id.* at 2114.

[50] *Id.* at 2115; *see also Advanced Clean Cars Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/about (last visited Nov. 5, 2023).

[51] *See* California State Motor Vehicle Pollution Control Standards, 78 Fed. Reg. at 2119.

[52] *States That Have Adopted California's Vehicle Standards Under Section 177 of the Federal Clean Air Act*, CAL. AIR RES. BD. (May 13, 2022), https://ww2.arb.ca.gov/resources/documents/states-have-adopted-californias-vehicle-standards-under-section-177-federal (select "California Section 177 States" under the "Documents" heading).

[53] *California Moves to Accelerate to 100% New Zero-Emission Vehicle Sales by 2035*, CAL. AIR RES. BD. (Aug. 25, 2022), https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035; *see also* Lisa Friedman & Brad Plumer, *Here are the Challenges Ahead for California's Ban on Gas Cars*, N.Y. TIMES (Aug. 26, 2022), https://www.nytimes.com/2022/08/26/climate/california-electric-gasoline-car-ban-enforcement.html?searchResultPosition=3.

[54] *Advanced Clean Cars II Regulations*, *supra* note 1 (stating the ACCII Program calls for "increasingly stringent standards" to reduce emissions).

[55] *See id.* (stating the standards comply with the Governor's executive order mandating all new passenger vehicles sold in California to be zero-emissions by 2035).

between gasoline- or electric-powered vehicles.[56] And this drastic change in purported authority leads to concerns about the Agency's delegated authority.

Allowing the ACCII standards to go into effect will have an impact beyond the borders of California. Currently, New York, Massachusetts, and Washington are already slated to adopt California's ACCII standards if the EPA grants the waiver.[57] Other states including Oregon and Vermont are expected to follow suit soon too, especially those that are members of the International Zero-Emissions Vehicle Alliance.[58]

B. Delegation of Lawmaking Authority to Agencies and the Major Questions Doctrine

1. What is Delegation and How it Works

The important policy-making authority is vested in Congress through its power to legislate, and Congress is not allowed to delegate this power to the other branches of government.[59] But at the same time, it is difficult for the tedious process of legislation to keep up with the quick advancements and complexity of our society. To combat this issue, Congress has enacted broad or ambiguous statutes and left interpretive discretion to administrative agencies.[60] The Supreme Court has stated this delegation is constitutional, so long as these statutes contain an "intelligible principle" that the agency can follow.[61] But because these delegations by Congress flirt with a separation of powers concern, the delegations themselves, as well as the agency actions which interpret these broad or ambiguous delegations, have frequently been the subject of judicial review.[62]

When an agency action is challenged, there are two legal authorities at issue: (1) a congressional statute conferring some authority to the agency and (2) the agency's rule or regulation interpreting the authority granted. An agency derives its authority directly from the language of the congressional statute and, specifically, the language

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[56] *See id.*

[57] Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. 29184, 29188 (May 5, 2023); *see also* Kathy Harris, *States Embrace the Transition to Clean Cars*, NAT. RES. DEF. COUNCIL (Dec. 14, 2022) https://www.nrdc.org/bio/kathy-harris/states-embrace-transition-clean-cars.

[58] Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles, 88 Fed. Reg. at 29188.

[59] U.S. CONST. art I.

[60] *See, e.g.*, Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 476 (2001) (requisite to protect public health); Touby v. United States, 500 U.S. 160, 163 (1991) (necessary to avoid an imminent hazard to public safety).

[61] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle, . . . such legislative action is not a forbidden delegation of legislative power.").

[62] *See, e.g.*, A.L.A Schechter Corp. v. United States, 295 U.S. 495 (1935); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Lichter v. United States, 334 U.S. 742 (1948); *Touby*, 500 U.S. 160; *Whitman*, 531 U.S. 457.

of the intelligible principle.[63] So, to comply with the precept of separation of powers, agency rules or regulations must adhere to the power conferred by the intelligible principle.[64] Thus, when an agency rule or regulation is challenged, the court is, in essence, determining whether the agency rule or regulation is a sound interpretation of the agency's authority as stated in the intelligible principle.

2. *Chevron* Deference to Agency Decision-making when Statutory Delegation is Ambiguous or Broad

When an agency's rule or regulation is challenged as an unsound interpretation of the agency's authority, a reviewing court must first ask whether the statute makes a clear delegation or if the statutory language is unclear and ambiguous.[65] A clear delegation of agency power occurs when Congress, usually in the language of the enabling statute, has directly addressed the precise issue before the court.[66] If Congress' intent is clearly stated, the court must give effect to that unambiguous meaning; the court may not defer to an agency's interpretation and may not give effect to its own interpretation of the statute.[67] Thus, a sound interpretation by an agency of a clear delegation would be an interpretation that aligns with the unambiguous meaning of the statute.[68] But, if an agency's rule or regulation runs contrary to the clear delegation in the statute, the agency's interpretation of its authority is unsound and violates the separation of powers.[69]

However, the language in the enabling statute is not always clear and unambiguous, which presents a different issue. If the statute at issue is silent or ambiguous regarding a specific question about the agency's authority, then the court must ask if the agency's interpretation is based on a permissible construction of the statute.[70] Courts evaluating this question can look to the Supreme Court's precedent to make the determination.

If an enabling statute's language is ambiguous, courts ordinarily give significant deference to an agency's interpretation of the statute's grant of authority—meaning most interpretations would be considered sound.[71] After the Supreme Court's decision in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, so long as Congress has not explicitly spoken

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[63] *J.W. Hampton*, 276 U.S. at 409.

[64] *Id.*

[65] *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

[66] *Id.*; *see also* KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE 1 (2022).

[67] *Chevron*, 467 U.S. at 842–43.

[68] *Id.*

[69] *See id.*

[70] *Id.* at 843–44.

[71] *Id.* at 844.

on the question at issue, and the agency's interpretation is "reasonable," courts are to defer to the agency's interpretation of the statute's grant of authority.[72] This standard has become known as "*Chevron* deference."[73]

Commonly, the *Chevron* deference standard covers delegations with words or phrases that make the statute unclear or ambiguous.[74] In *Chevron*, the issue was about what constituted a "stationary source."[75] The statute at issue required certain states to establish a permit program to regulate "new or modified major stationary sources" of air pollution.[76] A permit would not be given to a plant unless the "stationary source" met a strict set of conditions.[77] A subsequent EPA regulation permitted these states to adopt a plantwide definition of the term "stationary source."[78] Essentially, this regulation allowed an existing plant to side-step the permit requirement. A plant could install or modify one piece of equipment without receiving a permit, so long as the change did not increase the total amount of emissions from the plant.[79] Because the term "stationary source" was not defined for purposes of this section, there was an ambiguity about whether this plantwide definition was a sound interpretation of the statute.[80] In creating and applying the *Chevron* deference standard to this case, the Court held that the EPA's regulation defining "stationary source" at a plantwide level was a reasonable interpretation of the statute and, therefore, was owed deference.[81] For that reason, the interpretation of the ambiguous phrase "stationary source" was a sound interpretation of the statute.

The *Chevron* deference standard also covers broad delegations of authority. This was exemplified in *City of Arlington v. FCC*, where the Supreme Court was faced with the question of whether an agency's interpretation of a statutory ambiguity regarding the scope of its regulatory authority is entitled to *Chevron* deference.[82] The enabling

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[72] *Id.* ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[73] *Chevron Deference*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/chevron_deference (July, 2022).

[74] *See* Kristine C. Karnezis, Annotation, *Construction and Application of "Chevron Deference" to Administrative Action by United States Supreme Court*, 3 A.L.R. Fed. 2d Art. 25 (2005).

[75] *Chevron*, 467 U.S. at 840.

[76] 42 U.S.C. § 7502(c)(5).

[77] *Id.* § 7502; *see also Chevron*, 467 U.S. at 840.

[78] *Chevron*, 467 U.S. at 840.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 865–66.

[82] City of Arlington v. FCC, 569 U.S. 290, 293 (2013).

statute in *Arlington* empowered the Federal Communications Commission ("FCC") to "prescribe such rules and regulations as may be necessary in the public interest to carry out [the statute's] provisions."[83] One limitation of this authority, and the central issue in this case, provided that state or local governments must act on wireless-siting applications "within a reasonable period of time after the request is duly filed."[84]

The FCC, pursuant to its broad authority, made a declaratory ruling that a "reasonable period of time" for a state or local government to act is presumptively, but rebuttably, 90 days or 150 days, depending on the type of wireless-siting application.[85] Several cities then challenged the agency's ruling by arguing that the statute limited the FCC's authority and prohibited it from making such a ruling.[86] By refocusing the issue, the Court stated that the question to be asked when determining if *Chevron* applies is whether the statutory text prohibits the agency's assertion of authority or not; it is not important to label the agency's interpretation as one regarding its scope of authority or an application of its authority.[87] Because the FCC was granted the broad authority to administer the Communications Act through rulemakings, the Court deferred to the FCC's interpretation and found that the agency's assertion of authority did not exceed the statutory text.[88] Thus, the rule defining a "reasonable period of time" was a sound interpretation of the statute.

The general *Chevron* deference standard does have limitations, however. The Supreme Court has limited the scope of *Chevron* deference to agency interpretations contained in a formal regulation, such as an adjudication or a notice-and-comment rule, which has the force of law.[89] Interpretations that come from informal procedures which do not have the force of law, such as opinion letters, policy statements, or agency manuals, are not afforded *Chevron* deference.[90] And most importantly, agency interpretations are still subject to Constitutional limitations.[91]

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[83] *Id.*; 47 U.S.C. § 201(b).

[84] *City of Arlington*, 569 U.S. at 294; 47 U.S.C. § 332(c)(7)(B)(ii).

[85] *City of Arlington*, 569 U.S. at 295.

[86] *Id.*; *see* 47 U.S.C. § 332(c)(7)(A), (c)(7)(B)(v).

[87] *City of Arlington*, 569 U.S. at 300–01.

[88] *Id.* at 307.

[89] Christensen v. Harris Cnty., 529 U.S. 576, 587 ("[T]he framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation."); *see also Chevron Deference*, *supra* note 73.

[90] *Christensen*, 529 U.S. at 587 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); *see also Chevron Deference*, *supra* note 73.

[91] *Administrative Law*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/administrative_law (June 2022).

3. Major Questions Doctrine as an Exception to *Chevron* Deference

a. What is the Major Questions Doctrine

In certain instances where Constitutional concerns arise, the Supreme Court has declined to apply the *Chevron* deference standard to an agency's interpretation of its own authority and has instead applied the Major Questions Doctrine. The Major Questions Doctrine asks whether the agency action at issue is considered to be an "extraordinary case."[92] And if the agency action under review is considered to be an "extraordinary case," the Major Questions Doctrine requires a clear, specific statement by Congress authorizing the action at issue.[93] If there is no such statement, the agency action is unconstitutional.[94] This judicial doctrine has become a powerful and controversial way for courts to keep agency authority in check.[95]

b. Extraordinary Case — The Test to Determine When the Major Questions Doctrine Applies

The Supreme Court has clearly outlined the steps in a Major Questions Doctrine "extraordinary case" analysis. An agency action is considered "extraordinary" when the power sought by the agency is broad and consequential in scope or, in other words, would be expansive of agency power.[96] In making this determination, a court must consider: (1) if the issue is economically and politically significant and (2) if the agency action is historically unprecedented.[97] If both these elements are met, the only way to uphold the agency action is by pointing to explicit Congressional authority for

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92 Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. 693, 716 (2022) (stating that the Supreme Court described *Brown & Williamson* and other early Major Questions Doctrine cases as "extraordinary cases"); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.").

93 West Virginia v. EPA, 142 S. Ct. 2587, 2595 ("Under this body of law, known as the major questions doctrine, . . . the agency must point to 'clear congressional authorization' for the authority it claims."); *see also* Griffith & Proctor, *supra* note 92, at 716.

94 *See West Virginia*, 142 S. Ct. at 2609; Griffith & Proctor, *supra* note 92, at 716.

95 Griffith & Proctor, *supra* note 92, at 694.

96 *See, e.g., Brown & Williamson*, 529 U.S. at 160 ("[W]e are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.").

97 *See, e.g., id.* at 159–60 ("Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. . . . [W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *West Virginia*, 142 S. Ct. at 2608 ("Nonetheless, judicial precedent teaches that there are extraordinary cases that call for a different approach, i.e., 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.").

the specific action on review.[98] Absent this authorization, the agency action is struck down as an "extraordinary case" of purported agency power.[99] This protects the Constitutional principle of separation of powers and preserves Congress' authority to make these major economic and political decisions itself.

4. Application of the Major Questions Doctrine in *West Virginia v. EPA*

The Supreme Court's legal and factual analysis in *West Virginia v. EPA* has serious implications for California's section 7543 waiver for the ACCII standards because the two have starkly similar circumstances. In *West Virginia v. EPA*, the Supreme Court reviewed the EPA's Clean Power Plan ("Plan") rule which had gone through notice and comment, and otherwise would have been eligible for the usual *Chevron* deference standard for agency interpretation.[100] The Plan called for coal-fired power plants to shift their energy source from these higher-emitting pollution sources to lower-emitting (or zero-emitting) pollution sources like natural gas, wind, or solar power.[101] As its authority to enact the Plan, the EPA cited section 111 of the CAA which permits the EPA to regulate power plants by setting a "standard of performance" that limits a plant's emission of certain pollutions into the air.[102] To be a valid standard of performance, the EPA had to determine that such a standard, whether for new or existing plants, is "adequately demonstrated" to be the "best system of emission reduction."[103] This requirement is what made the Court skeptical of the EPA's interpretation of its authority.[104]

a. Ambiguity in Section 111

Before the Court in *West Virginia v. EPA* could apply *Chevron* deference or the Major Questions Doctrine, it first had to find that there was an ambiguity in section 111 of the CAA, the EPA's cited authority for its action. The Court determined that the ambiguity in the statute was whether the Plan was a "system" within the meaning of section 111.[105] Thus, the Court paved the way to apply the Major Questions Doctrine to this case.

b. Economically and Politically Significant Action

In order to apply the Major Questions Doctrine, rather than the usual *Chevron* deference, the Court next had to determine that the EPA's action was an "extraordinary

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98 *West Virginia*, 142 S. Ct. at 2609.

99 *See id.*

100 *Id.* at 2602.

101 *Id.* at 2603.

102 *See id.* at 2599, 2610; 42 U.S.C. § 7411(a)(1).

103 *West Virginia*, 142 S. Ct. at 2599; § 7411(a)(1).

104 *West Virginia*, 142 S. Ct. at 2607.

105 *Id.* at 2610 (stating the EPA cited section 111(d) for its authority); *see also id.* at 2614 (discussing what the word "system" means).

case" by first showing the action was economically and politically significant.[106] To do so, Justice Gorsuch, in his concurrence, pointed to the fact that the electric power sector is one of the largest sectors in the U.S. economy and one that is connected to "every other sector."[107] Justice Gorsuch further considered the prediction that the transition to zero-carbon renewable energy sources would "force dozens of power plants to close and eliminate thousands of jobs by 2025" and cause consumers' electricity costs to increase by over $200 billion in coming to the determination that the EPA's rule was economically significant.[108] In determining the EPA's rule was politically significant, Justice Gorsuch identified that Congress had frequently debated in the past whether coal-fired power plants should operate.[109] Congress had even debated legislation that would have been similar to the EPA's Clean Power Plan at issue.[110] Further, Justice Gorsuch acknowledged precedent that stated a President's intervention—here, in the form of an executive agency—"'[may] underscor[e] the enormous significance' of a regulation."[111] For these reasons, the EPA's action in implementing the Clean Power Plan was both an economically and politically significant decision, and thus, supported the finding that the action was an "extraordinary case."

c. Historically Unprecedented Agency Action

The Court heavily relied on its analysis that the agency action at issue was historically unprecedented. The Court's opinion discussed at length how the EPA's enactment of the Plan under section 111 of the CAA was historically unprecedented.[112] For fifty years since the Act was passed, the EPA had only used section 111 to set a limit for greenhouse gas emissions from these power plants—it had never before called for a complete shift to a new power source.[113] And while one part of the Plan did implement the usual, emissions-limiting standards, that did not excuse the unprecedented "generation shifting" prong of the Plan.[114] Allowing the EPA to wield such an "unheralded power" would have been a "transformative

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106 *See id.* at 2608.

107 *Id.* at 2622 (Gorsuch, J., concurring). The majority opinion did not spend much time on its discussion of the economic and political significance; the concurring opinion by Justice Gorsuch provides a much more detailed breakdown of each step in the Major Questions Doctrine analysis. *See id.* at 2607–16 (majority opinion) (analysis of the Major Questions Doctrine issue).

108 *Id.* at 2622 (Gorsuch, J., concurring).

109 *Id.* at 2621.

110 *Id.* at 2621–22.

111 *Id.* at 2622.

112 *Id.* at 2610–13 (majority opinion).

113 *Id.* at 2612.

114 *Id.* at 2603 (stating the first building block was an efficiency improvement plan and the other two were "generation-shifting" plans).

expansion in [its] regulatory authority."[115] For that reason, the EPA's generation shifting plan was historically unprecedented. Because the Supreme Court found the EPA's action (the implementation of the Clean Power Plan) to be both economically and politically significant, and historically unprecedented, the action qualified as an "extraordinary case."

d. Clear Congressional Authorization

Following the Major Questions Doctrine analysis, the next question is whether there was a clear delegation by Congress for the EPA to implement a "generation shifting" plan like the Clean Power Plan. Because the EPA's action was an "extraordinary case," the Agency must point to a "clear congressional authorization," allowing it to implement a plan requiring coal-fired power plants to shift to natural gas, wind, or solar energy sources.[116] Because there is no such delegation within the CAA, the EPA's Clean Power Plan was struck down under the Major Questions Doctrine as a violation of the separation of powers.[117] This decision by the Supreme Court is pivotal to determining the legal viability of California's section 7543 waiver for its ACCII standards.

C. Important Economic Considerations for California and the Advanced Clean Cars II Waiver

1. California's Power Grid Has Frequently Faced Problems in the Past

Aside from the legal challenges, the ACCII standards also face practical concerns. The ACCII standards will put even further strain on California's electrical power grid, which has already struggled to support the energy needs of the State's residents.[118] Blackouts have plagued California's electrical power grid relatively frequently in the past. In 2000 and 2001, California suffered an energy crisis, and residents suffered rolling blackouts statewide.[119] In 2005, there were more blackouts affecting over 500,000 California residents.[120] And in 2011 the State suffered even more blackouts, which showcased just how fragile California's electrical grid was.[121]

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[115] *Id.* at 2610.

[116] *Id.* at 2614.

[117] *See id.* at 2605 ("As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a clear statement of congressional intent to delegate such power to EPA."); *see also id.* at 2616 ("The judgment of the Court of Appeals for the District of Columbia Circuit is reversed . . . .").

[118] *Case Study: California Blackouts*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/case-study-california-blackouts (Oct. 21, 2022).

[119] *Id.* (stating that rolling blackouts are when electricity demand exceeds supply and the power supplier will suspend its service to a segment of its customers for a period of time, usually one to two hours, to redress the demand and supply imbalance).

[120] *Id.*

[121] *Id.*

Given recent developments with California's power grid, there are even more reasons to be concerned that it will not be able to support all the State's residents buying new electric cars. In 2020, there were serious rolling blackouts due to the State's inadequate energy supplies yet again.[122] Part of the California Independent System Operator's[123] response plan, aside from instituting the rolling blackouts, was to merely ask residents to use less electricity.[124] And as recently as 2022, California residents were bracing for rolling blackouts, yet again, because of the electrical grid's inability to support the energy demand of residents.[125] As if he were proud of the close call with yet another energy crisis, California's governor, Gavin Newsome, said that the energy demands of the residents "[w]ent right up to the edge of breaking our grid, but . . . didn't."[126] These concerns raise doubt as to the State's ability to support the even greater electrical energy demand it is forcing with the implementation of its ACCII standards.

2. Cross-Border Shopping Could Impact California's Economy

Cross-border shopping could negatively impact California because of its ACCII standards, similar to how the phenomenon negatively impacts Maine because of that state's unfavorable policies. Essentially, cross-border shopping (in the domestic U.S. context) occurs when residents of one state travel to a neighboring state to benefit from the neighboring state's favorable policy.[127]

In the United States, a prominent example of cross-border shopping is illustrated by the relationship between Maine and New Hampshire. Maine has a general sales tax

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122 Meredith Deliso, *Why California Has Blackouts: A Look at the Power Grid*, ABC NEWS (Sept. 9, 2022, 4:02 AM), https://abcnews.go.com/US/california-blackouts-power-grid/story?id=89460998; *see also* Nives Dolsak & Aseem Prakash, *California is Facing an Electricity Crisis. But It Has Also Mandated a Switchover to Electric Vehicles*, FORBES (Sept. 8, 2022, 12:58 AM), https://www.forbes.com/sites/prakashdolsak/2022/09/08/california-is-facing-an-electricity-crisis-but-it-has-also-mandated-a-switchover-to-electric-vehicles/.

123 The California Independent System Operator is responsible for managing 80% of California's electrical grid. *The ISO Grid*, CAL. INDEP. SYS. OPERATOR, http://www.caiso.com/about/Pages/OurBusiness/The-ISO-grid.aspx (last visited Nov. 5, 2023).

124 Deliso, *supra* note 122 ("For more than a week, the California Independent System Operator . . . has been calling on residents to conserve their energy use in the later afternoon and evening . . . .").

125 *See* Camille Von Kaenel, *California's Latest Power Grid Problems Are Just the Beginning*, POLITICO (Sept. 23, 2022, 4:30 AM), https://www.politico.com/news/2022/09/23/californias-lofty-climate-goals-clash-with-reality-00058466 ("The 10 days of triple-digit temperatures across the state this month sent power demand surging . . . bringing state regulators close to ordering rolling blackouts . . . ."); *see also* Deliso, *supra* note 122.

126 Von Kaenel, *supra* note 125.

127 *See, e.g.*, ART WOOLF, A RIVER DIVIDES IT: A COMPARATIVE ANALYSIS OF RETAILING IN THE CONNECTICUT RIVER VALLEY OF VERMONT AND NEW HAMPSHIRE 6 (Brian Lee Crowley ed., 2004) ("Higher retail prices caused by higher sales tax rates will induce consumers to purchase goods in political jurisdictions with lower prices, assuming consumers can make that change at a relatively low cost in terms of time and convenience.").

rate of 5.5%, whereas New Hampshire does not have a general sales tax on goods purchased in the state.[128] Because of this discrepancy, Maine residents see a benefit to go shopping in New Hampshire rather than in Maine—leaving Maine with less revenue from its sales tax.[129] But Maine residents are not acting alone in undermining their home state. New Hampshire has put on initiatives to promote awareness throughout New England about the tax incentives the State offers.[130]

III. DISCUSSION

With eighteen states currently following California's vehicle emissions standards,[131] which comprises about 40% of the car market,[132] the ACCII standards have significant implications for the future of the car sales market due to the absence of choice they would provide to the consumer. Currently, over 75% of new car buyers in California are purchasing gasoline-powered vehicles rather than electric vehicles[133]—a percentage the ACCII standards seek to drastically reduce to 0% in merely ten years.[134] While the EPA has yet to consider a possible section 7543 waiver,

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128 *Sales and Use Tax Rates & Due Dates*, ME. REVENUE SERVS. DEP'T OF ADMIN. AND FIN. SERVS., https://www.maine.gov/revenue/taxes/sales-use-service-provider-tax/rates-due-dates (last visited Nov. 5, 2023); *Frequently Asked Questions - General*, N.H. DEP'T OF REVENUE ADMIN., https://www.revenue.nh.gov/faq/general-information.htm (last visited Nov. 5, 2023).

129 *Tax Savings to Mainers Engaging in Cross-Border Shopping in New Hampshire*, ME. POL'Y INST. (Jan. 24, 2008), https://mainepolicy.org/tax-savings-to-mainers-engaging-in-cross-border-shopping-in-new-hampshire/ ("This enormous tax differential becomes a powerful incentive for Mainers to do their shopping in New Hampshire.").

130 J. Scott Moody, *New Hampshire Says "Load Up" to Cross-Border Shoppers*, ME. POL'Y INST. (Nov. 22, 2011), https://mainepolicy.org/new-hampshire-says-load-up-to-cross-border-shoppers/ ("State legislators, local businessmen, and the New Hampshire Grocers Association are touting a new effort to bring more out-of-state shoppers across the border . . . . The program will include media interviews and coverage throughout New England to remind shoppers of New Hampshire's retail advantages . . . .").

131 *States That Have Adopted California's Vehicle Standards*, *supra* note 52.

132 *California Moves to Accelerate to 100% New Zero-Emission Vehicle Sales by 2035*, *supra* note 53; *see also Advanced Clean Cars II Regulations*, *supra* note 1 ("This additional support for the clean vehicle market means that more than 35% of national new light-duty vehicle sales meet California automotive emissions standards."); Zach Bright, *States Ride Shotgun With California to Rev Up Clean Cars Rules*, BLOOMBERG L. (Sept. 2, 2022, 6:00 AM), https://news.bloomberglaw.com/environment-and-energy/states-ride-shotgun-with-california-to-rev-up-clean-cars-rules ("In total, those states make up roughly 40% of nationwide auto sales.").

133 *See New ZEV Sales in California*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/data-reports/energy-almanac/zero-emission-vehicle-and-infrastructure-statistics/new-zev-sales (last visited Nov. 5, 2023) (noting that zero-emission vehicle sales accounted for 24.3% of all new vehicle sales in 2023).

134 *See Advanced Clean Cars II Regulations*, *supra* note 1.

the standards have already passed at the state level; therefore, a waiver application is an inevitable next step.[135]

Once the waiver application is submitted, the EPA should reject California's ACCII standards. The ACCII standards are troubling in two separate and significant ways. First, an EPA approval of the standards implicates the Major Questions Doctrine and violates the Constitution's separation of powers check. The standards are both economically and politically significant, and historically unprecedented—as required to invoke the Major Questions Doctrine.[136] Further, the Supreme Court precedent in *West Virginia v. EPA* instructs that an EPA action to permit the ACCII standards would not only invoke the Major Questions Doctrine, but satisfy the doctrine and violate the Constitution.[137] And second, an EPA approval of the ACCII standards exceeds the statutory authority granted to the EPA.[138] In *Massachusetts v. EPA*, the Supreme Court described the limits of the EPA's statutory authority.[139] The Agency's action in approving the ACCII standards goes beyond those limits. Because of these legal limitations, the EPA cannot pass a waiver for the ACCII standards.

A. Major Questions Doctrine Applies to California's Waiver for the Advanced Clean Cars II Standards Because the Standards are an Extraordinary Case

The power sought by the EPA in this case is an "extraordinary case" and, therefore, the EPA's action in deciding to ban the sale of gasoline-powered cars in California should be analyzed under the Major Questions Doctrine rather than *Chevron* deference. Doing so would be consistent with Supreme Court precedent found in *West Virginia v. EPA*. There, the Court was faced with a similar interpretive issue—an EPA regulation claiming the authority to force coal-fired power plants to switch to a power source with lower emissions.[140] Here, the issue is another EPA regulation, but one that would claim the authority to force a switch from new gasoline-powered vehicles to new electric vehicles in order to decrease emissions.[141] For the same reasons as in *West Virginia v. EPA*, the EPA's approval of the ACCII standards would violate the Major Questions Doctrine.[142]

1. Section 7543 is Ambiguous

In order to get to the Major Questions Doctrine, there must first be an ambiguity in the statute. Here, the ambiguity is about whether the delegation of authority to

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135 *California Moves to Accelerate to 100% New Zero-Emission Vehicle Sales by 2035*, *supra* note 53.

136 *See infra* Parts III.A.2, III.A.3, III.A.4.

137 *See infra* Parts III.A.

138 *See infra* Part III.B.

139 *See* Massachusetts v. EPA, 549 U.S. 497, 531 (2007).

140 West Virginia v. EPA, 142 S. Ct. 2587, 2600 (2022).

141 *See Advanced Clean Cars II Regulations*, *supra* note 1.

142 *See supra* Section II.B; *see infra* Section III.A.

"adopt[] standards . . . for the control of emissions from new motor vehicles"[143] encompasses the authority to *prohibit* the sale of new motor vehicles with a particular fuel source—in this case, gasoline-powered vehicles.

2. Economically Significant Action

a. Economic Impact Similar to That Found in West Virginia v. EPA

The EPA's decision is economically significant, which indicates that the Agency's assertion of power here is an extraordinary case. In *West Virginia v. EPA*, the Court looked at the future job loss that would occur from switching to a renewable energy source and also the increase in costs surrounding the switch.[144] Here, California has expressly acknowledged the economic impact on its own citizens by forecasting the significant negative impact on the state's workforce.[145] And the ACCII standards are not able to act alone: there are several other costly plans that have been set in place in order to reach the complete ban on new gasoline-powered vehicles.[146] For these reasons, the EPA's decision to force a switch from new gasoline-powered cars to new electric-powered cars is an economically significant one.

The general economic impact on the manufacturing industry also lends to the economic significance of the EPA's action. Internationally, combustion engine manufacturers have been bracing for huge financial losses and massive layoffs because of the manufacturing costs associated with a switch to electric vehicles.[147] By implementing this short timeline for the switch, the EPA is accelerating those consequences for domestic manufacturers and also creating a stronger dependence on foreign manufacturers of electric vehicle parts—both leading to significant economic impacts.

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[143] 42 U.S.C. § 7543(b).

[144] *See West Virginia*, 142 S. Ct. at 2622.

[145] CAL. AIR RES. BD., PUBLIC HEARING TO CONSIDER THE PROPOSED ADVANCED CLEAN CARS II REGULATIONS, STAFF REPORT: INITIAL STATEMENT OF REASONS 12 (2022) ("The decreasing trend in demand for gasoline has the potential to result in the elimination of businesses in this industry and downstream industries, such as gasoline stations and vehicle repair businesses, if sustained over time."); *see also id.* (showing projections of almost 40,000 lost jobs in California alone in Table X-9).

[146] *Governor Newsom Outlines Historic $10 Billion Zero-Emission Vehicle Package to Lead the World's Transition to Clean Energy, Combat Climate Change*, OFF. OF GOVERNOR GAVIN NEWSOM (Jan. 26, 2022), https://www.gov.ca.gov/2022/01/26/governor-newsom-outlines-historic-10-billion-zero-emission-vehicle-package-to-lead-the-worlds-transition-to-clean-energy-combat-climate-change/.

[147] Mike Collins, *Gas Engines, and the People Behind Them, Are Cast Aside for Electric Vehicles*, WALL ST. J. (Jul. 23, 2021), https://www.wsj.com/articles/gas-engines-cast-aside-electric-vehicles-job-losses-detroit-11627046285; *see also* Laurence Frost & Edward Taylor, *Carmakers Face Electric Reality as Combustion Engine Outlook Dims*, THOMSON REUTERS (Sept. 11, 2017), https://www.reuters.com/article/ctech-us-autoshow-frankfurt-electrics-idCAKCN1BN00X-OCATC.

b. Economic Impact on California's Power Grid

As it stands, California's electrical power grid is severely underprepared to support the sharp increase in electricity demand that will result from the ACCII standards forcing residents to purchase electric cars. California has already experienced electricity supply issues in the past—and as recently as September of 2022—which casts significant doubt on the State's ability to generate enough energy to support an increased demand due to the ACCII standards.[148] By its own projections, California will need to increase the current electric power capacity by over 300% to power all the vehicles residents would be buying.[149] Such a radical increase should have been accounted for before setting in place the lofty expectations of ACCII; now, California has to hope that everything through 2035 goes perfectly according to plan, or else the State will struggle mightily to meet its quixotic goals.

To its credit, California has set out a plan to increase its electric power supply and move toward renewable energy sources—addressing the concern that electricity generated by nonrenewable resources would only relocate greenhouse gas emissions rather than reduce them. In fact, California's 2018 Senate Bill 100 calls for 100% of all retail electricity sold in California to be generated by renewable sources that do not emit greenhouse gases (like solar and wind energy) by 2045.[150] But the State's proactiveness cannot be viewed in a vacuum—the actual effectiveness of its plans must be assessed as well.

While California's environmental initiative may be admirable, it is not realistic—much like the State's ACCII standards. California has not been very good at predicting the energy consumption of its citizens, as evident by its repeated supply issues.[151] In each of these instances, the State has used some variant of the excuse that it is experiencing "record temperatures" that could not have been accounted for.[152] Surely,

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148 Deliso, *supra* note 122 (stating that California was on the brink of rolling blackouts in September of 2022); *see also* Erik Anderson, *Can California's Grid Handle More EVs?*, KBPS (Sept. 19, 2022, 6:01 AM), https://www.kpbs.org/news/environment/2022/09/19/california-grid-can-handle-electric-vehicle-load-with-updated-infrastructure-and-customer-discipline ("I think many of the studies suggest that light-duty vehicles alone, cars, they are going to be responsible for a one quarter increase in the demand for electricity between now and 2045.").

149 CALIFORNIA ENERGY COMMISSION, ACHIEVING 100% CLEAN ELECTRICITY IN CALIFORNIA 10 (2021) ("To reach the 2045 target, California will need to roughly triple its current electricity power capacity."); *see also* Nadia Lopez, *Race to Zero: Can California's Power Grid Handle a 15-Fold Increase in Electric Cars?*, CALMATTERS (Jan. 17, 2023), https://calmatters.org/environment/2023/01/california-electric-cars-grid/ ("Powering the vehicles . . . means the state must triple the amount of electricity produced . . . .").

150 S.B. 100, 2017–2018 Reg. Sess. (Cal. 2018) ("This bill would state that it is the policy of the state that eligible renewable energy resources and zero-carbon resources supply 100% of retail sales of electricity to California end-use customers . . . by December 31, 2045.").

151 *See Case Study: California Blackouts*, *supra* note 118 (2001 blackouts); *see also* Dolsak & Prakash, *supra* note 122 (2020 blackouts); Von Kaenel, *supra* note 125 (2022 blackouts).

152 *See Case Study: California Blackouts*, *supra* note 118 ("In 2000 and 2001 . . . a hotter than usual summer led to spikes in demand that California's system could not handle."); Deliso, *supra* note 122 ("In August 2020, hundreds of thousands of Californians briefly lost power in

if such a situation has occurred in two of the past three years, it is something the electrical suppliers can—and should—start to plan for. Further, critics of California's Senate Bill 100 plan have argued that the State's goals rely on a "best-case" scenario.[153] Even the state agencies that are responsible for achieving this goal say that it is only "technically achievable"[154]—an unsettling assessment of the plan's viability.

c. Economic Impact of Electric Vehicle Infrastructure

Even if California had the energy supply to support its electrification goals, it does not have the charging infrastructure necessary to keep up with those goals. Currently, California projects that there needs to be 1.2 million public and shared charging stations by 2030 in order to stay on pace with the ACCII goal of zero new gasoline-powered car sales by 2035.[155] But the State was only at around 70,000 chargers as of January of 2021.[156] Further, California is already behind on its 2025 goal by about 57,000.[157] California's inability to keep up with its own projections—or even remain close to those projections—shows that the State's goals are impractical at this time and unlikely to be met.

Because the charging station infrastructure is crucial to the sale of electric vehicles, meeting the ACCII standards' goal of zero new gasoline-powered car sales by 2035 is also impractical. "Range anxiety" is one of the most prominent barriers which prevents consumers from purchasing electric vehicles.[158] This phenomenon is described as the

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rolling blackouts amid a heat wave."); *see also id.* ("[T]he ISO warned that power outages were imminently possible 'as electricity supplies run low in the face of record heat and demand.'").

153 Lopez, *supra* note 149 (stating that California's goals are a "best-case" scenario and also comparing the pace at which the State has historically built renewable energy sources to the pace required to meet the stated goals).

154 CALIFORNIA ENERGY COMMISSION, *supra* note 149; S.B. 100, 2017–2018 Reg. Sess. (Cal. 2018) ("The bill would require the PUC, Energy Commission, and state board to utilize programs authorized under existing statutes to achieve that policy . . . .").

155 CALIFORNIA ENERGY COMMISSION, ASSEMBLY BILL 2127: ELECTRIC VEHICLE CHARGING INFRASTRUCTURE ASSESSMENT 1 (2021) ("[N]early 1.2 million public and shared private chargers are needed to support almost 8 million ZEVs in 2030.").

156 *Id.* at 2 ("As of January 4, 2021, there are more than 70,000 public and shared private chargers available across the state.").

157 *Id.* ("To meet the 2025 goal of 250,000 public and shared chargers, the state will need about 57,000 more than are already installed or planned."). Even if California were on pace to reach its 2025 goal, the exponential efficiency that would need to occur to meet the 2030 goal is nonsensical. California's electrical infrastructure plan was put in place on September 13, 2018. A.B. 2127, 2017–2018 Reg. Sess. (Cal. 2018). This means that, in order to reach the goal of 250,000 by 2025, there needs to be, on average, roughly 34,418.6 charging stations built per year from the time of enactment in 2018 through 2025. Even assuming that goal is met, California would need 950,000 more chargers to be built by 2030. This equates to 190,000 chargers built per year from 2026-2030—an impossible 552.03% increase in output per year.

158 Shahil Patel, *Electric Vehicle Limbo: The Need for Charging Incentives*, 8 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 75, 82 (2021).

"fear that the electric vehicle won't have sufficient charge to complete its duty" or, in other words, the fear that there are not enough charging stations and the car battery is going to die, leaving the driver stranded.[159] Taking this into account, it is impractical to expect that California residents will uphold their end of the ACCII goal and buy an electric car if the State cannot show that it has the infrastructure in place to support such a purchase.

d. Potential Cross-Border Shopping Effects

The ACCII standards could lead to a cross-border shopping phenomenon similar to that experienced between Maine and New Hampshire. Maine's high sales tax rate is the unfavorable policy that incentivizes that State's residents to shop in New Hampshire instead.[160] Here, the complete ban on the sale of new gasoline-powered cars imposed by the ACCII standards would be the unfavorable policy that drives California residents to make their car purchases in neighboring states instead.[161] If California residents do engage in this kind of cross-border shopping, the ACCII standards will have done more harm than good for the State. Not only will the standards have failed in forcing California residents to purchase electric vehicles, but they will also have lost the California government tax revenue.[162] Tax revenue on the purchase of a new gas-powered vehicle and on the income of the business that sold the vehicle, which would have accrued in California, would now go to the neighboring state that still sells new gas-powered vehicles.[163]

3. Politically Significant Action

The EPA's decision to ban the sale of gasoline-powered cars in California is also politically significant, which further indicates that the Agency's assertion of power here is an extraordinary case. To determine if the EPA's action was politically significant, the Court in *West Virginia v. EPA* considered whether Congress had discussed the issue before and if the President had intervened on the issue—either directly or through an agency. Here, both Congress and state legislatures have discussed the issue of transitioning to exclusively electric vehicles several times in the

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159 *Id.*

160 *Tax Savings to Mainers*, *supra* note 129.

161 For example, a resident of Southern California could drive to Arizona to purchase a gas-powered vehicle and then drive that car back to his or her home in Southern California.

162 *See* J. Scott Moody & J. Dwight, *Maine Issue Brief No.30—The Silent Tax Revolt: Mainers Cross-Border Shopping in New Hampshire II*, THE ME. HERITAGE POL'Y CTR. (Mar. 18, 2008), http://mainepolicy.org/wp-content/uploads/The-Silent-Tax-Revolt-Mainers-Cross-Border-Shopping-New-Hampshire-2.pdf (estimating that Maine lost $21,185,112 of tax revenue in 2008 due to cross-border shopping just on Saturdays alone).

163 *See id.* The estimated revenue that Maine lost due to cross-border shopping would equate to revenue gained by New Hampshire through its gas tax, cigarette tax, and income tax (because there is no sales tax, the revenue would be gained after taxing the income of the business which would include the cross-border shopping sales).

past.[164] There has also been significant intervention by several presidential administrations regarding California's section 7543 waiver.[165] Further, the EPA Administrator position experiences frequent turnover; when a new president is elected, a new EPA Administrator usually follows soon after.[166] The frequent shift from a Democratic party president to a Republican party president has led to waiver denials, approvals, revocations, and lawsuits.[167] And these political disagreements can be expected to continue with a waiver that is even more extreme than any seen before.[168] Because there has been Congressional discussion and presidential intervention on the issue of California's section 7543 waiver, the EPA's action in approving the waiver is politically significant.

These significant political and economic impacts are amplified because of the other states that adopt California's regulations. Seventeen states other than California follow the current iteration of the State's tailpipe-emissions regulations.[169] Together with California, these eighteen states comprise about 40% of the car market.[170] This provides a benchmark for the states that may choose to follow the ACCII standards, and, currently, five states have adopted the ACCII standards, with several others announcing plans to do the same.[171] All of these states will have to make

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164 *See, e.g.*, *Fact Sheet: Biden-Harris Administration Announces New Private and Public Sector Investments for Affordable Electric Vehicles*, WHITEHOUSE.GOV (Apr. 17, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/17/fact-sheet-biden-harris-administration-announces-new-private-and-public-sector-investments-for-affordable-electric-vehicles/ ("President Biden's Federal Sustainability Plan requires federal agencies to transition the largest fleet in the world to all electric by acquiring 100 percent light-duty ZEVs annually by 2027."); *Immediate Relief From High Oil Prices: Deploying the Strategic Petroleum Reserves: Hearing Before the Select Comm. on Energy Independence and Global Warming*, 110th Cong. 44 (2008) ("[I]f the Fed does its job in encouraging the American consumers to become efficient, within a decade or so we will see most new vehicles being plug-in hybrids or all-electric . . . .").

165 *See supra* Part II.A.2.b.

166 *See EPA's Administrators*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/history/epas-administrators (last visited Nov. 5, 2023).

167 *See* Coral Davenport et al., *California to Ban the Sale of New Gasoline Cars*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/climate/california-gas-cars-emissions.html.

168 *See* Chris Busch, *Zero-Emission Vehicle Sales Standards: California and China's Secret Weapon on Transportation Electrification*, FORBES (Dec. 19, 2022.), https://www.forbes.com/sites/energyinnovation/2022/12/19/zero-emission-vehicle-sales-standards-california-and-chinas-secret-weapon-on-transportation-electrification/.

169 *States That Have Adopted California's Vehicle Standards*, *supra* note 52.

170 *California Moves to Accelerate to 100% New Zero-Emission Vehicle Sales by 2035*, *supra* note 53; Bright, *supra* note 132.

171 Kathy Harris, *States Embrace the Transition to Clean Cars*, NAT. RES. DEF. COUNCIL (Dec. 14, 2022), https://www.nrdc.org/bio/kathy-harris/states-embrace-transition-clean-cars.

implementation plans, like California has,[172] in order to support the ACCII standards. This only increases the economic significance of the EPA's action because of the additional layoffs and costs that will be incurred. Further, by adopting the ACCII standards, these states will be endorsing one side of the political battle, thereby increasing the political significance of the EPA's action.

4. Historically Unprecedented Agency Action

The EPA's decision to ban the sale of gasoline-powered cars in California is historically unprecedented, indicating that the Agency's assertion of power here is an extraordinary case. In *West Virginia v. EPA*, the Court looked at the authority granted by the text of the statute and then looked at how the Agency had utilized that authority historically.[173] Because the EPA had not attempted to exercise such sweeping authority in the fifty years since the enactment of the statute, the action by the Agency was historically unprecedented.[174] Here, the EPA is only given two very specific powers under section 7543, neither of which are the authority to control the fuel source of cars that U.S. citizens are permitted to drive.[175] First, the general rule under section 7543(a) empowers the EPA to "control the emissions from new motor vehicles or new motor vehicle engines."[176] And second, the exception under section 7543(b) allows the EPA to waive federal preemption and allow a state to control their own new motor vehicle or new motor vehicle engine emissions, provided certain circumstances are met.[177] From the EPA's prior interpretation and exercise of these powers, the Agency's authority cannot be understood to reach a full-scale prohibition on the sale of gasoline powered cars.

Prior to 2023, the EPA had always controlled vehicle emissions (and allowed certain states to do the same) by regulating tailpipe-emissions standards for combustion engine vehicles[178]—never by looking to a prohibition that would reduce vehicle emissions simply by shifting the polluting activity from gas-powered cars to electric cars.[179] And California has even acknowledged the novelty of their ACCII Program when it stated that it was pursuing "innovative . . . measures" that will "help

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172 *Governor Newsom Outlines Historic $10 Billion Zero-Emission Vehicle Package*, *supra* note 146.

173 West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

174 *See id.* at 2599, 2610.

175 42 U.S.C. § 7543(a)–(b).

176 *Id.* § 7543(a).

177 *Id.* § 7543(b).

178 *See, e.g.*, California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2114 (Jan. 9, 2013).

179 The Advanced Clean Car I standards did have a modest ZEV sales goal of 15%, however, that is far from a complete prohibition like the ACCII standards call for. *Id.*

ensure consumers can successfully replace their conventional [gasoline-powered] vehicles . . . with new or used ZEVs and PHEVs."[180] Through their prohibitory action, the EPA is controlling more than just the emissions from vehicles. The EPA is attempting to regulate the type of vehicle that citizens can buy and is doing so by hiding behind the guise of emissions regulation. In the 68 years since the enactment of the CAA and section 7543,[181] the EPA has never attempted to exercise such sweeping authority before.[182] This view of the EPA authority is unprecedented[183] and a "fundamental revision of the statute, changing it from a scheme of [tailpipe emissions] regulation . . . to a [legal prohibition on the sale of new gasoline-powered vehicles in the country]."[184] This historically unprecedented action by the EPA signifies the extraordinary nature of the case at hand.

5. Clear Congressional Authorization

Because the agency action here is an extraordinary case, the Major Questions Doctrine requires clear and specific Congressional authorization, which is not present here. To preserve the constitutional precept of separation of powers, Congress needs to have given the EPA explicit authority to take the action at issue. Here, that would mean that section 7543 of the Clean Air Act would have to specifically grant the EPA the authority to approve a waiver that would ban the sale of new gasoline-powered cars in the state of California. And because no such language is present anywhere in the CAA, the EPA's action to prohibit the sale of new gasoline-powered vehicles would violate the Major Questions Doctrine and be unconstitutional.[185]

B. Waiver Would Exceed the EPA's Authority to Regulate Greenhouse Gas Emissions

Even if the Major Questions Doctrine does not apply to the EPA's approval of the ACCII standards, the EPA would still exceed the bounds of its authority as described by the Supreme Court in *Massachusetts v. EPA*. While the Supreme Court found that it was within the EPA's authority to regulate greenhouse gas emissions from new vehicles, the Court implicitly recognized a limitation on that authority when it distinguished *FDA v. Brown & Williamson Tobacco Corp.* The Court in *Brown & Williamson* was afraid the FDA would ban the sale of tobacco products—against the

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180 CAL. AIR RES. BD., PUBLIC HEARING TO CONSIDER THE PROPOSED ADVANCED CLEAN CARS II REGULATIONS, FINAL STATEMENT OF REASONS FOR RULEMAKING, INCLUDING SUMMARY OF COMMENTS AND AGENCY RESPONSE 1 (2022).

181 42 U.S.C. § 7543 (1955).

182 *See, e.g.*, California State Motor Vehicle Pollution Control Standards, 78 Fed. Reg. at 2118–19 (stating most recent waiver standards before ACCII, which did not rise to the level of a complete prohibition).

183 West Virginia v. EPA, 142 S. Ct. 2587, 2210, 2612 (2022) (finding that 50 years between enactment and first use was enough to be historically unprecedented).

184 MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231–32 (1994); *West Virginia*, 142 S. Ct. at 2612.

185 *See West Virginia*, 142 S. Ct. at 2615–16.

intent of Congress—and, therefore, held that the FDA did not have the authority to regulate tobacco as a "drug."[186] But, in distinguishing *Brown & Williamson*, the Court in *Massachusetts v. EPA* stated that it did not think a similar consequence would arise if the EPA had the authority to regulate the greenhouse gas emissions from new vehicles.[187] Essentially, the Court was implicitly saying that, so long as the EPA does not attempt to implement some sort of ban, it is within the Agency's power to regulate greenhouse gas emissions from new vehicles.[188] If the EPA *did* attempt to implement a ban, then *Brown & Williamson* would be analogous and would have applied, prohibiting the EPA from taking such drastic action.[189] Therefore, attempting to prohibit the sale of new gasoline-powered vehicles is not within the Agency's authority, as stated in *Massachusetts v. EPA*.

The Court's language in the opinion also supports this interpretation of the EPA's authority. In the opinion, the Supreme Court states that there is a commonsense intuition that Congress wanted the EPA to "curtail" greenhouse gas emission from new vehicles.[190] And the definition of "curtail" is "to make less by . . . cutting off or away some part."[191] This is fundamentally different from "prohibit" which means "to forbid by authority" entirely.[192] The careful language of the Supreme Court thus limits the statutory authority of the EPA to implementing standards that limit or curtail new vehicle emissions. To the Court, a full-scale prohibition would exceed the statutory authority that is granted by Congress to the Agency.[193] Therefore, the ACCII standards, which are a complete prohibition, exceed the scope of the EPA's regulatory authority and are unconstitutional.

IV. ALTERNATIVE SOLUTION

A. Imposing a Sin Tax on the Sale of Gasoline-Powered Cars

Instead of seeking a waiver that implicates several legal concerns, California, and other states, should explore alternatives that aim to achieve the same climate-change goals without the legal issues—like implementing a sin tax on the sale of gasoline-powered cars. The alcohol sin tax in California provides a workable model of the kind of sin tax that could be implemented on the sale of gas-powered cars. By statute, California places a dollar-per-wine-gallon tax on alcoholic beverages, the amount of

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186 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000).

187 Massachusetts v. EPA, 549 U.S. 497, 531 (2007).

188 *See id.*

189 *Id.*

190 *Id.*

191 *Curtail*, MERRIAM WEBSTER DICTIONARY.COM, https://www.merriam-webster.com/dictionary/curtail (last visited Nov. 5, 2023).

192 *Prohibit*, MERRIAM WEBSTER DICTIONARY.COM, https://www.merriam-webster.com/dictionary/prohibit (last visited Nov. 5, 2023).

193 *See Massachusetts*, 549 U.S. at 531.

which varies depending on the type of beverage.[194] For example, tequila that is less than 100 proof has an alcoholic beverage tax rate of $3.30 per wine gallon.[195] This tax is in addition to general state sales and federal excise taxes.[196] There are also some general exceptions from the imposition of the alcoholic beverage tax that fit certain public policy reasons of the State.[197] These, or similar exceptions, could also be part of the legislation imposing the sin tax.

This rate-per-measurement metric could be easily implemented to gasoline-powered cars on a dollars-per-miles-per-gallon basis. This proposed sin tax would be imposed at a higher rate for gasoline-powered cars with low miles-per-gallon fuel efficiency, thereby creating a harsher penalty for those who choose to purchase a vehicle with inefficient gas mileage.[198] This tax would steer consumers toward the more ideal options of fuel-efficient cars and electric vehicles but still provide consumers the ability to choose—rather than being forced into a decision.[199] The revenue from this tax could then be used to improve electric-vehicle infrastructure (i.e., quality and quantity of charging stations). In turn, this would likely lead to more sales of electric vehicles as residents see that the infrastructure in the area can support the purchase of an electric car.[200]

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194 CAL. REV. & TAX. CODE § 32151 (West 2023).

195 *Tax Rates—Special Taxes and Fees*, CAL. DEP'T OF TAX AND FEE ADMIN., https://www.cdtfa.ca.gov/taxes-and-fees/tax-rates-stfd.htm#alcoholictax (last visited Nov. 5, 2023) (select the "Alcoholic Beverage Tax" heading to see the tax rates applied to different kinds of alcohol).

196 CAL. REV. & TAX. CODE § 32151 (West 2023).

197 *See, e.g.*, *id.* §§ 32172, 32174, 32177.5; CAL. BUS. & PROF. CODE §§ 23111–23113 (West 2023). For example, the sale from distilled spirits manufacturers to the armed forces is exempt from the alcoholic beverage tax. REV. & TAX. § 32177.5. Applied in the context of vehicle sales, this exception could be that the armed forces are exempt from the gasoline-powered vehicle tax if the vehicle were to be purchased in California. Further, certain sales of alcohol, distilled spirits, or wine for use in trades, professions, or for industrial purposes, and not for beverage purposes, are exempt from the alcoholic beverage tax. BUS. & PROF. §§ 23111–23112. Applied in the context of vehicle sales, this exception could be that certain sales of gasoline-powered cars for use in trades, professions, or for industrial purposes, and not for transportation purposes, are exempt from the gasoline-powered vehicle tax.

198 For illustrative purposes only, a proposed gasoline-powered tax schedule could look like the following: $500 for gasoline-powered vehicles averaging 0–15 miles per gallon (mpg), $400 for gasoline-powered vehicles averaging 16–20 mpg, $300 for gasoline-powered vehicles averaging 21–25 mpg, $200 for gasoline-powered vehicles averaging 26–30 mpg, $100 for gasoline-powered vehicles averaging 30–35 mpg, and $50 for gasoline-powered vehicles averaging 36+ mpg.

199 *See* CHRISTOPHER OLIVOLA & ABIGAIL B. SUSSMAN, THE CAMBRIDGE HANDBOOK OF CONSUMER PSYCHOLOGY 571 (Michael I. Norton et al. eds., 2015).

200 *See What Will It Take to Transition to Electric Cars? Interview with Kenneth Gillingham*, YALE INSIGHTS (Mar. 16, 2022), https://insights.som.yale.edu/insights/what-will-it-take-to-transition-to-electric-cars ("People feel uncomfortable getting an electric vehicle because they're worried about finding charging stations and the time it takes to recharge.").

B. Practical Concerns with Implementing a Sin Tax

The key to this proposal hinges on the fact that the sin tax must be passed by ballot vote from a majority of registered voters in the State.[201] Passing legislation takes time, so a sin tax would not be a quick and efficient solution. California's legislators would need to get the issue on the ballot, or the state citizens would need to gather enough signatures to get the issue placed on the ballot.[202] Additionally, people do not like paying more taxes, so even if the issue gets on the ballot, there is no guarantee that it will be approved.[203] One way to counteract this would be by including something more favorable in the proposal, like when the excise tax on cannabis was passed in California in conjunction with the legalization of cannabis.[204] This way, voters get something out of the deal (legalization of cannabis), and so does the state government (tax on the sale of cannabis).

V. CONCLUSION

California's ACCII standards pose significant legal concerns. Approving these standards would be a highly controversial, unprecedented, and economically and politically significant decision that is constitutionally reserved for Congress to make.[205] Further, a potential EPA approval of the ACCII standards would overstep the Agency's regulatory authority and intrude on Congress' lawmaking power.

The EPA's action in approving a section 7543 waiver for the ACCII standards would violate the Major Questions Doctrine. According to Supreme Court precedent in *West Virginia v. EPA*, the EPA's action to force a switch from a higher-emitting source (gasoline) to a lower-emitting source (electricity) after historically only limiting the emissions levels is a Major Questions Doctrine violation.[206] The EPA's action in approving California's section 7543 waiver would be politically significant because Congress has discussed the switch from gasoline to electric vehicles in the past, and several presidential administrations have intervened specifically on the topic of California's section 7543 waiver.[207] Further, approving the section 7543 waiver for the ACCII standards would be an economically significant decision for four main reasons: (1) the negative impact on employment in California and any state that adopts

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201 CAL. CONST. art. XIII, § 2.

202 BASIC FACTS ABOUT TAX LEGISLATION, CALIFORNIA STATE ASSEMBLY COMMITTEE ON REVENUE AND TAXATION 5 (2009).

203 *See* Jaime C. Yesnowitz et al., *Voters Decide Various Tax Legislation in Ballots*, GRANT THORTON (Nov. 22, 2022), https://www.grantthornton.com/insights/alerts/tax/2022/salt/general/voters-decide-various-tax-legislation-in-ballots-11-22 (stating California voters rejected a tax ballot measure, but Massachusetts voters authorized a tax ballot measure in the 2022 general elections).

204 CAL. BUS. & PROF. CODE § 26000 (West 2023).

205 West Virginia v. EPA, 142 S. Ct. 2587, 2614; Griffith & Proctor, *supra* note 92, at 694–97.

206 *West Virginia*, 142 S. Ct. at 2616.

207 *See Fact Sheet*, *supra* note 164; *Immediate Relief From High Oil Prices*, *supra* note 164.

the standards,[208] (2) the significant added costs to manufacturers and state government to switch to electric vehicles and implement electric vehicle infrastructure, respectively, (3) issues with California's power grid, and (4) the potential implications for cross-border shopping. Additionally, approving a waiver that calls for a complete prohibition on the sale of new gasoline-powered vehicles would be historically unprecedented, as the EPA has only ever used its authority under section 7543 to approve standards that curtail emissions levels—never to prohibit them altogether.[209] Finally, there is no explicit congressional authorization for the EPA to take such an action, so this extraordinary case of agency action would be a violation of the Major Questions Doctrine.

The EPA's action in approving California's section 7543 waiver for the ACCII standards is even more concerning legally because that action would exceed the scope of the Agency's authority, as stated in *Massachusetts v. EPA*. There, the Supreme Court stated that the EPA's authority over regulating greenhouse gas emissions from vehicles would not lead to any "extreme measures," such as a ban.[210] Implicitly, the Court was saying that, although the EPA does have authority to regulate greenhouse gas emissions, the EPA does not have the authority to implement any sort of ban. If the Court thought that a ban would be within the Agency's power, it would have held similarly to *Brown & Williamson*.[211] Further, the particular language the Court chose to use in its opinion further demonstrates that the EPA's authority only encompasses curtailing vehicle emissions, not banning vehicles that produce any level of emissions. So, even if the Major Questions Doctrine is not implicated, the ACCII standards do not comport with the EPA's statutory authority.

To avoid all of these concerns, California should look to implement a sin tax on the sale of gasoline-powered vehicles. The tax would influence vehicle-purchaser behavior by predisposing them to a less expensive electric vehicle or a more fuel-efficient gas-powered vehicle while simultaneously building up electric-vehicle infrastructure for the future.[212] But most importantly, the sin tax would respect the checks and balances provided in the Constitution and would therefore preserve Congress' lawmaking authority.

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208 *See* CAL. AIR RES. BD., PUBLIC HEARING TO CONSIDER THE PROPOSED ADVANCED CLEAN CARS II REGULATIONS, STAFF REPORT: INITIAL STATEMENT OF REASONS 168–70 (2022).

209 *See, e.g.*, California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2118–19 (Jan. 9, 2013).

210 Massachusetts v. EPA, 549 U.S. 497, 531 (2007).

211 *Id.*

212 OLIVOLA & SUSSMAN, *supra* note 199, at 571.