September 22, 2025

Submitted Via Regulations.gov

Re: Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, Docket ID No. EPA-HQ-OAR-2025-0194, 90 Fed. Reg. 36,288 (August 1, 2025)

The Honorable Lee M. Zeldin
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Zeldin:

We write on behalf of Americans for Prosperity Foundation ("AFPF"), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels. AFPF appreciates the opportunity to comment on the Environmental Protection Agency's ("EPA") Proposed Rule, Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards ("Proposed Rule"),[1] in furtherance of President Trump's directives.[2] AFPF believes that proper environmental stewardship, including appropriate measures to ensure the American people have clean air, can coexist with a prosperous economy and American energy dominance. AFPF applauds President Trump and the EPA's efforts to repeal burdensome and unnecessary regulations, unleash American prosperity, and lower costs consistent with the Supreme Court's decisions in *Loper Bright Enterprises v. Raimondo*,[3] *West Virginia v. EPA*,[4] *Utility Air Regulatory Group* ("*UARG*") *v. EPA*,[5] *Michigan v. EPA*,[6] and the Executive Branch's obligations under the U.S. Constitution's Take Care Clause.[7]

AFPF writes here to address how recent Supreme Court precedent impacts the statutory interpretation and administrative law questions raised by this rulemaking, the scope of EPA's authority to regulate under Section 202(a) of the Clean Air Act ("CAA"), the scope of discretion Congress has statutorily delegated to the Administrator to choose whether and how to do so, and

[1] 90 Fed. Reg. 36,288 (Aug. 1, 2025).
[2] *See* EO 14154 § 6(f), 90 Fed. Reg. 8,353, 8,357 (Jan. 29, 2025); EO 14219 §§ 2(iii)–(iv), 90 Fed. Reg. 10,583, 10,583 (Feb. 25, 2025) (directing agencies to identify "regulations that are based on anything other than the best reading of the" statute and those that "implicate matters of social, political, or economic significance that are not authorized by clear statutory authority").
[3] 603 U.S. 369 (2024).
[4] 597 U.S. 697 (2022).
[5] 573 U.S. 302 (2014).
[6] 576 U.S. 743 (2015).
[7] *See* U.S. Const. art. II, § 3.

the considerations that may properly inform the Administrator's exercise of that discretion.[8] AFPF takes no position on any scientific and technical questions raised by the Proposed Rule.

As is often the case, at its core "[t]he question here is not whether something should be done; it is who has the authority to do it."[9] AFPF believes the key question here—and "[t]he basic and consequential tradeoffs involved in such a choice"[10]—is not just one of science but of policy. Any answer to that question involves major decisions of vast economic and political importance impacting all Americans and the entire private economy. At bottom those are normative, value-laden policy decisions that require weighing the real-world costs and basic tradeoffs of various approaches. Under Article I of the U.S. Constitution, those momentous policy choices should exclusively rest with the American People's elected representatives in Congress.

EPA has used its standalone 2009 Endangerment Finding[11] to arrogate to itself unilateral power to set national policy on a global issue—power that properly belongs to Congress alone. Experience has shown that decisions flowing from it have enormous consequences that require tradeoffs made by Congress. Indeed, EPA has used the Endangerment Finding in past rulemakings as a springboard to claim power to force generation shifting and technology switching, impose a de facto electric-vehicle ("EV") mandate, and attempt to effectively ban a major traditional source of baseload electricity. As *West Virginia* holds, under the major questions doctrine, if Congress wants EPA to make such consequential decisions, it must clearly say so.[12] It has not done so.

AFPF agrees with EPA that, at a minimum, "[d]emocratic accountability is essential to the exercise of delegated authority by administrative agencies, and retaining the Endangerment Finding without clear statutory authority would frustrate, not promote, constitutional values and the rule of law."[13] Although *Massachusetts v. EPA* remains good law,[14] it is out of step with later decisions in *West Virginia* and *UARG* and, even on its own terms, does not squarely foreclose EPA's proposal.[15] Consistent with the President's directives in furtherance of his obligations under the Take Care Clause, the Administrator should withdraw the Finding to the maximum extent legally defensible and supported by the record. To minimize litigation risk and maximize regulatory certainty, EPA should adopt all rationales and alternatives that independently support repeal of its greenhouse gas ("GHG") regulations, including the disastrous de facto EV mandate EPA imposed under the Biden Administration, provided those alternatives are adequately

[8] AFPF previously filed a comment in support of EPA's proposed Repeal of Greenhouse Gas Emissions Standards for Fossil Fuel-Fired Electric Generating Units, Dkt. ID No. EPA-HQ-OAR-2025-0124, discussing, among other things, *Loper Bright*'s general impact on statutory interpretation and the scope of agency discretion. *See* AFPF Comment, Dkt. ID No. EPA-HQ-OAR-2025-0124, at 2–4 (filed Aug. 7, 2025), https://www.regulations.gov/comment/EPA-HQ-OAR-2025-0124-0251. Here, AFPF's focuses on how *West Virginia* and *UARG* affect the interpretive project.
[9] *Biden v. Nebraska*, 600 U.S. 477, 501 (2023).
[10] *West Virginia*, 597 U.S. at 730.
[11] *See* 74 Fed. Reg. 66,496, 66,501–02 (Dec. 15, 2009).
[12] *See West Virginia*, 597 U.S. at 732; *UARG*, 573 U.S. at 324.
[13] 90 Fed. Reg. at 36,297.
[14] *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).
[15] *See Massachusetts v. EPA*, 549 U.S. 497, 533–35 (2007); *UARG*, 573 U.S. at 318.

supported by the administrative record.[16] In so doing, EPA should reasonably explain why each alternative operates independently and stands on its own and include a severability clause.[17]

I. Under the Major Questions Doctrine, EPA Lacks Authority to Make Major Policy Decisions Unless Congress Clearly Authorizes It to Do So. (C–1, C–11)

EPA is a creature of statute, which possesses only those powers Congress chooses to confer upon it.[18] EPA must establish statutory authorization for its actions.[19] Congress need not expressly negate EPA's claimed powers.[20] As the Supreme Court explained in *West Virginia*, under the major questions doctrine, "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."[21] In those cases, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[22] "If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress."[23] In this way, "the approach under the major questions doctrine is distinct" from "routine statutory interpretation[.]"[24] And "[l]ike many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees."[25] Specifically, it "protect[s] the Constitution's separation of powers."[26] It does this by "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[27]

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[16] AFPF believes *Massachusetts* was wrongly decided; would be decided differently today under *West Virginia*, *UARG*, and *Loper Bright*; and should be overruled or, at minimum, strictly cabined to its precise facts and holding. But AFPF respectfully suggests that EPA would be on firmer ground withdrawing the Endangerment Finding on the basis that it lacks clear statutory authority to make that major policy decision if it was writing on a blank slate. This counsels against exclusive reliance on this rationale to withdraw the Finding.

[17] *See Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 187–88 (D.C. Cir. 2022).

[18] *See FCC v. Cruz*, 596 U.S. 289, 301 (2022); *La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986).

[19] *West Virginia*, 597 U.S. at 723 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting *U.S. Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

[20] *See Loper Bright,* 603 U.S. at 399, 411.

[21] *West Virginia*, 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159–60 (2000)). The major questions doctrine appears to have emerged as an alternative to enforcing Article I's Vesting Clause. *See Gundy v. United States*, 588 U.S. 128, 166–67 (2019) (Gorsuch, J., dissenting) ("When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines."); *see also NFIB v. DOL, OSHA*, 595 U.S. 109, 125 (2022) (per curiam) (Gorsuch, J., concurring); *FCC v. Consumers' Rsch.*, 145 S. Ct. 2482, 2515 (2025) (Kavanaugh, J., concurring).

[22] *West Virginia*, 597 U.S. at 723 (quoting *UARG*, 573 U.S. at 324).

[23] *NFIB*, 595 U.S. at 124 (Gorsuch, J., concurring).

[24] *West Virginia*, 597 U.S. at 724.

[25] *Id.* at 735 (Gorsuch, J., concurring); *see Heating, Air Conditioning and Refrigeration Distributors International ("HARDI") v. EPA*, 71 F.4th 59, 67 (D.C. Cir. 2023) ("major-questions doctrine has a constitutional basis").

[26] *West Virginia*, 597 U.S. at 735 (Gorsuch, J., concurring).

[27] *NFIB*, 595 U.S. at 125 (Gorsuch, J., concurring).

Whether an agency action implicates the major questions doctrine is a threshold inquiry.[28] The Supreme Court's "cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required."[29] As particularly relevant here, the "Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country.'"[30] Another telltale sign of a major question is if "Congress has considered and rejected bills authorizing something akin to the agency's proposed course of action."[31] The Supreme Court "has [also] said that an agency must point to clear congressional authorization when it seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities."[32] Economy-wide GHG regulations easily meet this threshold test.

II. The Question of Whether and, If So, How to Regulate GHG Emissions Is One Only Congress Should Answer. (C–1, C–11, C–24, C–25)

A. The Endangerment Finding Triggers the Major Questions Doctrine as Articulated In *West Virginia* and *UARG*. (C–1, C–11, C–25)

The Endangerment Finding triggers the major questions doctrine as articulated in *West Virginia* and *UARG*. It is plainly of great political importance. The question it addressed "has staked a place at the very center of this Nation's public discourse."[33] It is a subject of vast political importance and "earnest and profound debate across the country[.]"[34] Indeed, according to the Proposed Rule, "[t]he Nation's policy response to" that question "was a major issue in the 2024 presidential election, in which voters were presented with distinct legal and policy approaches and elected a candidate promising a change in policy."[35] This is also not a question "that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government[.]"[36] For example, "[b]y one estimate, Congressmen have proposed over 400 bills concerning GHGs between 1990 and 2009."[37] Tellingly, "[i]n drafting the 1990 Amendments, Congress considered—and *expressly rejected*—proposals authorizing EPA to regulate GHGs under the

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[28] *See, e.g.*, *West Virginia*, 597 U.S. at 720–25; *see id.* at 743 n.3 (Gorsuch, J., concurring) ("[O]ur precedents have usually applied the [major questions] doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it.").

[29] *Id.* at 743 (Gorsuch, J., concurring).

[30] *Id.* (Gorsuch, J., concurring) (quoting *NFIB*, 595 U.S. at 117; *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

[31] *Id.* (Gorsuch, J., concurring) (cleaned up).

[32] *Id.* at 744 (Gorsuch, J., concurring) (cleaned up).

[33] *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari); *see Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 415 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (describing issue as "important at the national and international level"); *City of Hoboken v. Chevron Corp*., 45 F.4th 699, 713 (3d Cir. 2022) (Bibas, J.) (describing issue as "important problem with national and global implications").

[34] *Nebraska*, 600 U.S. at 504 (cleaned up); *see Janus v. AFSCME, Council 31*, 585 U.S. 878, 913 (2018) (recognizing it is a "controversial subject"); *see also* Elaine Kamarck, *The Challenging Politics of Climate Change*, Brookings (Sept. 23, 2019) (issue "remains the toughest, most intractable political issue we, as a society, have ever faced"), https://www.brookings.edu/articles/the-challenging-politics-of-climate-change/.

[35] 90 Fed. Reg. at 36,288.

[36] *Massachusetts*, 549 U.S. at 535 (Roberts, C.J., dissenting).

[37] *Coal. for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322 et al., 2012 U.S. App. LEXIS 25997, at *38 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from denial of rehearing en banc) (citing Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference As A Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong*), 60 Admin. L. Rev. 593, 636–37 (2008)).

CAA."[38] And more recently, Congress repeatedly considered and declined to pass legislation granting EPA authority to establish sweeping regulatory programs that EPA later attempted to unilaterally impose anyway, grounding its new power claims in the Endangerment Finding, such as the ill-fated Clean Power Plan ("CPP").[39] If anything, Congress has recently done the opposite, limiting EPA's powers.[40] When Congress has defined "air pollutant" to expressly include GHG emissions, it has done so in a targeted way in specific sections of the CAA that conspicuously do not grant EPA regulatory authority over GHGs.[41] In short, "this is not an area of policymaking where the legislature has acted rashly or unthinkingly in delegating authority to agencies."[42] That is unsurprising. As Judge Sentelle put it concurring in denial of rehearing en banc in *Coalition for Responsible Regulation v. EPA*, "[t]he underlying policy questions" relating to the Endangerment Finding "are undoubtedly matters of exceptional importance."[43]

The Endangerment Finding is also of vast economic significance. As EPA correctly warned before it went down that path, the decision to regulate GHGs "would constitute an 'unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.'"[44] Indeed, the Endangerment Finding underpins the vast bulk of EPA's attempts to regulate GHG emissions—not just motor vehicles but power plants, aircraft engines, and other industries.[45] EPA has used it to assert power over major sectors of the national economy, including energy, transportation, and construction. Hundreds of billions (perhaps trillions) of dollars are at stake. For example, EPA used the Endangerment Finding as a springboard to claim "power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide" under the CAA's Prevention of Significant Deterioration ("PSD") program and Title V,[46] "including retail stores, offices, apartment buildings, shopping centers, schools, and churches[.]"[47] EPA's ill-fated CPP—which would have caused massive generation-shifting away from a traditional source of baseload electricity and toward politically-favored variable-generation sources—was also premised on the

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[38] *Id.* at *37 (Brown, J., dissenting from denial of rehearing en banc); *see, e.g.,* S. 324, 101st Cong. (1989); S. 1224, 101st Cong. (1989); H.R. 5966, 101st Cong. (1990).
[39] *See West Virginia*, 597 U.S. at 731 (listing examples).
[40] *See* 90 Fed. Reg. at 36,306–07 (noting Congress recently enacted legislation that, *inter alia*, "rescinded funding to administer grant programs in CAA sections 132 and 135–38, and repealed CAA section 134, which had included a section-specific definition of "greenhouse gas" applicable to the grant program set out in that section" and "disapproved several actions taken by the EPA with respect to GHG emissions").
[41] *See, e.g.,* Inflation Reduction Act, Pub. L. No. 117-169, §§ 60101–03, 60107, 60113–14, 60201, 136 Stat. 1818, 2064–79 (2022) (amending 42 U.S.C. §§ 7432–38). As the Proposed Rule notes, "[w]hen addressing GHGs more generally, Congress has used non-regulatory tools that incentivize, rather than mandate, changes in private ordering, including through additional funding provisions in the IRA." 90 Fed. Reg. at 36,306. For example, "[i]n the CAA Amendments of 1990 as enacted, Congress called on EPA to develop information concerning global climate change and 'nonregulatory' strategies for reducing CO[2] emissions." 68 Fed. Reg. 52,922, 52,926 (Sept. 8, 2003).
[42] *Coal. for Responsible Regulation*, 2012 U.S. App. LEXIS 25997, at *38 (Brown, J., dissenting from denial of rehearing en banc).
[43] *Id.* at *28 (concurring in denial of rehearing en banc).
[44] *UARG*, 573 U.S. at 310–11 (quoting Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008)). At that time, numerous other federal agencies presciently expressed similar warnings. *See id.* at 311 n.2 (summarizing comments).
[45] "EPA has promulgated GHG emission standards for various classes of new motor vehicles and engines in reliance on the Endangerment Finding and sought to expand the same analytical framework to regulatory provisions governing existing vehicles, stationary sources, aircraft, and oil and gas operations." 90 Fed. Reg. at 36,295.
[46] *UARG*, 573 U.S. at 224; *see id.* at 310–13.
[47] *Id.* at 228.

Endangerment Finding.[48] The CPP would have had massive consequences for the entire economy, closed numerous power plants, and cost untold billions of dollars.[49]

The Biden Administration's misbegotten tailpipe standards are another example. There, even after *West Virginia*, EPA made the remarkable claim that Section 202(a) granted it power to set "technology forcing" standards "when EPA considers that to be appropriate," expressing the view that "Section 202 does not specify or expect any particular type of motor vehicle propulsion system to remain prevalent[.]"[50] The tailpipe standards would have effectively imposed a de facto EV-manufacturing mandate that would force fuel and technology switching and require manufacturers to limit production of gasoline-powered and hybrid vehicles.[51] This would, in turn, increase the price of new vehicles and reduce consumer choice. According to EPA's own estimates at the time, those mandates would have imposed approximately $900 billion of costs on manufacturers through 2055.[52] More recently, EPA's Draft Regulatory Impact Analysis for this Proposed Rule found that the "government-driven radical transformation of the market" the tailpipe standards would bring about "would be enormously costly," estimating "[t]he price tag" at "likely in the hundreds of billions annually and thereby several trillion in net present value[.]"[53]

In sum, the major questions doctrine, as articulated in *West Virginia* and *UARG*, applies with full force to the important policy choice at issue in this rulemaking and the fundamental economy-wide tradeoffs inevitably flowing from it.

B. Section 202(a) Does Not *Clearly* Authorize EPA To Make Major Policy Choices of Sweeping Political and Economic Importance. (C–1, C–11)

Against this backdrop, EPA's use of the Endangerment Finding to "claim to extravagant statutory power over the national economy" must be greeted skeptically.[54] Where, as here, the major questions doctrine applies, "a colorable textual basis" is not enough.[55] "[C]lear congressional authorization" is instead required.[56] As a matter of first principles, irrespective of whether Section 202(a) could *plausibly* be read to support the Endangerment Finding, it does not *clearly* authorize EPA to choose whether to regulate GHG emissions through the standalone Endangerment Finding.

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[48] *See West Virginia*, 597 at 711 ("Both [Rules] were premised on the Agency's earlier finding that carbon dioxide is an 'air pollutant[.]'"); *id.* at 714 (discussing consequences).
[49] *See id.* at 714–15.
[50] 88 Fed. Reg. 25,926, 25,949 (Apr. 27, 2023).
[51] *See* 89 Fed. Reg. 28,057, 28,057, 28,060 (Apr. 18, 2024) (light- and medium-duty vehicles); 89 Fed. Reg 29,440, 29,443, 29,567–68 (Apr. 22, 2024) (heavy-duty vehicles). AFPF agrees with EPA's current position that "mandating a shift in the national vehicle fleet from one type of vehicle to another is indistinguishable from the emission guidelines at issue in *West Virginia,* which were calculated to force a shift from one means of electricity generation to another." 90 Fed. Reg. at 36,306.
[52] 89 Fed. Reg. at 28,105; 89 Fed. Reg. at 29,455.
[53] Draft Regulatory Impact Analysis, Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, EPA-420-D-25-003, at 33 (July 2025) (Appendix B) [hereinafter "Draft RIA"] *Cf. BST Holdings, L.L.C. v. OSHA,* 17 F.4th 604, 617 (5th Cir. 2021) ($3 billion in compliance costs triggers major questions doctrine).
[54] *UARG*, 573 U.S. at 324.
[55] *See West Virginia*, 597 U.S. at 722–23.
[56] *Id.* at 723 (cleaned up).

Congress does not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[57] If Congress wanted to grant EPA power to regulate GHG emissions, as EPA has repeatedly used the Endangerment Finding to do, Congress would have clearly said so. It certainly knows how to do so and has had no shortage of opportunities to expressly empower EPA to regulate GHGs.[58] But it has chosen not to. As *UARG* makes clear, Section 302(g)'s Act-wide definition of "air pollutant" cannot apply in context-specific circumstances in which EPA claims sweeping powers Congress has not clearly granted it.[59] And whether Section 202(a) *clearly*, as opposed to plausibly, encompasses GHG emissions as conceived in the Endangerment Finding is a separate question from the breadth of Section 302(g)'s definition of "air pollutant."[60]

"[A]n agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority."[61] So too here. "The origins of the Clean Air Act are closely tied to fatal fogs and deadly air inversions that, for much of early post-industrial history, seemed to be the inevitable consequence of economic progress."[62] As EPA has recognized, the CAA was "originally enacted to control regional pollutants[.]"[63] Given this direct and limited application, only a single member of the House voted against it, and it unanimously passed the Senate.[64] If Section 202 clearly authorized EPA to promulgate regulations that would force fuel- and technology-shifting, this provision would at a minimum have generated more controversy.[65] And as *Massachusetts* acknowledges, "the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming[.]"[66] That suggests the lack of a clear statement, as required under *West Virginia*, underscoring EPA's lack of statutory authority.

As the Supreme Court explained in *West Virginia*, "'just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of

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[57] *Id.* (citation omitted).
[58] *See, e.g.,* 42 U.S.C. § 7675 (authorizing EPA to regulate HFCs); *see supra* nn. 36–41 and accompanying text.
[59] *UARG*, 573 U.S. at 319–20.
[60] In his dissent in *Massachusetts*, Justice Scalia expressed the view that "EPA's interpretation" of Section 302(g) "is far more plausible than the Court's alternative." 549 U.S. at 558 n.2 (dissenting). Section 302(g) defines "air pollutant" to "mean[] any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g). As Justice Scalia observed, "[u]nlike 'air pollutants,' the term 'air pollution' is not itself defined by the CAA[.]" *Massachusetts*, 549 U.S. at 558 (dissenting). The term "air pollution" should therefore be given its ordinary meaning, as it was understood when Section 302(g) was enacted in 1970. *See Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). At that time, "pollute" meant "to make physically impure or unclean: befoul, dirty, taint" and was a synonym for "contaminate." *Pollute*, Webster's Seventh New Collegiate Dictionary 657 (1972).
[61] *West Virginia*, 597 U.S. at 747 (Gorsuch, J., concurring) (citation omitted).
[62] *Coal. for Responsible Regulation*, 2012 U.S. App. LEXIS 25997, at *31-32 (Brown, J., dissenting) (citing Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 Envtl. L. 1549, 1575 (1991)).
[63] 73 Fed. Reg. 44,354, 44,355 (July 30, 2008).
[64] *See* To Pass H.R. 17255, Govtrack, https://www.govtrack.us/congress/votes/91-1970/h268.
[65] *Cf. Nebraska*, 600 U.S. at 504 ("[I]magine instead asking the enacting Congress a more pertinent question: 'Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?' We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind.").
[66] *Massachusetts*, 549 U.S. at 532.

power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'"[67] Here, EPA first claimed power to regulate GHGs in the 2009 Endangerment Finding, not before, and affirmatively disavowed such power in the Order at issue in *Massachusetts*.[68] Relatedly, as *Loper Bright* teaches, "the contemporary and consistent views of a coordinate branch of government can provide evidence of the law's meaning."[69] And "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."[70] The regulatory history here is clear: "In its first four decades administering the statute, the EPA applied CAA section 202(a) to local and regional air pollution problems[.]"[71] This further suggests that Congress did not clearly authorize EPA to regulate GHGs under Section 202(a).

Finally, statutes like the CAA should be read to avoid nondelegation concerns absent *clear* textual evidence to the contrary.[72] Indeed, citing *West Virginia*, the Court reiterated just last Term in *Consumers' Research v. FCC* that "[s]tatutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it."[73] Application of this principle to the Endangerment Finding further counsels toward the conclusion that the Section 202(a) does not provide the requisite clear statutory authority for that transformative expansion of power EPA has used it to claim. And here, as EPA recognizes, "a limiting construction is necessary to avoid absurd results and potential conflict with the nondelegation doctrine."[74]

C. *Massachusetts* Must Be Harmonized With *West Virginia* and *UARG*. (C–1, C–11, C–24, C–25)

Although EPA is not writing on a blank slate, *Massachusetts* does not squarely foreclose EPA's proposed withdrawal of the Endangerment Finding. *Massachusetts* held that the CAA's Act-wide definition of "air pollutant" "embraces all airborne compounds of whatever stripe," including GHGs.[75] As Justice Scalia wrote in his dissenting opinion, joined by the Chief Justice and Justices Thomas and Alito, under that capacious definition "[i]t follows that everything airborne, from Frisbees to flatulence, qualifies as an 'air pollutant,'" expressing the view that "[t]his reading of the statute defies common sense."[76] But *Massachusetts* "d[id] not reach the question whether . . . EPA must make an endangerment finding [for GHGs], or whether policy concerns can inform EPA's actions in the event that it makes such a finding."[77] *Massachusetts* left open the possibility that EPA could choose not to regulate "if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to" make a finding.[78] As *UARG* explains, *Massachusetts* "did not hold that EPA must always regulate greenhouse gases as an 'air

[67] 597 U.S. at 725 (quoting *FTC v. Bunte Brothers, Inc*., 312 U.S. 349, 352 (1941)).
[68] 68 Fed. Reg. 52,922, 52,925–29 (Sept. 8, 2003).
[69] *Bondi v. Vanderstok*, 145 S. Ct. 857, 874 (2025) (citing *Loper Bright*, 603 U.S. at 394).
[70] *Loper Bright*, 603 U.S. at 394.
[71] 90 Fed. Reg. at 36,293.
[72] *See, e.g., West Virginia*, 597 U.S. at 722–23. *Cf. UARG*, 573 U.S. at 327("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers.").
[73] 145 S. Ct. at 2491 (citing, *inter alia*, *West Virginia*, 597 U.S. at 722–23).
[74] 90 Fed. Reg. at 36,301.
[75] *Massachusetts*, 549 U.S. at 528–29; *see* 42 U.S.C. § 7602(g) (defining "air pollutant").
[76] *Massachusetts*, 549 U.S. at 558 n.2 (Scalia, J., dissenting).
[77] *Id.* at 534–35 (majority op.).
[78] *Id.* at 533.

pollutant' everywhere that term appears in the statute, but only that EPA must 'ground its reasons for action *or inaction* in the statute,' rather than on 'reasoning divorced from the statutory text."[79] *UARG* recognizes that "while *Massachusetts* rejected EPA's categorical contention that greenhouse gases *could not* be 'air pollutants' for any purposes of the Act, it did not embrace EPA's [then] current, equally categorical position that greenhouse gases *must* be air pollutants for all purposes regardless of the statutory context."[80]

In addition, after *Massachusetts*, the Supreme Court decided a number of important cases affecting the principles of statutory interpretation, generally, and the scope of EPA's powers under the CAA, specifically. The reasoning of *Massachusetts* is out of step with those decisions. *West Virginia*, *UARG*, and *Loper Bright* indicate that *Massachusetts* may well have been decided differently today.[81] The *Massachusetts* majority did not address the statutory interpretation question at issue using the clear-statement major questions analysis now required under *UARG* and *West Virginia*.[82] To the contrary, the majority applied a different, weaker version of the major questions doctrine articulated in *FDA v. Brown & Williamson Tobacco Corp*.[83] This variant operated as a Step Zero exception to *Chevron* deference, *not* a clear-statement requirement.[84] And *Brown & Williamson* applied it "more like an ambiguity canon."[85] Those canons operate as tie-breakers "and are thus weaker than clear-statement rules."[86] *UARG*, by contrast, "applied the traditional clear-statement rule, . . . requiring the EPA identify clear congressional authorization to apply Clean Air Act regulations to certain businesses and homes."[87] As the *UARG* Court explained, Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[88] And in the 2021 Term, the Supreme Court made pellucid that the major questions doctrine is a clear-statement rule.[89] Quoting *UARG*, *West Virginia* explained that where the major questions doctrine applies, "[t]he agency . . . must point to 'clear congressional authorization' for the power it claims,"[90] "confirm[ing]" it operates as a clear-

[79] *UARG*, 573 U.S. at 318 (quoting *Massachusetts*, 549 U.S. at 532, 535).
[80] *Id.* at 319 (cleaned up).
[81] *See generally* Frances Williamson, *Implicit Rejection of Massachusetts v. EPA: The Prominence of the Major Questions Doctrine in Checks on EPA Power*, 2022 Harv. J.L. & Pub. Pol'y Per Curiam 1, 5 (2022).
[82] As Justice Kavanaugh recently noted, *Loper Bright* and *West Virginia* operate in tandem to "substantially mitigate[]" "many of the broader structural concerns about expansive delegations" of power to federal agencies. *Consumers' Rsch.*, 145 S. Ct. at 2515 (concurring); *see id.* at 2538 (Gorsuch, J., dissenting) (making similar point).
[83] *See Massachusetts*, 549 U.S. at 530–31 (narrowly applying *Brown & Williamson* in fact-specific way). Shortly after it was decided, one commentator argued that "[t]he substantive logic in *Massachusetts* is, in the end, fundamentally incompatible with any substantive justification for a major questions exception" to *Chevron* under *Brown & Williamson*. Moncrieff, 60 Admin. L. Rev. at 595.
[84] *See Brown & Williamson*, 529 U.S. at 159; *see also* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L.J. 191, 212–14 (2023); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 481–82 (2021) (explaining *Brown & Williamson* applied "*Chevron* carve-out theory of the major questions doctrine").
[85] *West Virginia*, 597 U.S. at 742 n.8 (Gorsuch, J., concurring) (citing *Brown & Williamson* 529 U.S. at 159).
[86] *Id.* (Gorsuch, J., concurring).
[87] *Id.* at 215 (citing *UARG*, 573 U.S. at 324).
[88] *UARG*, 573 U.S. at 324 (cleaned up).
[89] *See* Capozzi, 84 Ohio St. L.J. at 216–26.
[90] *West Virginia*, 597 U.S. at 723 (quoting *UARG*, 573 U.S. at 324); *accord Ala. Ass'n of Realtors v. HHS,* 594 U.S. 758, 764 (2021) (per curiam) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." (cleaned up)); *NFIB,* 595 U.S. at 117 (per curiam).

statement rule.[91] The Supreme Court reiterated this point in *Biden v. Nebraska*,[92] underscoring that "*West Virginia* is the law."[93]

The distinction between *Brown & Williamson*'s framing of the major questions doctrine as a relatively weak tie-breaking ambiguity canon operating as an exception to the then-extant *Chevron* deference regime and *West Virginia*'s formulation of it as a clear-statement rule is not one without a difference. To the contrary, whether the major questions doctrine applies as a clear-statement rule—as *West Virginia* and *UARG* confirm that it should—may be outcome determinative. And there is good reason to think it would be here as a matter of first impression.[94]

III. The Administrator May Properly Conclude That Section 202(a) Does Not Clearly Authorize the Endangerment Finding. (C–1, C–11, C–26)

Although the Constitution tasks Article III courts with independently interpreting the law,[95] under Article II the Executive Branch also has a role to play. The Executive's constitutional responsibility to "take Care that the Laws be faithfully executed"[96] necessarily entails interpreting those laws.[97] And the Executive Branch—including EPA—has a duty to respect limits on its statutory authority and ensure that its actions comply with the Constitution.[98] Indeed, in theory EPA "could, in the rulemaking process, decide for itself that a statute unconstitutionally delegates too much power, rendering a rule unlawful."[99] Therefore, if EPA properly concludes that regulating in a certain area would require it to make major policy choices of vast economic and political importance without clear statutory authorization and thereby violate the major questions doctrine and usurp Congress's legislative role under Article I, that alone is a sufficient reason for EPA to decline to do so.

In a similar vein, EPA has a duty to interpret laws that it administers consistent with current Supreme Court precedent, including precedent that alters the way agencies and courts interpret statutory text.[100] Many such alterations have occurred since the Supreme Court's 2007 decision in *Massachusetts*, which resulted in a strained reading of the CAA, and the 2009 Endangerment Finding, which itself may have overread *Massachusetts*. AFPF agrees with the Administrator that "recent Supreme Court decisions, including *Loper Bright*, *West Virginia*, *UARG*, and *Michigan v. EPA*, [have] provided new guidance on how [EPA] should interpret and apply the statutes

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[91] *West Virginia*, 597 U.S. at 742 n.8 (Gorsuch, J., concurring); *see also Consumers' Rsch.*, 145 S. Ct. at 2491 (Kavanaugh, J., concurring) ("[C]ourts presume that Congress . . . has not delegated authority to the President to issue major rules—that is, rules of great political and economic significance—unless Congress clearly says as much. (citing *West Virginia*, 597 U.S. at 721–24); Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1013 (2023) (*West Virginia* "represents the full emergence of the doctrine as a clear-statement rule").

[92] *See* 600 U.S. at 506.

[93] *Id.* at 505.

[94] *Massachusetts* "distinguished *Brown & Williamson* . . . only in the context of tailpipe emissions." *Coal. for Responsible Regulation*, 2012 U.S. App. LEXIS 25997, at *52 (Brown, J., dissenting from denial of rehearing en banc). EPA's use of the Endangerment Finding has not been limited to that context. *See* 90 Fed. Reg. at 36,295.

[95] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[96] U.S. Const. art. II, § 3.

[97] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 123 n.4 (2015) (Thomas, J., concurring in judgment) ("executive officials necessarily interpret the laws they enforce").

[98] *See Ahmed Salem Bin Ali Jaber v. United States*, 861 F.3d 241, 252–53 (D.C. Cir. 2017) (Brown, J., concurring).

[99] *HARDI*, 71 F.4th at 65 n.1.

[100] *See generally supra* n.82.

Congress entrusted [EPA] to administer."[101] Those decisions have ushered in a sea change in administrative law and statutory interpretation, dramatically curtailed the scope of the Executive to take unilateral actions, and made clear that Congress presumptively reserves major policy choices for itself.

For these reasons, if the Administrator concludes that the Endangerment Finding violates the major questions doctrine, as articulated in *West Virginia* and *UARG*, this would support withdrawing it to the extent doing so is consistent with *Massachusetts* and other binding precedent. Should the Administrator so conclude, to minimize litigation risk, EPA should also set forth in the final rule all alternative administrative law, statutory interpretation, policy, and other justifications that would independently support this action to the extent such justifications are legally defensible and adequately supported by the record and include a severability clause for each independent alternative.[102] This approach will allow each basis of EPA's rule to operate independently and stand on its own, providing regulated entities with maximum certainty and ensuring that if any portion of EPA's rule is invalidated, unaffected provisions will remain effective.

If you have questions about this comment, please contact us at mpepson@afphq.org or FBurns@afphq.org. Thank you for your attention to this matter.

Sincerely,

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[101] 90 Fed. Reg. at 36,291 (citation omitted).

[102] "[W]hether an agency order is severable turns on the agency's intent. . . . Additionally, a reviewing court must consider whether the remainder of the regulation could function sensibly without the stricken provision." *Belmont Mun. Light Dep't*, 38 F.4th at 187–88 (cleaned up).