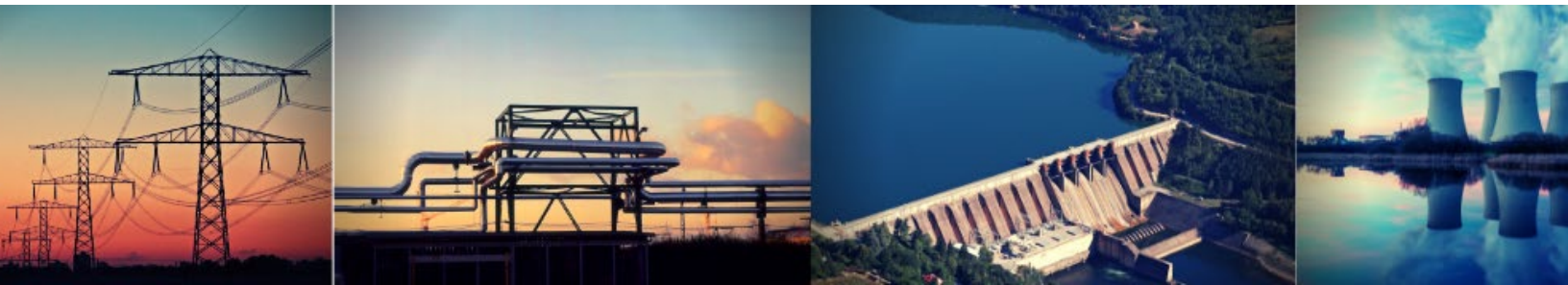


# EBA BRIEF

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## The Hydrogen Pipeline Debate Requires Candid and Serious Consideration of Existing Regulatory Regimes

Richard E. Powers, Jr., Joseph R. Hicks, William G. Bolgiano - Venable LLP

An active debate is currently underway as to how hydrogen pipelines can and should be regulated. Within this debate are those who believe hydrogen pipelines are (and should be) subject to regulation under the Interstate Commerce Act (ICA), which currently governs pipelines carrying oil, petroleum products, and natural gas liquids (NGLs), and those who believe hydrogen pipelines are (or should be) regulated under the Natural Gas Act (NGA). The former view has been advocated by the authors of this article in academic publications, public forums, and Congressional hearings. The latter view, which has some support in Congress,<sup>1</sup> has been most comprehensively advocated by Michael Diamond in his recent article, *Jurisdiction Over Hydrogen Pipelines and Pathways to an Effective Regulatory Regime* (hereinafter *Hydrogen Pathways* or Article).<sup>2</sup>

As explained below, this interpretation of the current law regarding the regulation of hydrogen pipelines is not supported.<sup>3</sup> Furthermore, singular focus on the NGA as a vehicle to govern hydrogen pipeline transportation appears driven by unsupported

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assumptions, economic interests that favor expanding the NGA's scope, and a lack of understanding as to how other regulatory regimes operate. The authors remain unconvinced that hydrogen pipelines are, could, or should be subject to the NGA's expansive regulatory regime. Rather, we continue to believe that the law (and policy) favors regulation under the ICA. Our aim in this short article is to address misconceptions regarding the regulation of hydrogen pipelines and clear up some concerns for those readers less familiar with the ICA.

### Natural Gas Pipeline Interests Are Biased in Favor of Expanding the Scope of the NGA

In addition to running contrary to existing facts and applicable law, the argument that hydrogen pipelines are (or should be) regulated under the NGA may be driven by the interests of existing natural gas pipelines. Pipelines already regulated under the NGA are likely the only entities that would benefit if hydrogen were exclusively regulated under the NGA. Conversely, existing and new hydrogen pipeline operators as well as hydrogen startups would be harmed, as described in greater detail below. Understanding these interests is invaluable in scrutinizing the arguments made by those who favor expanding the scope of the NGA to cover hydrogen.

Specifically, if the meaning of "natural gas" under the NGA were to be redefined to include hydrogen, all existing natural gas pipelines would have the scope of their FERC certificates significantly expanded. Certificated natural gas pipelines would also necessarily be the *only* entities authorized to transport hydrogen in interstate commerce. This is because the NGA prohibits regulated pipelines from engaging in any construction, expansion, or transportation of any kind without first obtaining a certificate.<sup>4</sup> Relatedly, the NGA framework would give incumbent gas pipeline owners an outsized voice in the construction of new hydrogen infrastructure that may amount to a veto over some projects. This is because the NGA framework is oriented around the "orderly" planning of gas infrastructure, where the interest of existing NGA pipelines and their customers *must* be considered.<sup>5</sup> Approval of new hydrogen pipeline construction would be especially difficult to justify because, in theory, every natural gas pipeline that serves any market would also be authorized to serve that market with hydrogen, whether they ever actually plan to do so. In contrast, as

discussed below, under the ICA or the closely related Interstate Commerce Commission Termination Act (ICCTA), any entity can build a new pipeline regardless of whether the market was already served.

The NGA also has a much further reach than the ICA or ICCTA. The NGA regulates pipeline transportation and non-exempt sales “in interstate commerce,” which occurs whenever the pipeline crosses a state line *or* if the gas transported is commingled with gas that has crossed state lines.<sup>6</sup> As the authors have said elsewhere, this would likely cover numerous existing hydrogen pipelines throughout the country serving essential services like making fuels, fertilizer, and other chemicals.<sup>7</sup> These pipelines typically transport hydrogen that is made from natural gas, and the NGA does not exempt interstate gas transportation simply because it is downstream from a processing plant.<sup>8</sup> These pipelines—and related sales—would likely become regulated if the NGA covered hydrogen.<sup>9</sup> By contrast, the ICA and ICCTA regimes are much narrower in scope, regulating only the terms of transportation from one state to another. In addition to being less disruptive, this lack of a certificate requirement and narrower scope in the ICA does not present anything like the incentives for regulatory overreach that the NGA creates.

Fundamentally, regulating hydrogen under the NGA without new legislation would require FERC to reinterpret the language and meaning of the NGA so radically that the agency would stray into making legislative decisions unsupported by any of its enabling acts, which are more properly addressed by Congress. However, commenters who view this legal question entirely from the perspective of the NGA may fall into the logical trap of trying to fit every gaseous commodity into that regime.<sup>10</sup> FERC would need to completely reinterpret all relevant statutes to reach the Article’s conclusion that “FERC could deem hydrogen to be ‘natural gas’ in its own right and regulate it identically to other natural gas transported on the interstate pipeline grid.”<sup>11</sup> If FERC were to somehow adopt the positions advocated, the agency might easily be reversed by an appeals court, especially given the Supreme Court’s recent decisions.<sup>12</sup> Therefore, regulation of hydrogen under the NGA could only be achieved through new legislation.

However, the policy arguments presented in support of such legislation<sup>13</sup> are largely unsupported or

misplaced. There certainly could be valid arguments for applying certain aspects of the NGA regulatory regime to hydrogen pipelines, such as federal siting authority. But it is not helpful to take the NGA regime’s superiority for granted without offering evidence to support that position or adequately considering the alternatives. As this debate continues, it is important for observers to be mindful of the windfall of benefits that natural gas pipelines would reap from subjecting hydrogen pipelines to the NGA. These biases can lead to results-driven analyses rather than the even-handed review that this question requires.

### **Incorrect Presentations of Law**

The Article’s arguments that hydrogen could be regulated under the NGA, or that it cannot be regulated under the ICA, are not supported by substantive legal authority.<sup>14</sup> Primarily, these arguments fail to account for the plain language of the statutes. Contrary to the arguments that the ICA cannot regulate hydrogen because it is a gas,<sup>15</sup> there is no legal support for the idea that ICA covers only liquids and does not cover gases.<sup>16</sup> The plain language of the ICA’s jurisdictional statute (now split with ICCTA) states that it covers “the transportation of oil or other commodity, except water and except natural and artificial gas, by means of pipe lines.”<sup>17</sup> Since 1977, the “oil” portion of “oil or other commodity” has been administered by FERC and pipelines carrying “other commodities” are now regulated by the Surface Transportation Board (STB) under its cognate authority under the ICCTA.<sup>18</sup> Based on the legislative history, FERC and the courts interpret “oil” broadly as petrochemicals with energy potential.<sup>19</sup> The current consensus, based on the outdated or mistaken reasoning that hydrogen is not an energy resource, is that hydrogen pipelines are subject to the ICCTA.<sup>20</sup>

Anecdotal statements such as “‘Oil’ refers to liquids, not gases,”<sup>21</sup> or “the ICA covers liquids”<sup>22</sup> are not borne out by legal precedent or history. FERC has never based its ICA jurisdiction on whether a regulated commodity is a gas or a liquid (and neither has the STB for its “other commodities” pipelines). In fact, from 1977 to 1990 FERC exercised ICA jurisdiction over pipelines carrying gaseous anhydrous ammonia (because it was made with hydrogen considered to be a petrochemical).<sup>23</sup> In 1990, FERC and the Interstate Commerce Commission (ICC, now the STB) determined

that that authority was more properly exercised by the ICC, not because it was a gas, but because ammonia was not used as a fuel.<sup>24</sup> Ammonia pipelines are still regulated by the STB under the ICCTA.<sup>25</sup> This would be impossible under the Article's interpretation of the term "artificial gas"<sup>26</sup> because the STB has no jurisdiction over pipelines carrying "artificial gas."<sup>27</sup> The cited argument that the ICA can only apply to liquid commodities is not supported by any substantive legal authority.

Furthermore, categorical statements that the dividing line between the NGA and ICA is whether the commodity is liquid or gas<sup>28</sup> makes little practical sense when held up to any scrutiny. "Natural gas" and "artificial gas" have specific meanings that do not cover every gaseous commodity. As the Article admits, carbon dioxide is a naturally occurring gas that is not "natural gas,"<sup>29</sup> and ammonia is an artificially created gas that is not "artificial gas."<sup>30</sup> Further, ethane, propane, and butane (i.e., NGLs) are gases at normal temperature and pressure and are regulated by the ICA as "oil" despite the fact that they are gases in their natural state.<sup>31</sup> Methane can also be liquified, as is evident from the existence of liquified natural gas (LNG), which is still regulated as natural gas under the NGA because it is methane.<sup>32</sup> Simply put, the law is clear that NGA jurisdiction depends on whether the pipeline is carrying "natural gas" (i.e., methane) and has nothing to do with the physical state of the commodity. In fact, FERC's predecessor, the Federal Power Commission (FPC), stated that when prior FPC and court decisions found "the sale of heavier hydrocarbon from a gas stream in a liquid form were found not to be jurisdictional, . . . [it] . . . *did not turn on the fact that the heavier hydrocarbons were extracted in the liquid state.*"<sup>33</sup>

Notwithstanding these facts, the Article attempts to expansively define natural and artificial gas to include hydrogen.<sup>34</sup> Such arguments concerning the definitions of "natural" and "artificial" gas<sup>35</sup> are directly contradicted by the NGA's legislative history.<sup>36</sup> And the proposition that the NGA can be applied beyond methane are not supported by applicable precedent.<sup>37</sup> For instance, the Article claims that propane and ethane have been "deemed" by FERC to be "artificial gases."<sup>38</sup> This, however, is simply not accurate: neither ethane nor propane are "artificial gas"—rather, the interstate transportation of these commodities is regulated under the ICA—which explicitly excludes artificial gas—as

"oil."<sup>39</sup> The congressional record and case law makes clear that "natural gas" means methane and "artificial gas" means artificially created methane or the archaic gas sourced from coal and originally used for lighting, sometimes called "town gas."<sup>40</sup> None of these definitions apply to hydrogen, which was treated as a commodity separate from methane when the relevant statutes were passed.<sup>41</sup>

## Misplaced Policy Arguments Against the ICA and in Favor of the NGA

Policy arguments in favor of regulating hydrogen pipelines under the NGA and not the ICA tend to be unsupported, poorly analyzed, and demonstrate a misunderstanding of relevant statutes. These include arguments that hydrogen pipelines should not be regulated under the ICA if blends of hydrogen and methane would be regulated under the NGA;<sup>42</sup> that the NGA is preferable because it contains exemptions for facilities;<sup>43</sup> that the NGA allows for federal eminent domain authority;<sup>44</sup> and that the NGA's methods of allocating constrained capacity are superior.<sup>45</sup> These policy arguments, taken together, create problems concerning hydrogen regulation under the ICA where our work indicates that none exist and focus on theoretical advantages of the NGA that are of uncertain relevance to the hydrogen industry.<sup>46</sup>

First, the claim that pipelines carrying hydrogen should not be regulated under the ICA because regulation of blends of hydrogen and methane would be regulated under the NGA, leading to a problem of divergent regulation where FERC would "regulate hydrogen under two different statutes,"<sup>47</sup> ignores the fact that the entire NGL industry already operates this way without any of the unspecified "practical problems" the Article implies.<sup>48</sup> Under the current energy regulatory regime, pipelines carrying methane blended with NGLs are NGA-jurisdictional, while the transportation of NGLs on their own is governed by the ICA,<sup>49</sup> because NGLs are considered "oil" for purposes of the ICA's jurisdiction.<sup>50</sup> FERC has separately regulated the transportation of blended and unblended NGLs under the NGA and ICA for years without incident.<sup>51</sup> There is no reason hydrogen transportation could not operate in the same way. The concerns over FERC regulating hydrogen pipelines under two separate regimes thus fails to account for how pipelines operate in reality. Further, categorical assertions that hydrogen

“will be transported in natural gas pipelines”<sup>52</sup> and “will be a direct substitute for natural gas”<sup>53</sup> are unsupported. In fact, the smart money is taking a more skeptical view regarding the adoption of hydrogen as a direct replacement for natural gas compared to other uses such as transportation fuel, and projecting hydrogen’s current uses in refining and fertilizer production remain dominant in the near term.<sup>54</sup>

Another legally misplaced argument is the claim that the NGA is preferable for the regulation of hydrogen because it contains limited exemptions for some intrastate or local activities in the form of its Hinshaw and gathering pipeline exemptions<sup>55</sup>. The ICA only covers shipments by pipelines between states or internationally<sup>56</sup> and does not have the same level of regulatory reach over regulated company activities, as found in the NGA.<sup>57</sup> Simply put, the ICA has no need to exempt a small subset of intrastate activity because no intrastate activity is regulated by the ICA in the first place.

Claims that the NGA is superior for the regulation of hydrogen pipelines because it allows for federal eminent domain authority<sup>58</sup> have two major weaknesses. First, the NGA’s certification process—which requires gas pipelines to apply for and receive a Certificate of Public Convenience and Necessity from FERC prior to exercising federal eminent domain authority—is currently a lengthy and expensive process that typically takes years to resolve.<sup>59</sup> Importantly, this certificate is required before a gas pipeline can begin construction, expansion, or transportation of any kind.<sup>60</sup> Second, before it grants a certificate, FERC must evaluate the need for, and impacts of, the proposed pipeline, and it is unclear how FERC (or anyone) has adequate expertise to answer these questions for an emerging industry like hydrogen or how the agency would adapt its existing gas policies.<sup>61</sup> This is not ideal for fostering the efficient construction or repurposing of pipelines for use in hydrogen transportation, as a major goal in the development of hydrogen pipeline systems is to quickly move forward with decarbonization.

Furthermore, the Article does not mention that there are currently more than two hundred thousand miles of crude oil, petroleum products, and NGL pipelines that were built and are functional without the need for federal eminent domain authority, including nearly fifty thousand miles built in the last ten years.<sup>62</sup>

Given that state governments have been applying in droves to host “hydrogen hubs,” it is simply implausible that they would be so hostile to hydrogen pipeline construction that federal preemption would be needed. There are certainly potential advantages with federal siting authority, but it is unreasonable to take for granted that federal oversight is always superior without any serious consideration of countervailing evidence.

Claims that the NGA’s methods of allocating constrained capacity are superior to the ICA’s because they allow a pipeline to “allocate scarce capacity based on price, quantity, and length of a contract”<sup>63</sup> do not appreciate how pipelines operate under the ICA. Fundamentally, these concerns simply do not arise. The ICA is a common carrier regime, where contracts are the exception. However, ICA pipelines can enter into contracts to support new or expanded capacity, and when they do those contracts govern allocation of

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capacity in times of constraint.<sup>64</sup> Such contracts can account for all the factors about which the Article was concerned. But, otherwise, service on ICA pipelines must be offered to all shippers on an equal basis,<sup>65</sup> typically based on a pro-rata or historical basis.<sup>66</sup> Therefore, when an ICA pipeline allocates limited capacity among its non-contract shippers, there are no “differences in price” or “length of a contract” to consider.

Finally, NGA regulation would have a detrimental impact on the existing hydrogen industry and pipelines that currently transport hydrogen. Imposing the requirements of the NGA on existing hydrogen manufacturers and transporters without exemption would lead to serious regulatory burdens that have a high probability of disrupting or even crippling the burgeoning hydrogen industry.<sup>67</sup> In order to have practical value, a policy analysis must address the serious concerns of a large and important industry that would be directly impacted by its proposal. For instance, in his written testimony to the Senate, Mr. Powers analyzed how all major substantive

requirements of the ICA’s much more simplified regime could be readily applied to hydrogen.<sup>68</sup> Just as importantly, that testimony also discussed how that regime’s narrower scope would cover much less economic activity than the NGA, reducing the likelihood and extent of unintended consequences.<sup>69</sup>

## Conclusion

While there are some aspects of the NGA worth further examination, there has yet to be a convincing argument for that statute’s wholesale absorption of the hydrogen pipeline industry under new or existing law. Overall, as the fulsome analyses provided by Mr. Bolgiano illustrate, under current law hydrogen pipelines are most properly considered regulated under the ICA and not under the NGA.<sup>70</sup> More importantly, from a policy perspective, the more limited regulatory regime of the ICA is ideal for a developing industry like hydrogen, where the economic realities from production to consumption are all still in rapid flux, as Mr. Powers testified to in the Senate last summer.<sup>71</sup>

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<sup>1</sup> Building American Energy Security Act of 2022 S. Amdt. 6513, 117th Cong. § 12122 (2022) (rejected amendment that would have, among many much more controversial provisions, redefined natural gas under the NGA to include hydrogen).

<sup>2</sup> Michael Diamond, *Jurisdiction Over Hydrogen Pipelines and Pathways to an Effective Regulatory Regime*, 3 EBA BRIEF, Fall 2022, 1 (2022) [hereinafter Article or *Hydrogen Pathways*].

<sup>3</sup> As explained by Richard Powers in his testimony before the Senate Environmental Resources Committee and expounded upon in great detail in William Bolgiano’s Energy Law Journal article, all of the existing legal evidence—including statutory language, legislative history, and prior precedent—supports the interpretation that hydrogen pipelines cannot be subject to the NGA and must therefore be subject to regulation either under the ICA or the closely related Interstate Commerce Commission Termination Act (ICCTA). *Hearing to Examine Federal Regulatory Authorities Governing the Development of Interstate Hydrogen Pipelines, Storage, Import, and Export Facilities, Before the S. Comm. on Energy & Nat. Res.*, 117th Cong. (July 19, 2022) (Written Testimony of Richard E. Powers, Jr.), <https://www.energy.senate.gov/services/files/542E24C8-F2A2-4483-869F-1201C6E7D9FD> [hereinafter Powers Senate Testimony]; William G. Bolgiano, *FERC’s Authority to Regulate Hydrogen Pipelines Under the Interstate Commerce Act*, 43 ENERGY L.J. 1 (2022) [hereinafter *Hydrogen Pipelines*]. Furthermore, Joseph Hicks recently debated Mr. Diamond at the Energy Bar Association mid-year conference regarding these very issues. Rich Reidorn, Jr., *Lawyers, Industry Debate Path for Hydrogen Regulation: Natural Gas Act, Interstate Commerce Act or New Law?* RTO INSIDER (Oct. 16, 2022),

<https://www.rtoinsider.com/articles/30955-lawyers-industry-debate-path-hydrogen-regulation>.

<sup>4</sup> 15 U.S.C. § 717f(c)(1)(A).

<sup>5</sup> *Certification of New Interstate Nat. Gas Facilities*, 178 F.E.R.C. ¶ 61,107, at P 69 (2022) (“Ensuring the orderly development of natural gas supplies includes preventing overbuilding. One way that the Commission can prevent overbuilding is through careful consideration of a proposed project’s impacts on existing pipelines. To the extent that a proposed project is designed to substantially serve demand already being met on existing pipelines, that could be an indication of potential overbuilding.”); see also *Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (competitors have standing to challenge NGA licensing determinations).

<sup>6</sup> 15 U.S.C. § 717(b); *FPC v. E. Ohio Gas Co.*, 338 U.S. 464, 467 (1950).

<sup>7</sup> See Richard E. Powers, Jr., et al., *Permitting Bill Would Impose Regulatory Burdens and Economic Disruption on Hydrogen Infrastructure Owners*, VENABLE LLP (Sept. 23, 2022), <https://www.venable.com/insights/publications/2022/09/permitting-bill-would-impose-regulatory-burdens> [hereinafter *Regulatory Burdens of Permitting Bill*].

<sup>8</sup> *Rendezvous Gas Servs., L.L.C.*, 112 F.E.R.C. ¶ 61,141, at P 15 (2005) (“in the absence of countervailing factors, pipeline facilities located downstream of a processing plant may be considered exempt from NGA regulation only when they are incidental extensions of the processing plant or of the behind-the-plant gathering system.”). See also *International Paper Co. v. FPC*, 438 F.2d 1349, 1355 (2d Cir. 1971) (FERC has jurisdiction over the transportation and facilities of a company that transports gas

through its own pipeline from a processing plant to the company's own plant for consumption).

<sup>9</sup> Powers, *et al.*, *Regulatory Burdens of Permitting Bill*, *supra* note 9.

<sup>10</sup> See, e.g., Diamond, *Hydrogen Pathways*, *supra* note 2, at 5 & nn.38-39, discussed *infra*.

<sup>11</sup> *Id.* at 6. *But see id.* at 13 (claiming that “Under current law, hydrogen is most logically classified as ‘artificial gas’ under the NGA).

<sup>12</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (“in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. To convince us otherwise, 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.”) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); see also *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). For a discussion of the Major Questions Doctrine, see Harvey L. Reiter, *Would FERC’s Landmark Decisions Have Survived Review Under the Supreme Court’s Expanding “Major Questions Doctrine” And Could The Doctrine Stifle New Regulatory Initiatives?*, 3 EBA Brief, Spring 2022, 1 (2022).

<sup>13</sup> See discussion *infra* & notes 45-48.

<sup>14</sup> See, e.g., Diamond, *Hydrogen Pathways*, *supra* note 2, at 6-9.

<sup>15</sup> See, e.g., *id.* at 7 (“The most basic distinction between substances regulated under the NGA and ICA is that the NGA covers gases while the ICA covers liquids”) (citing *Mobil Oil. Corp. v. FPC*, 483 F.2d 1238, [sic] 243-46, [presumably 1238-40] (D.C. Cir. 1973) (dicta); *Gulf Cent. Pipeline Co.*, 50 F.E.R.C. ¶ 61,381, at 62,164 (1990) (also dicta)) see also *id.* at 8 & n.87 (“‘Oil’ refers to liquids, not gases. When in gaseous form, ‘petroleum by-products, derivatives, or petrochemicals’ are classified as either ‘artificial gas’ or ‘natural gas’ under the NGA, not oil. Because hydrogen is transported on pipelines as a gas, not a liquid, it is not ‘oil’ under the ICA.”)

<sup>16</sup> The Article in fact quotes the portion of FERC’s *Gulf Central* decision that was not providing a holding at all but rather describing the “common usage” of the word “oil” that the D.C. Circuit and FERC specifically found not to control that question. *Gulf Cent. Pipeline Co.*, 50 F.E.R.C. ¶ 61,381, at 62,164 (1990); *aff’d* *CF Indus., Inc. v. FERC*, 925 F.2d 476, 477 (D.C. Cir. 1991) (“The legislative history, moreover, confirms that ‘oil’ was not to be given a dictionary meaning”). Compare *Bolgiano, Hydrogen Pipelines*, *supra* note 5, at 42-50 with *Diamond, Hydrogen Pathways*, *supra* note 2, at 7-8 (repeating Mr. Bolgiano’s analysis of the cases but inserting the word “liquid” throughout without citing authority for it).

<sup>17</sup> *Hepburn Act*, Pub. L. No. 59-337, 34 Stat. 584, 584 (1906) (codified as amended at 49 U.S.C. app. § 1(1)(b) (1988)).

<sup>18</sup> See 49 U.S.C. § 15301(a).

<sup>19</sup> *CF Industries*, 925 F.2d at 478 (“Congress intended a broader meaning of ‘oil’ . . . The legislative history, moreover, confirms that ‘oil’ was not to be given a dictionary meaning”) (citing S. REP. NO. 95-367, at 69 (1st Sess. 1977) (Conf. Rep.); H.R. REP. NO. 95-539, at 69 (1st Sess. 1977) (Conf. Rep.)); see also *Bolgiano, Hydrogen Pipelines*, *supra* note 5, at 42-50.

<sup>20</sup> PAUL W. PARFOMAK, CONG. RSCH. SERV., *PIPELINE TRANSPORTATION OF HYDROGEN: REGULATION, RESEARCH, AND POLICY 10* (2021) [hereinafter *CRS Report*]; *Statement Regarding a Coordinated Framework for*

*Regul. of a Hydrogen Econ.*, 72 Fed. Reg. 609, 618 (U.S. Dep’t of Transp., Jan. 5, 2007); GOV’T ACCOUNTABILITY OFF., *ISSUES ASSOCIATED WITH PIPELINE REGULATION BY THE SURFACE TRANSPORTATION BOARD*, app. I (1998).

<sup>21</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 8.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> See *Bolgiano, Hydrogen Pipelines*, *supra* note 5, at 43-47.

<sup>24</sup> *Gulf Cent. Pipeline Co.*, 7 I.C.C.2d 52 (1990); *Gulf Cent. Pipeline Co.*, 50 F.E.R.C. ¶ 61,381, *aff’d* *CF Industries*, 925 F.2d at 477. See *Bolgiano, Hydrogen Pipelines*, *supra* note 5, at 42-50; *Diamond, Hydrogen Pathways*, *supra* note 2, at 8.

<sup>25</sup> See *CF Indus., Inc. v. Koch Pipeline Co., L.P.*, 4 S.T.B. 637, 640 n.11 (2000) (rejecting the argument that STB lacks jurisdiction over ammonia because it is a gas), *aff’d* *CF Indus., Inc. v. STB*, 255 F.3d 816 (D.C. Cir. 2001).

<sup>26</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 13 (“Under current law, hydrogen is most logically classified as ‘artificial gas’ under the NGA, because in most cases it is ‘artificially created by the agency of man.’”) (quoting *Natural Gas Pipeline Co. of Am.*, 13 F.E.R.C. ¶ 61,165, at 61,352 (1980) (finding that biomethane could not be “natural gas”); see also *id.* at 5-7.

<sup>27</sup> 49 U.S.C. § 15301(a) (no jurisdiction over pipelines carrying “water, gas, or oil.”); Act to Revise Without Substantive Change the ICA, Pub. L. No. 95-473, 92 Stat. 1337, 1470 (1978) (changing to words “natural or artificial gas” to simply “gas” without impacting their meaning).

<sup>28</sup> *Id.* at 7 (“The most basic distinction between substances regulated under the NGA and ICA is that the NGA covers gases while the ICA covers liquids.”) (citing dicta and summary of arguments as explained in notes 17-18, *supra*).

<sup>29</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 4-5.

<sup>30</sup> *Id.* at 9-10.

<sup>31</sup> *Williams Olefins Feedstock Pipelines, L.L.C.*, 145 F.E.R.C. ¶ 61,303 (2013).

<sup>32</sup> See, e.g., *Distrigas Corp.*, 47 F.P.C. 752 (1972).

<sup>33</sup> See, e.g., *id.* at 816 (emphasis added) (rather it “was because the sales were not an incident in the sale of natural gas”). See also *CF Indus., Inc. v. Koch Pipeline Co., L.P.*, 4 S.T.B. 637, 640 n.11 (2000) (rejecting the argument that ICCTA excluded pipelines carrying gaseous commodities under cognate statutory provision identical to that currently defining FERC’s ICA jurisdiction).

<sup>34</sup> Diamond, *Hydrogen Pathways*, *supra* note 2 at 4-7.

<sup>35</sup> See *id.* at 5 (claiming “FERC has deemed several substances to fall within the category of ‘artificial gas.’” and that “FERC has left the door open to considering whether other substances also may be classified as ‘natural gas’ in light of the ‘goals and purpose’ of the NGA.”)

<sup>36</sup> See *Bolgiano, Hydrogen Pipelines*, *supra* note 5, at 16-30. In particular, the Congressional record at the time of the NGA’s (and Hepburn Act’s) passage clearly that “natural gas” was understood to “consist[] principally of methane.” See *id.* at 24-25 & nn.116-17 (quoting FED. TRADE COMM’N, FINAL REPORT NO. 84-A, ECONOMIC, CORPORATE, OPERATING AND FINANCIAL PHASES OF THE NATURAL-GAS-PRODUCING, PIPELINE, AND UTILITY INDUSTRIES, WITH CONCLUSIONS AND RECOMMENDATIONS, S. DOC. NO. 70-92 (1st Sess. 1936) [hereinafter *Report No. 84-A*]). Report No. 84-A was identified by Congress as the basis for the NGA. NGA section 1(a), Pub. L. No. 75-688, 52 Stat. 821, 822 (1938) (codified at 15 U.S.C. § 717). This narrow definition of natural gas was confirmed by other legislative sources

in the preceding years. See *id.* at 25 & nn.118-121 (citing legislative reports provided by the Department of Interior). The record also reflects that “artificial gas” was understood to be the inferior substitute made primarily from coal. *Id.* at 25-26 & nn.123-24. Most importantly though, at all relevant times the Congressional record reflected a clear understanding of hydrogen as its own resource with unique values and applications that was distinct from artificial or natural gas. See *id.* at 25 & n.120, 26 & n.125. *Hydrogen Pathways* does not address the legislative history regarding the definition of natural or artificial gas.

<sup>37</sup> For instance, the Article claims that hydrogen pipelines could attain NGA jurisdiction by blending trace amounts of methane but only cites cases that deal with blending interstate and intrastate natural gas. See Diamond, *Hydrogen Pathways*, *supra* note 2, at 3 & n.15 (citing Opinion No. 610, *United Gas Pipe Line Co.*, 47 F.P.C. 245, 258 (1972); *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 536 (1945)). This precedent is inapplicable, and this extrapolation is flatly wrong—in fact, FERC and FPC precedent establishes that trace amounts of natural gas (i.e., methane) in non-NGA pipelines does not establish NGA jurisdiction. See *S. Jersey Gas Co. v. SunOlin Chem. Co.*, 47 F.E.R.C. ¶ 61,031, at 61,095 (1989) (finding “no necessity for [FERC] to attempt to trace these stray [natural gas] molecules, much less regulate them” under the NGA).

<sup>38</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 5 & nn.38-39 (citing *Paiute Pipeline Co.*, 52 F.E.R.C. ¶ 61,311, at 62,253-54 (1990) and *Columbia Gas Transmission Corp.*, 17 F.E.R.C. ¶ 61,020 (1981)). These cases do not stand for this, in fact they do not even use the word “artificial.” The other examples in the Article claiming “several substances” have been “deemed” to be “artificial gas” are all just examples of methane manufactured using different processes. See Diamond, *Hydrogen Pathways*, *supra* note 2, at 5. Further, “regulated as natural gas under the NGA” (Diamond, *Hydrogen Pathways*, *supra* note 2, at 7) is a misnomer because the transportation of artificial gases is exempt from regulation unless they are mixed with, and therefore meet the definition of, natural gas.

<sup>39</sup> See, e.g., *M3 Ohio Gathering LLC*, 179 F.E.R.C. ¶ 61,221 (2022) (exercising ICA enforcement jurisdiction over propane and ethane pipelines); *Williams Olefins*, 145 F.E.R.C. ¶ 61,303 (ethane subject to ICA, rather than ICCTA); *Mid-America Pipeline Co. v. FPC*, 330 F.2d 226, 227 (D.C. Cir. 1964) (“an interstate common carrier of natural gas liquids . . . is subject to regulation only by the [ICC],” since replaced by FERC).

<sup>40</sup> See note 38, *supra*. For a discussion of “town gas,” see CRS Report, *supra* note 22, at 6 (“Beginning in the 1800s, gas used for lighting streets and buildings was manufactured from coal (primarily), pitch, petroleum products, and even whale oil. Commonly referred to as ‘town gas’ or ‘water gas,’ it typically consisted of hydrogen, methane, carbon monoxide, and small amounts of carbon dioxide and nitrogen. . . . the increasing availability of lower cost natural gas from domestic reserves starting in the 1940s eventually supplanted town gas in these distribution systems, although town gas was still used in some communities until the 1950s.”). See also Bolgiano, *Hydrogen Pipelines*, *supra* note 5, at 35-42 (describing cases where only methane has been found to be natural gas, and only synthetic methane has been found to be “artificial gas”).

<sup>41</sup> *Id.* at 25 & n.120, 26 & n.125.

<sup>42</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 8-9, 13.

<sup>43</sup> *Id.* at 13.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.* at 13.

<sup>46</sup> See Powers Senate Testimony, *supra* note 5, at 8-12.

<sup>47</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 8-9, 13.

<sup>48</sup> *Id.* at 8-9.

<sup>49</sup> Bolgiano, *Hydrogen Pipelines*, *supra* note 5, at 57-58 (“Case Study: The Ethane Molecule”).

<sup>50</sup> See note 41, *supra*, and authorities cited therein.

<sup>51</sup> Importantly, FERC does not broadly regulate the entire NGL market (or the crude oil or refined products markets) like it does with natural gas. Rather, FERC regulates only transportation of these commodities (and directly related services) on a route-by-route basis. See Powers Senate Testimony *supra* note 5, at 9-12.

<sup>52</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 8.

<sup>53</sup> *Id.*

<sup>54</sup> See e.g., GOLDMAN SACHS, CARBONOMICS: THE CLEAN HYDROGEN REVOLUTION 26 (Exhibit 46), <https://www.goldmansachs.com/insights/pages/gs-research/carbonomics-the-clean-hydrogen-revolution/carbonomics-the-clean-hydrogen-revolution.pdf> (projecting relatively modest adoption of hydrogen for “Grid blending (heating industrial & buildings)” even under a 2050 “bull scenario”); Michael Cembalest, *The Elephants in the Room*, J.P. Morgan 2022 Annual Energy Paper, May 2022, at 28, 38, <https://privatebank.jpmorgan.com/content/dam/jpm-wm-aem/global/cwm/en/insights/eye-on-the-market/2022-energy-paper/elephants-in-the-room-jpmwm.pdf>; HYDROGEN COUNCIL AND MCKINSEY & CO., HYDROGEN INSIGHTS: A PERSPECTIVE ON HYDROGEN INVESTMENT, DEPLOYMENT AND COST COMPETITIVENESS 35 (Fig. 17) (Feb. 2021), <https://hydrogencouncil.com/wp-content/uploads/2021/02/Hydrogen-Insights-2021.pdf> (ranking “Hydrogen competitiveness per end application in 2030” and ranking uses such as heating buildings or powering turbines as less competitive compared to transportation and existing applications of hydrogen); INT’L ENERGY AGENCY, GLOBAL HYDROGEN REVIEW 241 (Sept. 2022), <https://iea.blob.core.windows.net/assets/c5bc75b1-9e4d-460d-9056-6e8e626a11c4/GlobalHydrogenReview2022.pdf> (“The option to use hydrogen, either co-fired with natural gas or as a pure fuel in gas turbines . . . may be limited due to the high associated costs and the competition from a large pool of technologies that can provide grid flexibility (such as pumped hydro, batteries and demand side response, among others) . . . The scope of direct use of hydrogen in buildings in the near term is limited as other options, such as heat pumps, can be deployed much faster and more efficiently.”). See also *id.* at 262 (“Hydrogen blending [into natural gas pipelines] can be a first step while developing infrastructure for dedicated hydrogen transport. . . . For the longer term, the capability of new equipment to be ready to operate on pure hydrogen or to be easily upgraded should be considered.”).

<sup>55</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 13.

<sup>56</sup> See *Aircraft Serv. Int’l, Inc. v. FERC*, 985 F.3d 1013, 1020 (D.C. Cir. 2021); See also Powers Senate Testimony *supra* note 5, at 3-4.

<sup>57</sup> See Powers Senate Testimony *supra* note 5, at 9-10. See also Powers, *et al.*, *Regulatory Burdens of Permitting Bill*, *supra* note 9.

<sup>58</sup> Diamond, *Hydrogen Pathways*, *supra* note 2, at 12 (“Unlike the NGA, the ICA grants FERC no certificate and siting authority. FERC’s inability under the ICA to preempt state and local laws and provide pipeline companies the right of eminent domain would be a major drawback to regulation of hydrogen under the ICA.”).



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<sup>59</sup> See, e.g., *Hearing to Examine Federal Regulatory Authorities Governing the Development of Interstate Hydrogen Pipelines, Storage, Import, and Export Facilities, Before the S. Comm. on Energy & Nat. Res.*, 117th Cong. (July 19, 2022) (Spoken Testimony of Chad Zamarin, the Williams Companies) (estimating that it takes 4-5 years to build an interstate gas pipeline that could physically be built in a year and claiming the cost of NGA certification has raised the cost of building a pipeline from \$1 million a mile to \$8-20 million).

<sup>60</sup> 15 U.S.C. § 717f(c)(1)(A).

<sup>61</sup> Powers, et al., *Regulatory Burdens of Permitting Bill*, supra note 9.

<sup>62</sup> PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN. PIPELINE MILEAGE AND FACILITIES (accessed March 8, 2023), available at <https://portal.phmsa.dot.gov/analytics/saw.dll?Portalpages&PortalPath> (select “hazardous liquid” under “system, type”); see also Powers Senate Testimony at supra note 6, 7-8, 11-12 (noting recent projects approved by Pennsylvania and Illinois regulators).

<sup>63</sup> Diamond, *Hydrogen Pathways*, supra note 2, at 13.

<sup>64</sup> See, e.g., *Navigator Borger Express LLC*, 175 F.E.R.C. ¶ 61,133, at P 30 (2021) (approving proration policy allocating capacity to committed shippers first).

<sup>65</sup> See, e.g., *Tricon Energy Ltd. v. Colonial Pipeline Co.*, 171 F.E.R.C. ¶ 61,078, at PP 24 (2020) (assessing whether a pipeline’s prorationing policy “is just and reasonable, and not unduly discriminatory or preferential”).

<sup>66</sup> See *Oil Pipeline Capacity Allocation Issues & Anomalous Conditions*, 178 F.E.R.C. ¶ 61,105, at PP 2-4. (2022).

<sup>67</sup> Powers, et al., *Regulatory Burdens of Permitting Bill*, supra note 9.

<sup>68</sup> See Powers Senate Testimony at supra note 5, 4-9, 11-12.

<sup>69</sup> *Id.* at 3-4, 9-11.

<sup>70</sup> See generally Bolgiano, *Hydrogen Pipelines*, supra note 5.

<sup>71</sup> See generally Powers Senate Testimony.

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# The Impact of *West Virginia v. EPA* on Challenges to FERC’s Authority Under the Major Questions Doctrine

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## Introduction

In the Spring 2022 issue of this publication, Harvey Reiter highlighted a significant legal development that implicated the authority of federal regulatory agencies, including the Federal Energy Regulatory Commission (FERC). Specifically, Reiter summarized recent applications of the nascent “major questions doctrine” in the Supreme Court’s decisions in *Alabama Association of Realtors v. Department of Health & Human Services* (2021)<sup>1</sup> and *National Federation of Independent Business v. OSHA* (2022),<sup>2</sup> which he interpreted as potentially allowing courts to strip an agency of its power to regulate if they determine “that an agency’s policy initiative was too big and too important to be entrusted to it.”<sup>3</sup> Reiter queried how some of the most consequential rulemakings from FERC (or its predecessor, the Federal Power Commission) would have fared under the Supreme Court’s analysis in *Alabama Realtors* and *NFIB*. And he concluded that those decisions might spark challenges to future or pending FERC actions, including proposed revisions to Order No. 1000’s regional transmission-planning and cost-allocation rules (Transmission Rulemaking)<sup>4</sup> and updated draft policy statements on certification of new interstate natural gas facilities (Draft Policy Statements).<sup>5</sup> Reiter’s observations have proven to be prescient, as critics have tried to leverage the major questions doctrine to attack both of these FERC initiatives.

This article picks up where Reiter’s left off to address *West Virginia v. EPA*—the most recent Supreme Court case involving the major questions doctrine, and the first Supreme Court majority opinion expressly referencing and exploring the doctrine.<sup>6</sup> In his 2022 article, Reiter correctly noted *Alabama Realtors* and *NFIB* relied on some worrisome factors to invoke the doctrine. Fortunately (in this author’s view), *West Virginia* does not rely on some of the most troubling factors from those earlier decisions, such as

the number of persons affected.<sup>7</sup> Rather, to determine whether the major questions doctrine applies, *West Virginia*’s framework asks whether the action (1) is “unheralded” and (2) represents a “transformative” change in the agency’s authority.<sup>8</sup> If the answer to these questions is yes, the agency must point to “clear congressional authorization” for its action.<sup>9</sup> *West Virginia* is far from a model of clarity, but the majority opinion’s analysis reflects an attempt to cabin the doctrine to only “extraordinary cases.”<sup>10</sup> Under that analysis, FERC’s Transmission Rulemaking and Draft Policy Statements should not trigger the doctrine because they are neither unheralded nor transformative.

While the *West Virginia* majority opinion seems to cabin the doctrine, Justice Gorsuch’s concurring opinion tries to expand it by (1) introducing factors for triggering the doctrine that the majority opinion omits and (2) recasting the doctrine as a clear-statement rule.<sup>11</sup> Perhaps most troubling for FERC is Justice Gorsuch’s reliance on “intru[sion] into an area that is the particular domain of state law” as an additional factor that may trigger the major questions doctrine.<sup>12</sup> Drawing on that statement, seventeen States have argued that FERC’s Transmission Rulemaking triggers the doctrine because it “implicates” the jurisdictional divide in the Federal Power Act (FPA) between state and federal authority.<sup>13</sup> Others have lobbed similar arguments at the Draft Policy Statements, citing the jurisdictional divide in the Natural Gas Act (NGA).<sup>14</sup>

But there is already a well-established body of case law delineating the divide between federal and state jurisdiction in the FPA and the NGA.<sup>15</sup> Inserting state interests into the major questions doctrine risks muddying that longstanding divide and creating uncertainty for FERC’s authority.

## I. *West Virginia* Eschews a Multi-Factor Test of Economic and Political Significance for the Major Questions Doctrine, Asking Instead Whether the Agency’s Action Is Unheralded and Transformative

In his 2022 article, Reiter lamented the Supreme Court’s reliance in *Alabama Realtors* and *NFIB* on (1) previously unclaimed agency authority and (2) the number of persons affected. He rightly criticized both: Courts have rejected similar novelty challenges to

FERC’s authority because “no inference may be drawn from prior non-use,”<sup>16</sup> and “[r]ulemakings, which establish regulations of general applicability, will almost by definition affect large numbers of businesses and persons.”<sup>17</sup> *West Virginia* relies on the first factor, but not the second—in fact, *West Virginia*’s legal analysis does not turn on any factors of economic significance, like the number of persons affected.

Before explaining this point, some background on *West Virginia* may be helpful. The case involved Section 111(d) of the Clean Air Act, which authorizes the Environmental Protection Agency (EPA) to set a “standard of performance” for power plants’ emission of certain air pollutants, including greenhouse gases.<sup>18</sup> “That standard must . . . reflect the ‘best system of emission reduction’ that [EPA] has determined to be ‘adequately demonstrated’ for the particular category” of power plant.<sup>19</sup> The question in *West Virginia* was whether Section 111(d) authorizes EPA to issue the Clean Power Plan (CPP), which, among other things, used a purposeful “generation shifting” approach to determine the best system of emission reduction.<sup>20</sup>

The Supreme Court began by announcing that, in cases involving agency authority, different analyses apply depending on whether the case is “ordinary” or “extraordinary.”<sup>21</sup> Extraordinary cases have been ones “in which the ‘history and the breadth of the authority that the [agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”<sup>22</sup> The Supreme Court then catalogued such cases, describing them as embodying the “major questions doctrine.”<sup>23</sup>

As Natasha Brunstein and I explain elsewhere, although the Supreme Court referenced economic and political significance in the prelude to its legal analysis, when it actually determined whether the CPP triggered the doctrine, it did not rest on some amorphous assertion of economic and political significance.<sup>24</sup> Nor did the Supreme Court march through a list of significance factors—like the amount of money involved, overall economic impact, number of persons affected, or degree of public attention.<sup>25</sup> The Supreme Court instead explained that “this is a major questions case” because “EPA ‘claim[ed] to discover in a long-extant statute an unheralded

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power’ representing a ‘transformative expansion in [its] regulatory authority.’”<sup>26</sup> The rest of the Supreme Court’s legal analysis of the triggers for the doctrine then tracked these two considerations, examining (1) whether the CPP was “unheralded,” i.e., “unprecedented,” and (2) whether it represented a “transformative” change in EPA’s authority.<sup>27</sup>

That the Supreme Court did not march through a multi-factor list of indicators of economic and political significance is, for lack of a better word, significant. Several parties used a multi-factor test of economic and political significance in their briefs.<sup>28</sup> The Supreme Court did not. And there are good reasons for that seemingly deliberate choice. Any test that relies on malleable indicators of significance

amounts to little more than you “know it when you see it.”<sup>29</sup> Such a test would also call for a political judgment rather than a judicial one.<sup>30</sup> And far from cabining the doctrine to extraordinary cases, a test turning on things like the amount of money involved or number of persons affected would sweep in hundreds of agency actions a year (if not more).

The broad reach of an amorphous test centered on economic and political significance would arguably capture many FERC actions, including its Transmission Rulemaking, which will have widespread impact on utilities, households, and others in between. As Reiter aptly observed, that is inherent in nearly any generally applicable regulation of the energy sector.<sup>31</sup> (Though that is not necessarily true of the Draft Policy Statements: They merely provide guidance on FERC’s case-by-case considerations when deciding whether individual pipeline applications satisfy the “public convenience and necessity” standard,<sup>32</sup> and it is unclear whether the number of pipelines approved or disapproved under that guidance will be meaningfully different than before.) But *West Virginia’s* two-prong framework should have more limited application than the type of amorphous test of economic and political significance advanced in the *West Virginia* briefing and implicitly rejected by the Supreme Court.

For example, FERC’s Transmission Rulemaking should not trigger the major questions doctrine under *West Virginia’s* two-prong analysis because it is neither unprecedented nor transformative.<sup>33</sup> Most notably, in Order No. 1000, FERC regulated regional transmission planning and cost allocation in response to similar concerns raised in the Transmission Rulemaking about the evolving generation mix.<sup>34</sup> FERC can thus readily point to a past analogous exercise of authority. The D.C. Circuit upheld Order No. 1000, explaining that FERC’s “recognizing that state and federal policies might affect the transmission market and direct[ing] transmission providers to consider that impact in their planning decisions . . . fits comfortably within [its] authority.”<sup>35</sup> That reasoning alone also demonstrates that FERC’s Transmission Rulemaking does not represent a transformative change in its authority.

For similar reasons, the Draft Policy Statements should not trigger the major questions doctrine either.<sup>36</sup> Among other relevant precedents, FERC’s 1999 Policy Statement on certification of new

interstate pipeline facilities, as clarified in 2000, stated that FERC would give weight to “the overall benefits to the environment of natural gas consumption” (e.g., as compared to coal consumption).<sup>37</sup> The Draft Policy Statements similarly explain that FERC will give weight to upstream and downstream greenhouse gas emissions.<sup>38</sup> Both represent analogous exercises of FERC’s authority to consider indirect environmental effects, meaning the Draft Policy Statements are not unheralded. Nor do they represent a transformative change in FERC’s authority because they merely endorse consideration of an effect similar to previously considered effects as part of an analysis that FERC (or its predecessor) has been doing for decades.<sup>39</sup> Stated differently, FERC’s “power over American industry” will look much the same under the Draft Policy Statements as before.<sup>40</sup>

## II. The *West Virginia* Concurring Opinion Would Create Uncertainty for FERC

Justice Gorsuch authored a concurring opinion that materially differs from the majority opinion by offering additional factors as potential triggers for the major questions doctrine. For example, Justice Gorsuch stated that the “major questions doctrine may apply when an agency seeks to ‘intrud[e] into an area that is the particular domain of state law.’”<sup>41</sup> Justice Gorsuch did not explain exactly how intrusion into an area that is the particular domain of state law fits into the major questions analysis. He observed only that it is a “suggestive factor[.]” for determining “when an agency action involves a major question for which clear congressional authority is required.”<sup>42</sup>

This “suggestive factor” is problematic as a general matter.<sup>43</sup> But if it were adopted as a trigger for the major questions doctrine, it would be especially problematic for FERC’s authority. As the Supreme Court explained in *FERC v. Electric Power Supply Association (EPSA)*, the FPA’s “statutory division” of authority between FERC and the States over the electricity sector “generates a steady flow of jurisdictional disputes because—in point of fact if not of law—the wholesale and retail markets in electricity are inextricably linked.”<sup>44</sup> Much the same could be said of the NGA’s jurisdictional divide.<sup>45</sup> The case law interpreting both statutes’ nearly century-old “bright line” between FERC and state authority is admittedly complicated. But, as others have persuasively argued, it provides an administrable framework for resolving

the “steady flow of jurisdictional disputes” between FERC and the States, even when applied to the modern energy sector.<sup>46</sup>

Drawing on Justice Gorsuch’s concurring opinion, however, critics of FERC’s actions have confusingly invoked the major questions doctrine in combination with arguments based on the FPA’s and NGA’s jurisdictional divide. For example, seventeen States filed comments opposing FERC’s Transmission Rulemaking, arguing that “[n]ational scale energy grid regulation is a ‘major question’ . . . because it implicates a unique and complex jurisdictional divide between State and federal regulatory authority.”<sup>47</sup> The States separately argued that, “[i]n addition to the lack of ‘clear congressional authorization,’ that would be required to survive review under the major questions doctrine, FERC’s goals here are also foreclosed by statutory prohibitions in the [FPA],” because the “[S]tates, not [FERC], are the entities responsible for shaping the generation mix.”<sup>48</sup> Private parties made similar arguments opposing the Draft Policy Statements, arguing that they triggered the major questions doctrine because the NGA “specifically left regulation of upstream and downstream activities to the States.”<sup>49</sup>

How would a court resolve these state-interest arguments? Would it need to decide whether FERC’s actions triggered the major questions doctrine by determining whether such actions violated the FPA’s or NGA’s jurisdictional divide? If so, the major questions doctrine would be irrelevant: If FERC improperly crossed the jurisdictional divide, its actions would be unauthorized without any need to proceed further in the major questions analysis; if FERC’s actions did *not* cross the jurisdictional divide, no further major questions analysis would be needed either.

Or would merely “implicat[ing]” the divide be enough to trigger the major questions doctrine, as the seventeen States seem to suggest? If so, a court would then proceed to determine whether FERC had “clear congressional authorization” for its action. But how would the search for “clear congressional authorization” differ from what a court would normally do when resolving the “steady flow of jurisdictional disputes” under the FPA and NGA?

The answer to that question may ultimately turn on how one views “clear congressional authorization.”

Brunstein and I read *West Virginia’s* use of clear congressional authorization as depriving the agency of deference and presuming the agency’s action is not authorized once a court finds the major questions doctrine is triggered, but that presumption can be overcome if the agency persuades a skeptical court that the “correct reading” of the statute authorizes the action.<sup>50</sup> Under that reading of *West Virginia*, a skeptical court would scrutinize FERC’s assertion of authority more closely than in the ordinary case, but it would not require magic statutory words to authorize FERC’s action.

Others, however, including Justice Gorsuch, equate “clear congressional authorization” with a clear-statement rule—an aggressive canon of statutory interpretation that allows courts to choose a less plausible statutory reading (over the more natural one) in certain circumstances.<sup>51</sup> As Brunstein and I explain, the majority opinion in *West Virginia* appears to have carefully omitted the phrase “clear statement” from its legal analysis, perhaps to avoid adopting such an aggressive canon of interpretation.<sup>52</sup>

But if the major questions doctrine is effectively a clear-statement rule, it is uncertain how such a rule would operate in practice when applied to the FPA and NGA. For example, would the FPA’s authorizing FERC to regulate “the sale of electric energy at wholesale in interstate commerce,” including both wholesale electricity rates and any rule or practice “affecting” such rates,<sup>53</sup> have provided the requisite clear statement for FERC to regulate the compensation that operators pay for demand response bids? The *EPSCA* Court resolved that jurisdictional dispute in FERC’s favor just a few years ago.<sup>54</sup> But “demand response does not fit neatly within the FPA’s jurisdictional boundaries,” namely because “[i]t is not a sale for resale” and “the entities that participate in wholesale markets through demand response programs are ordinarily retail purchasers.”<sup>55</sup> So it is far from certain that *EPSCA* would have come out the same way if the Supreme Court had required a clear statement in the FPA authorizing FERC to regulate compensation for demand response bids.<sup>56</sup> Similar questions arise concerning the D. C. Circuit’s opinion upholding Order No. 1000 given the court’s reliance on *Chevron* deference to reject challengers’ arguments.<sup>57</sup>

\* \* \*

These questions are academic, however, because the majority opinion controls and does not adopt intrusion into an area that is the particular domain of state law as a relevant factor in the major questions analysis nor endorse the clear-statement label for the doctrine.<sup>58</sup> But that will not stop parties from trying to use Justice Gorsuch’s concurring opinion. And some courts have been open to applying

<sup>1</sup> Ala. Ass’n of Realtors v. Dept. of Health & Human Servs., 141 S. Ct. 2485 (2021) (per curiam) (“Alabama Realtors”).

<sup>2</sup> Nat’l Fed. of Ind. Bus. v. OSHA, 142 S. Ct. 661 (2022) (per curiam) (“NFIB”).

<sup>3</sup> Harvey Reiter, *Would FERC’s Landmark Decisions Have Survived Review Under the Supreme Court’s Expanding “Major Questions Doctrine” and Could the Doctrine Stifle New Regulatory Initiatives at 3-4*, EBA Brief Vol. 3, Iss. 1 (Spring 2022) (“Reiter”).

<sup>4</sup> Notice of Proposed Rulemaking, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 F.E.R.C. ¶ 61,028 (2022).

<sup>5</sup> *Certification of New Interstate Natural Gas Facilities*, 178 F.E.R.C. ¶ 61,107 (2022); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 F.E.R.C. ¶ 61,108 (2022) (Draft GHG Policy Statement).

<sup>6</sup> W. Virginia v. EPA, 142 S. Ct. 2587 (2022). The Supreme Court may soon address the major questions doctrine again in two pending cases, *Biden v. Nebraska*, No. 22-506, and *Department of Education v. Brown*, No. 22-535.

<sup>7</sup> See generally Natasha Brunstein and Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV’T L. & POL’Y REV. 47 (2022).

<sup>8</sup> W. Virginia, 142 S. Ct. at 2610 (quoting Util. Air Regul. Grp. v. EPA (UARG), 73 U.S. 302, 324 (2014)).

<sup>9</sup> *Id.* at 2614 (quoting UARG, 573 U.S. at 324).

<sup>10</sup> *Id.* at 2608.

<sup>11</sup> *Id.* at 2620 (Gorsuch, J., concurring); see also Brunstein & Goodson, *supra* note 8, at 95–100.

<sup>12</sup> W. Virginia, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting *Alabama Realtors*, 141 S. Ct. at 2486–87).

<sup>13</sup> Comments of State of Texas et al., *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, F.E.R.C. Docket No. RM21-17-000 at 3 (Sept. 19, 2022).

<sup>14</sup> Supplemental Comments of Enbridge Gas Pipelines, F.E.R.C. Docket Nos. PL18-1 & PL21-3 at 15 (Aug. 12, 2022).

<sup>15</sup> See generally Joshua C. Macey & Matthew Christiansen, *Long Live the Federal Power Act’s Bright Line*, 134 HARV. L. REV. 1360 (2021) (examining recent Supreme Court precedents addressing the Federal Power Act’s “bright line” jurisdictional divide between state and federal control over the energy sector).

<sup>16</sup> Reiter, *supra* note 4, at 9 (quoting Assoc. Gas Distribs. v. FERC, 824 F.2d 981, 1001 (D.C. Cir. 1987)).

<sup>17</sup> *Id.*

his concurring opinion.<sup>59</sup> So far, none of those cases have involved the FPA or NGA. But any extension of the concurring opinion to those statutes could muddy their jurisdictional divide and create uncertainty for FERC—or at least headaches for courts trying to resolve these complicated arguments.

<sup>18</sup> *West Virginia*, 142 S. Ct. 2587, 2599 (2022) (quoting 42 U.S.C. § 7411(a)(1)).

<sup>19</sup> *Id.* (quoting §§ 7411(a)(1), (b)(1), (d)).

<sup>20</sup> *Id.* at 2603–05. “Generation shifting describes the shift from high-polluting energy sources on the grid—like coal plants—to lower-polluting sources—like gas-fired turbines, renewable energy sources, and energy efficient technologies.” Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 985 (2021).

<sup>21</sup> *West Virginia*, 142 S. Ct. 2587, at 2608.

<sup>22</sup> *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

<sup>23</sup> *Id.* at 2608–09.

<sup>24</sup> Brunstein & Goodson, *supra* note 8, at 81–82, 87–93.

<sup>25</sup> *Id.*

<sup>26</sup> *West Virginia*, 142 S. Ct. at 2610 (quoting UARG, 573 U.S. at 324).

<sup>27</sup> See Brunstein & Goodson, *supra* note 8, at 74–82. Notably, the Court emphasized similar factors in *NFIB*, the major questions case decided just before *West Virginia*. See *NFIB*, 142 S. Ct. at 666 (noting the “lack of historical precedent,” coupled with the breadth of authority that [OSHA] now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach”).

<sup>28</sup> Brunstein & Goodson, *supra* note 8, at 88–91.

<sup>29</sup> U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 481 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also Natasha Brunstein and Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317, 335–36 (2022) (referring to “regulatory costs, the number of public comments, the number of beneficiaries, the level of public salience, and even agencies’ intent” as “arbitrary and malleable metrics”).

<sup>30</sup> Cf. Chad Squitieri, *Who Determines Majorness*, 44 HARV. J. OF LAW & PUB. POL’Y 463, 504 (2021) (“[T]he major questions doctrine’s call for a consideration of both ‘economic and political significance’ ensures the inquiry is necessarily political by definition.”).

<sup>31</sup> Reiter, *supra* note 4, at 10.

<sup>32</sup> Draft GHG Policy Statement, *supra* note 4, at PP 106–12.

<sup>33</sup> Supplemental Comments of the Harvard Electricity Law Initiative and the Institute for Policy Integrity at New York University School of Law, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, F.E.R.C. Docket No. RM21-17-000 (Dec. 6, 2022).

<sup>34</sup> *Id.* at 4; see also *id.* at 4–6 and Appendix A (identifying other relevant regulatory precedents).

<sup>35</sup> S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 48–49 (D.C. Cir. 2014).

<sup>36</sup> See generally Comments of Legal Scholars Supporting FERC’s Authority to Consider Climate Impacts in Certification Proceedings Under Section 7 of the Natural Gas Act, F.E.R.C. Docket Nos. PL18-1 & PL21-3 (Aug. 12, 2022); Supplemental Comments of the Institute for Policy Integrity at New York University School of Law, F.E.R.C. Docket Nos. PL18-1 & PL21-3 (Oct. 20, 2022).

<sup>37</sup> Order Clarifying Statement of Policy, *Certification of New Interstate Pipeline Facilities*, 90 F.E.R.C. ¶ 61,398 (2000).

<sup>38</sup> Draft GHG Policy Statement, *supra* note 4, at PP 106–12.

<sup>39</sup> See generally Romany M. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. ENV’T L. J. 179, 190–94 (2020).

<sup>40</sup> *West Virginia*, 142 S. Ct. 2589, 2612 (2022) (quoting Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) (plurality op.)).

<sup>41</sup> *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting *Alabama Realtors*, 2486–87).

<sup>42</sup> *West Virginia*, 142 S. Ct. at 2620, 2622.

<sup>43</sup> Among other things, there is already a separate canon—the federalism clear-statement rule—to address such arguments. Justice Gorsuch stated that “the major questions doctrine and the federalism canon often travel together.” *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring). But it is not clear that they do. When the Court has listed the canonical precedents supporting, respectively, the federalism clear-statement rule and the major questions doctrine, it has provided a relatively well-defined universe of cases for each that do not overlap. Compare *Bond v. United States*, 572 U.S. 844, 858–59 (2014) (citing, as foundational federalism clear-statement cases, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001); *United States v. Bass*, 404 U.S. 336, 350 (1971)), with *West Virginia*, 142 S. Ct. at 2608–09 (citing, as relevant precedents for the major questions doctrine, *Brown & Williamson*, 529 U.S. at 159–60; *Alabama Realtors*, 141 S. Ct. at 2487; *UARG*, 573 U.S. at 310, 324; *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *NFIB*, 142 S. Ct. at 665; *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); *MCI*, 512 U.S. at 229 (1994); *King v. Burwell*, 576 U.S. 473, 486 (2015)). To support his observation that the two doctrines “often travel together,” Justice Gorsuch cited just one case. See *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (citing *Alabama Realtors*, 142 S. Ct. at 2486–87). To be fair, although Justice Gorsuch did not cite *Gonzales v. Oregon* for this proposition, that opinion arguably invokes both the major questions doctrine and the federalism clear-statement rule. 546 U.S. at 274. Still, that is just two decisions over roughly thirty years.

<sup>44</sup> *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 265 (2016); see also *Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020) (“[T]he Court must once again referee the Federal Power Act’s jurisdictional line separating the Federal Energy Regulatory Commission’s jurisdiction over the federal wholesale market and States’ jurisdiction over facilities used in local distribution. This time, Petitioners argue FERC is

off-sides in Order No. 841 by prohibiting States from barring electric storage resources on their distribution and retail systems from participating in federal markets.”).

<sup>45</sup> See, e.g., *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015) (“The pipelines’ behavior affected *both* federally regulated *wholesale* natural-gas prices *and* nonfederally regulated *retail* natural-gas prices. The question is whether the federal Natural Gas Act pre-empts these lawsuits.”).

<sup>46</sup> See Macey & Christiansen, *supra* note 16, at 1365 (“A trio of recent Supreme Court cases has the potential to create an enduring jurisdictional framework that can accommodate the transition to the electricity grid of the future while respecting the FPA’s federalist vision.”); *id.* at 1369 (“Under that framework, every dispute involving the FPA’s jurisdictional divide can be resolved by answering no more than three questions.”).

<sup>47</sup> Comments of State of Texas et al., *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, F.E.R.C. Docket No. RM21-17-000 at 3 (Sept. 19, 2022).

<sup>48</sup> *Id.* at 4–5.

<sup>49</sup> Supplemental Comments of Enbridge Gas Pipelines, F.E.R.C. Docket Nos. PL18-1 & PL21-3 at 15 (Aug. 12, 2022).

<sup>50</sup> Brunstein & Goodson, *supra* note 8, at 84–87.

<sup>51</sup> See *West Virginia v. EPA*, 142 S. Ct. 2589, 2616 (2022) (Gorsuch, J., concurring) (“Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.”); see, also e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109–10, 118 (2010). On separation of powers, Justice Gorsuch would also jettison the intelligible principle test for permissible delegations in favor of a much narrower test that would permit Congress to constitutionally delegate authority to agencies only to “fill up the details,” engage in “fact-finding,” or undertake “non-legislative responsibilities.” *Gundy v. United States*, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting); see also *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (“The major questions doctrine works . . . to protect the Constitution’s separation of powers.”). In other words, if a clear-statement rule would permit a court to adopt a less plausible reading of a statute to avoid a separation-of-powers problem, Justice Gorsuch would find a lot of separation-of-powers problems to avoid.

<sup>52</sup> Brunstein & Goodson, *supra* note 6, at 95–100

<sup>53</sup> 16 U.S.C. §§ 824(b), 824e(a).

<sup>54</sup> *EPSA*, 577 U.S. at 265.

<sup>55</sup> Macey & Christiansen, *supra* note 16, at 1377.

<sup>56</sup> Justice Gorsuch was not on the Court when it decided *EPSA*; Justice Alito did not participate in the decision. See *EPSA*, 577 U.S. at 296.

<sup>57</sup> *S.C. Pub. Serv. Auth.*, 762 F.3d at 54 (“The court reviews challenges to the Commission’s interpretation of the FPA under the familiar two-step framework of *Chevron*[.]”); *id.* at 58–59, 73, 76, 84, 86 (deferring to FERC’s interpretation of the FPA under *Chevron*).

<sup>58</sup> See *West Virginia*, 142 S. Ct. 2587, 2610–14 (2022) (explaining why “this is a major questions case” but omitting any discussion of intrusion on an area traditionally the domain of

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state law); *see also* Brunstein & Goodson, *supra* note 8, at 94–95.

<sup>59</sup> *Brown v. U.S. Dep’t of Educ.*, No. 4:22-cv-908, --- F. Supp. 3d ---, 2022 WL 16858525, at \*12, \*13 (N.D. Tex. Nov. 10, 2022), *cert. granted before judgment sub nom. Dep’t of Educ. v. Brown*,

143 S. Ct. 541 (2022) (relying on concurring opinion for factors triggering the major questions doctrine); *see also* *Louisiana v. Becerra*, No. 3:21-cv-4370, --- F. Supp. 3d ---, 2022 WL 4370448, at \*10, \*12 (W.D. La. Sept. 21, 2022) (relying on concurring opinion for meaning of “clear congressional authorization”).