



CleanLaw 89

3 lawsuits on auto emissions, 1 United Auto Workers strike, and the impact on the EV transition with Jody Freeman, Kevin Poloncarz, and Jack Ewing

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Intro: Welcome to CleanLaw from Harvard's Environmental and Energy Law Program. In this episode, Harvard Law professor and EELP's founding director Jody Freeman speaks with Kevin Poloncarz, a partner at the law firm Covington and Burling, and Jack Ewing, a New York Times business reporter who writes about the auto industry and electric vehicles. Jody, Kevin, and Jack discuss the three cases currently before the DC Circuit about how agencies set vehicle standards to reduce greenhouse gas emissions and improve fuel efficiency.

They also discuss the United Auto Workers strike, the economics and supply chain considerations for manufacturing electric vehicles, and how each may affect the Biden administration's climate policy for the transportation sector. We hope you enjoy this podcast.

Jody Freeman: Welcome to CleanLaw. I'm Jody Freeman, professor at Harvard Law School, and today we have a terrific podcast all about what's happening in the transportation sector on greenhouse gas reductions, the climate policy of the Biden administration, the rules that are caught up in litigation to control GHGs from cars and trucks, and we'll also talk about the role of the UAW strike and how it might impact the possibility of making progress on the EV transition. Joining us today to talk about these issues are Kevin Poloncarz and Jack Ewing.

Some of you know Kevin Poloncarz. He's a repeat player here on CleanLaw. Kevin is a nationally renowned environmental and climate attorney at Covington. He represents utilities, investors, and other clients in litigation and transactional matters related to power and carbon markets and clean energy technologies like CCS and hydrogen. He's been involved in representing what I would call the forward-leaning companies who support the government in litigation that challenges EPA's authority to set greenhouse gas standards for the power and transportation sectors.

And full disclosure, Kevin also sits on the EELP Advisory Board for our program here at the law school and he teaches at Stanford Law School. Kevin, thank you so much again for being with us.

Kevin Poloncarz: Wonderful to be here.

Jody: And Jack, who is new to the podcast, is a New York Times business reporter. He writes about the auto industry and the shift to electric vehicles in particular. He's



written a terrific book on the VW emission scandal from a few years ago and his recent coverage of the strike has addressed the intersection of the EV transition and the union's demands for higher wages and benefits and shorter work weeks. Jack, I'm delighted to have you here.

Jack Ewing: Thank you, Jody.

Jody: Let me start with three cases about standards to reduce greenhouse gases from cars and trucks that were argued in the DC Circuit recently, last month. These three cases combined made for what some people called Auto Week in the DC Circuit, and it was a really interesting set of arguments, and I'm going to turn to Kevin and ask him to help us understand what these three cases are about.

Just briefly by way of background, one challenges the CAFE standards that are set by NHTSA, the National Highway Traffic Safety Administration. The second case is a challenge to the Environmental Protection Agency's greenhouse gas standards for cars and trucks that they set in 2021, so these are the first standards the Biden administration set to drive down GHGs and they go out to 2026. And the third case challenges California's waiver.

California has historically for 50 years been able to get a waiver of preemption from the EPA under the Clean Air Act that lets set its own vehicle standards and a handful of states, between a dozen and 17 states, adopt those standards typically, which means California can really set standards for about 40% of the car market. Those three cases are all very serious challenges to the climate policy of the Biden administration. Kevin, can you help us understand what went on in the DC Circuit, what these cases are about, and how we ought to think about them?

Kevin: Well, the first case that we heard oral argument on is Texas v. EPA, and that case, as you mentioned, concerns the model year 2023 to 2026 greenhouse gas standards for light duty vehicles. And in the last administration, the standards were weakened, so they only required a year-over-year increase of 1.5% stringency, and the Biden administration restored the strong standards and requires a 10% increase in the stringency of the standards on a year-over-year basis.

Now, that rule has been challenged by fuel producers and states who are arguing that this case is a rerun of West Virginia v. EPA, and that's their words, a rerun. And they basically say, just like EPA can't use the Clean Air Act to force a shift to cleaner sources of electricity, so too EPA can't use the Clean Air Act to force a shift away from the internal combustion engine. So that's the case.

Jody: So Kevin, let me ask you to take a minute right there and help us understand the essence of this argument a little better. The Supreme Court in the West Virginia case you mentioned came down with a decision embracing what's called the major questions doctrine, and they basically said in the West Virginia case, and correct me if I'm wrong, Kevin, that when EPA chose a method of setting standards for power plants, that method was really beyond their authority.



And that setting standards for the power sector that would really drive it in a cleaner direction away from coal, that that was such a major political and economic decision, a decision of such importance that the authority to do something like that would have to have been much clearer in the Clean Air Act. And does that about capture the West Virginia case?

Kevin: Pretty much.

Jody: So if that's true, the argument here, I guess, is that in the Clean Air Act section authorizing EPA to set car standards to drive down greenhouse gas pollution, I guess the argument is Congress would've had to be much more explicit if they wanted the agency to move the industry to electrification. Does that capture it?

Kevin: That pretty much captures it. They're basically saying that despite the fact that the Clean Air Act defines motor vehicles in a way that doesn't say it's a vehicle that has an internal combustion engine, that EVs, electric vehicles, are something wholly different and therefore standards that require some degree of electrification, and that is a disputed premise whether the standards actually require some degree of electrification, but their argument is that these standards require electrification, and as a consequence, that is some transformative expansion of EPA's authority that in their view falls right within the major questions doctrine.

Jody: So let's talk about this a little bit and think about how oral argument went. You said that there's an open question whether these standards really require electrification. So let's back up and understand what EPA did when they set these standards, right? They basically under the Clean Air Act look at the available technologies that can help reduce pollution. The technology is already in the marketplace, or at least in reach of the auto companies, and they think about costs, right, Kevin, and other considerations, and they basically run it through a model that they've used for many years.

And after doing their analysis and assessment, they decide what an appropriate level of stringency is to reduce pollution that would also be affordable for the companies, achievable by the companies with enough lead time to implement. Does that sort of capture how they approach setting these standards?

Kevin: Yes. And when EPA sets standards, they afford a lot of flexibility, and this is very much what they've done for decades under this provision. They afford a lot of flexibility for the automakers on how they're going to achieve the standards on a fleet-wide basis.

Jody: So Kevin, just so I understand it, these standards for greenhouse gases for cars and trucks, they date to at least a decade back. The agency started setting them in the Obama administration, so they're not brand new. And is the argument that somehow the EPA this time around has done something radically different than it's been doing when setting these greenhouse gas standards that somehow is not authorized by the Clean Air Act?



Kevin: The argument they're making is that somehow despite the fact that EPA has always allowed for standards to be met on this fleet-wide basis and has included electric vehicles within the standards since they were first promulgated a decade ago, that somehow here the standards are requiring a degree of electrification that in their view is forcing a transformation of the industry, is forcing a transformation of the electric grid, is implicating national security issues to source the ingredients for batteries.

And that somehow by driving that change, as they say the standards do, that is a transformation of EPA's authority that goes beyond what they've done under this provision historically.

Jody: So they're really saying that EPA is doing a big thing driving electrification, setting standards that necessarily will result in forcing the industry to build cars that are electric that would otherwise not be built. Does that sound about right?

Kevin: That's correct. And as you mentioned, EPA models how automakers will achieve the standards using a model that they've long used. And in this instance, when EPA looks out at the available technologies and puts in the cost of those technologies, EPA says where we've set the standards is likely to result in an increase in penetration of EVs from 7% to 17%.

Jody: So let's talk about oral argument here because there was sort of this back and forth with the panel where there was a failure to come to an agreement over what these standards would result in, right? So the government kept saying, "Well, no, we're not necessarily forcing a certain amount of electric cars to be built. We're saying we project that a certain percentage of electric cars will be built, but we aren't responsible for it. We're not mandating it."

And then the bench kept asking, "Well, are you mandating it or are you just projecting it?" What's the answer to that question and how did they do at oral argument?

Kevin: Well, it's a really complicated question, and the interesting fact that came out at argument is that the agency did not confront this question squarely in its rulemaking because the question was never raised in the public comment period in a way that suggested that this went to the crux of EPA's authority, that EPA lacked the authority to use this provision of the Clean Air Act in a way that would cause electrification beyond what would happen in a business-as-usual scenario.

And so there was a lot of question at oral argument as to whether the standards were driving electrification, and that is a word that the administration has used is a priority to drive electrification of the vehicle fleet, or whether the standards were set in a way that electrification was bound to happen because it is the most cost-effective means for reducing greenhouse gas emissions from this class of motor vehicles.

Jody: So it's hard to get to the nub of this because as you say, there were some sort of procedural issues here that made this more complicated. Nobody, as you say in the



comment period, argued that EPA can't drive electrification. Nobody made that point, so they never raised it as an objection. And so there was a back and forth about why that ought to be disqualifying, that that ought to mean the court can't reach that issue, right, Kevin? And that it's not fair play because EPA didn't have a chance to respond to that argument.

But in terms of this actual substantive debate, can the EPA set standards to drive electrification or can it not? My own view would be, well, I don't understand why they can't. The whole point of the Clean Air Act provision is to clean up the emissions from vehicles. If there's technology that's both available and being deployed and accessible like all kinds of battery technologies and other technologies that reduce emissions from cars, then why shouldn't EPA be able to set standards based on their availability? I was just baffled by why this is such a hard issue.

Kevin: I'm with you, Jody. So the argument, if I could best phrase it, is that because the Clean Air Act provides authority for EPA to set standards for classes and motor vehicles that emit pollutants that endanger human health or welfare, that the vehicles that are included within the class must necessarily emit those pollutants that endanger human health or welfare.

And so despite the fact that the statute says those standards can rely upon technologies that control or prevent the emissions, they say that essentially a technology could be considered if it reduced emissions 99%. But if it reduces emissions 100% so that it necessarily takes the vehicle out of the class of those vehicles that contribute to the endangerment and the authority is lacking for EPA to do that.

Jody: So this is one of my favorite type of nerdy moments on CleanLaw when we drill down at this level of detail. What this really boils down to is the petitioners are saying when EPA goes to set these standards, they can't base it on cars that don't themselves produce the pollution you're trying to reduce. And it sounds to an outsider like it's ludicrous because electric vehicles are available. They're in the marketplace. The idea that you should ignore technologies that help reduce pollution just sounds like it's totally contrary to both the letter and the spirit of the Clean Air Act, but that is in fact what the petitioners are arguing.

Jody: How do you think oral argument went in this case? Talk a little bit about the panel. The panel was quite favorable. If you think about panels of judges on the DC Circuit in terms of who appointed them, which we often do as a way of kind of estimating how the outcome might go, it's not a perfect predictor, but it's something we look to. How do you think the argument went and what was your sense of the panel's reaction to these arguments?

Kevin: I don't think that the petitioners got much traction with their arguments in front of this panel. And the most instructive moments for me were when Judge Katsas, who was a Republican appointee, basically tested the petitioner's theory of how what EPA has done here implicates the major questions doctrine and said, "Isn't what EPA is



really doing here, turning the dial from four to eight?" It's not a difference in kind. It's just a difference in degree of what they're requiring and what has been required for over a decade for greenhouse gas emissions and how the statute has been interpreted and how EPA has promulgated emission standards for many decades.

Jody: So the government argued to that effect that this is really how we set these standards. Nothing new, nothing major here that qualifies as a major question. And so this went back and forth. And what's interesting here is the auto industry's position. Where was the auto industry in this litigation? They weren't among the people challenging the standards, right? Or among the parties challenging the standards.

Kevin: No, they weren't. They were on the side of EPA, and that's quite remarkable if you think of it. You have the industry that is directly regulated by these standards saying, "Of course EPA has the authority to consider electrification because this is the way that we are going to be reducing emissions. And moreover, this is how we're going to be designing cars going forward. This is the future. We've been putting billions of dollars into that. And the proposition that EPA should ignore the direction that the industry is going is, as you said, ludicrous.

Jody: It's interesting because years ago in the Obama administration when we did the first round, I was there for this in the White House when we did the first round of setting these standards, we had the auto industry on the government side of counsel table for the first time. And as you said, Kevin, it's remarkable and it was striking. And I think even back then it had an impact on the judges, because they saw, "wow, industry is aligned here with these standards" and we thought it made a difference. And do you think that will make a difference in the litigation?

Kevin: Well Jody, you asked that question to the wrong person, in so far as I thought that my presence in the West Virginia case as the representative of the power sector might make a difference to the Court. So I don't think it necessarily changes how the Court views petitioner's arguments, but I do think it certainly informs their views as to whether what EPA is doing is a radical transformation of its authority such that it implicates the major questions doctrine.

Jody: Right. Let me see if Jack might help us out here in our understanding of where the industry is right now on electrification just to give us a reality check. Are we being way too optimistic when we say, "Look, these technologies are being deployed, they're within reach, they're affordable." Is that a fair characterization, Jack? The industry's headed this way anyway?

Jack: The industry's definitely headed that way. I think everyone in the industry sees this as the future. They're going at different speeds. The traditional car makers are playing catch up with Tesla. It's a big challenge for them. But I do think that there's a consensus in the industry that they need to make electric cars not only because of regulations, but at some point that is what consumers will be demanding. A lot of consumers are demanding it already, and I think as they see prices coming down,



they're expecting that that will be the prevailing technology because it's better. Not because of any regulation.

Jody: Are there differences among the different companies? Sometimes, we can't see behind the curtain, but it often looks like Ford is playing a leadership role. There's sort of an alliance it feels like between Ford, BMW, Honda, a few of the companies, but not necessarily all of the American big three or former big three. Am I over analyzing this when I think about that?

Jack: No. There's no question they're at different stages in this transformation. Some are ahead of others. The one that's the furthest ahead, of course is Tesla, which is a pure electric car company, has been working on electric cars for more than a decade, has mastered the manufacturing as ahead in batteries and software, and basically all of the traditional car makers are playing catch up in one way or another. And then you could argue about which ones are the furthest ahead. I think Ford is doing pretty well. GM is I think on the cusp of introducing a lot of electric cars. And then you have Toyota and most of the Japanese makers who are behind, they're very invested in hybrid technology and have been resisting the shift to full electric. So there's kind of a spectrum there.

Jody: Yeah, it's interesting just to think about how they're figuring out their alignment in these kinds of cases and where to position themselves.

Kevin, let's turn to the second case. We might dispense with it relatively quickly but I want to at least mention it. It challenges the standards that NHTSA sets, which are known as CAFE standards, which everyone is familiar with, the miles per gallon standards you see at the pump. And you have to understand, I think, here that we have two regulators in this space. We have EPA setting greenhouse gas standards for motor vehicles, and we have CAFE standards set by NHTSA, and they use different statutory authorities to do it. The law governing these agencies is a bit different and they also can consider different things when they go to set their standards, and they don't always come out with exactly the same number.

So I remember back in the Obama administration, we worked quite hard to get the agencies on the same page to align their rulemakings. We did a joint rulemaking on purpose so that the industry would end up with essentially one standard to meet. One understandable, predictable standard for their fleets without having to figure out how to accommodate a different one from NHTSA and a different one from EPA.

Kevin, what is this litigation about challenging the NHTSA standards in a nutshell?

Kevin: So in a nutshell, there are specific provisions of EPCA, the Energy Policy Conservation Act, that explicitly prohibit NHTSA when it is determining the maximum degree of feasible fuel efficiency for cars and trucks from considering electrification and electric vehicles. Because the idea is electric vehicles don't have, quote unquote, "Fuel efficiency," because they're not consuming gasoline. And if you think of where



EPCA came from, the fuel economy standards came out of concerns about consumption of oil and oil products.

And so the central contention is that when NHTSA set its standards, it projected what the baseline was going to be of vehicles without its standards. And that baseline included electrification, and included the fact that electric vehicles are being produced. And so the central contention in the case is that that was an error, and that starting point for determining what the degree of feasible fuel economy is ran contrary to the statute's prohibition on considering electrification.

Jody:

In the modern day it sounds so crazy that the agency that setting fuel efficiency standards would ignore the cars that have the best fuel efficiency. Even though they don't use traditional fuel, their fuel is essentially electricity, and it seems a little crazy to ignore them when using baselines like that. But they're dealing with a very specific law, as you mentioned, Kevin, that comes from the days of after the oil embargo against the United States, and it was written in a very specific way, and it's much more constraining on NHTSA than the Clean Air Act is on EPA, and so they're kind of in a straight jacket setting their standards in a way. It's interesting that in this litigation, Kevin, the environmentalists are also challenging the NHTSA fuel efficiency standards. So they're essentially getting hit from both sides, arguing they're too stringent and their method was improper, and on the other side that they weren't stringent enough. So what's your takeaway from that argument?

Kevin:

From that argument my takeaway is that as you mentioned, the statute has some constraints on the agency which puts it in a tough place. But think about it. Just think about what it would mean. Because the agency has allowed electric vehicles to function in determining compliance with the standards as the number of electric vehicles goes up significantly and is averaged in for determining what the corporate wide average fuel economy is, the standards would become a nullity. Because if they were always, the baseline itself was premised only on those internal combustion engine vehicles, the standards would just become a nullity and become moot and the statute would become dead letter essentially. So that's kind of what's at issue there. I think though the statutory prescription is clear enough that the agency might be in some trouble there.

As for the environmentalist challenge, I don't think they got a huge amount of traction. I think the challenge really falls more in the heartland of arbitrary and capricious review, and I didn't see or sense an appetite for the panel to say that NHTSA got it wrong.

Jody:

What my takeaway is actually, Kevin, is that the CAFE law, EPCA is obsolete, and CAFE standard setting is obsolete and Congress should address it. My takeaway is we should just have greenhouse gas standards for cars and trucks for vehicles under the Clean Air Act. Don't need CAFE anymore. It's been overtaken. It just seems like it can't respond to the environment in which we're going to see more and more electric vehicles.



Kevin: I don't disagree. And I think that, honestly, trying to regulate fuel economy as a means of getting at the problem that we're trying to address today, which is climate change and greenhouse gas emissions, is a poor surrogate.

Jody: Yeah, I agree.

So let me turn to the third case, which is quite interesting because it features a novel legal theory that I want to get your views on. The third case is the challenge to California's historic waiver authority. This was before a panel, Childs, Garcia, and Wilkins. These were all Democratically appointed judges that again doesn't tell us everything, but it tells us something. Relatively favorable panel most likely. Can you encapsulate that argument that petitioners made in that case, which basically say that California having some special carve out in the Clean Air Act which allows the state to get a waiver of the normal preemption that would apply, normally states can't set their own vehicle standards, that would create 50 states with 50 different standards, that's the normal rule, but the Clean Air Act allows California and California alone to get a waiver of that presumption and go ahead and set its own vehicle standards. The argument is that special authority is somehow, and always has been, unconstitutional because it gives California this sort of special treatment and it violates a constitutional doctrine the petitioners have grasped onto called equal sovereignty.

Kevin, can you explain how that works, and where that doctrine came from, and why it's playing such an important role in this particular case?

Kevin: Well, the doctrine most immediately comes out of the 2013 decision of the Supreme Court in the case of Shelby County versus Holder. And in that case, the Supreme Court struck down very important provisions of the 1964 Voting Rights Act, what we call the pre-clearance requirements, which provided that states that historically discriminated against minorities in voting rights in some respect bore an additional burden if they wanted to change their voting rights laws. They needed to get clearance from DOJ to do that. And the Supreme Court found that that offended the Constitution upon some broad principles that were previously described as equal footing, that when all states are admitted to the union, they're on equal footing and you can't treat states differently. So that's where the doctrine comes from. And the assertion in this case is that the grandfathering provision of the Clean Air Act that allows California and California alone to go further and set its own vehicle standards similarly offends the Constitution.

Jody: So I'm just going to say this and go out on a limb and say a lot of legal academics consider this to be a kind of invented doctrine that the court just sort of deployed in Shelby County in a way that historically, perhaps, it had not been deployed, and this attempt to use it to go even further would be really unprecedented and unravel a lot of statutory accommodations of states where different states are actually treated quite differently, and that has always been tolerated. So legal scholars are quite critical of it in the sense that they think it's being used to jump the fence in a new



application that really doesn't have any precedent or any basis in existing law. You may not want to put it that way, but I'm happy to put it that way.

Did the government make an argument of this kind that actually many states are treated differently in many different contexts, and if they decide that it doesn't work here, it's unconstitutional here, it's going to do a lot of harm to these other regimes?

Kevin: Yes, they did make that argument and they pointed to some examples about authority for the federal government alone to regulate hydroelectric power, but giving Alaska authority to continue doing its own thing. And they did point out that when Congress exercises its commerce clause power, they necessarily treat states differently. And that if this statute were to be invalidated ... And just think of it. This is a facial challenge to this provision of the Clean Air Act that has existed for more than a half a century and allowed California to go further in regulating emissions from cars and trucks. Just think what that would mean if statutes that have long been on the books for over a half century could now be invalidated based on a doctrine that has very scant evidence in the Supreme Court's jurisprudence.

Jody: Yeah, it would be so far reaching. And my impression listening to the argument was the panel was not buying this equal sovereignty argument. Was that your impression?

Kevin: Absolutely. And I think the advocate for Ohio, the then solicitor General of Ohio, was abundantly aware that this panel was not buying his argument, and he was prepared for them not to buy it.

Kevin: I think frankly, he's pitching this argument and has been asserting this argument for a different audience.

Jody: And who is that audience, Kevin?

Kevin: The Supreme Court.

Jody: Right. So this leads to the question, are all three of these cases or maybe just two of these cases, the major questions doctrine argument against the EPA standards and the equal sovereignty argument against the California waiver, are at least those two pitched really for the Supreme Court? Are petitioners really just trying to get to the Court?

Kevin: Absolutely. I think that in the case of the Texas case concerning EPA's greenhouse gas standards, they really want to test the limits and boundaries of this major questions doctrine. And where we thought it was only when an agency is using a rarely used provision of a statute in a wholly new way, now they're saying no, despite the fact that EPA has used Section 202 in this way and has included averaging, banking, trading, has considered electrification, that this is a degree of difference. It's \$300 billion of difference. And that in and of itself implicates somehow the major questions doctrine. And we still don't really know what the major questions doctrine is.



As I think others have said, it's like this grab bag of factors that can be called into play to question whether an agency has authority. And so I think what they're really using this case to do is to say, "Let's put this up to the Supreme Court and see, will they bite on this?", is somehow implicating some transformation of authority that requires a clear statement.

Jody: And that's really why they're pitching the challenge to EPA's standards as forcing electrification upon the industry. Just like they're trying to sort of create this analogy to the West Virginia case, which forced this transformation away from coal. They're just trying to align this with West Virginia as much as they can, and hope that the Supreme Court bites when they go to seek cert. And that's why the narrative of transformation and EPA doing something huge and impactful and beyond what they've normally done, all of that is sort of Supreme Court bait that awaits this cert petition.

Kevin: Yeah, I think what they're saying is, just like the Supreme Court found that EPA in the Clean Power Plan, although I disagree with this characterization, this is what the Supreme Court concluded, arbitrarily decided the appropriate amount of coal-fired generation for the country, and engineered standards that would get to that level of coal-fired generation, that that was a transformative act. And EPA similarly here is trying to get rid of the internal combustion engine, and that Congress needs to do something of the magnitude of saying that the internal combustion engine should be outlawed.

Jody: So let me turn, Jack, to you and ask you a little bit about how from the industry's perspective, if you've ever thought about this or covered this, the California waiver is important. The idea that California sets standards for essentially about 40% of the market because other states are allowed to opt into them. Jack, can you give us a sense of California's role and how the industry might view it? Here again, the industry lined up on the side of supporting the government and supporting California's waiver. Which to some people might be surprising, because California has always pushed pretty aggressive car standards.

Jack: Yeah, well, I mean it's hard to overstate how influential California is for the whole car industry. I mean, listening to Kevin, I was just thinking if the Court were to rule that California no longer had that authority, that would really have global implications. Because California is not only influential in the U.S. car market, and all of the car companies I know pay very close attention to what California is doing. It would also have global effects because probably not a lot of people know this, but California's rules have been copied worldwide. China's clean air rules were basically copied from California. And so, it's really something that has global implications. If you took California out of the equation, it would really have a dramatic effect on not only the car market, but I think the progress of how we fight climate change.

Jody: Yeah, I mean I think it can't be overstated either. California has always been a first mover. If you eliminate their waiver authority, all bets are kind of off. I mean they've helped maintain standards, even when the federal ones get rolled back, when the



Trump administration rolled back the car standards. And they're out there basically with a stake in the ground over time saying, "Here's where we think we can go," setting aggressive pollution standards and demonstrating the art of the possible in the state. And then trying to push the marketplace in their direction. And that's always been an important driver.

Again, back in the days when we did this early on in the Obama Administration, we brought California into the process and said, "If we set stringent enough federal standards, will you basically accept these for purpose of California?" And they said yes. And so we were able to say, "Look, NHTSA, EPA, and California are all aligned, one set of standards." It would be nice if the Biden administration could do something like that again. It's in the process right now.

Aside from this litigation which they have to handle and defend what they've already done, they're moving forward with a new set of standards that will be for model years 2027 to 2032. And I do want to talk a little bit about how that process is going because that's on the clock. They have to get that done before the presidential election. And I wanted to ask you, Kevin, a little bit about that. Setting aside for the moment, the three cases we just discussed, which may be on their way to the Supreme Court eventually, at least some of them, what about this new set of standards that are yet to be finalized?

Kevin: Assuming that the DC Circuit upholds the model year 2023 to 2026 standards, and finds that EPA was in its heartland in regulating greenhouse gas emissions and allowing for averaging banking and trading, and considering electrification. I imagine that there will be a cert petition that points to either the proposed rulemaking, if it's not yet finalized or the final rule. And says, "Hey Court, if you allow this decision to stand of the DC Circuit, we know where EPA is headed. You need to step in now and nip it in the bud, and prevent EPA from doing what we think is unlawful, i.e. saying that all vehicles need to be electric by some date."

Jody: I see what you're saying and I agree. The fact that this rule is underway will be used as a reason the Court should take the existing case and make it clear what EPA can and can't do. I think that'll be the temptation, to make it an appealing case for the Court.

Kevin: I think so. I mean at the argument we had at the DC Circuit, these issues of what is EPA's authority vis-a-vis electrification under 202, they weren't presented clearly in the rulemaking. And it came up as well, you know what? There's this other rulemaking ongoing and we're pretty darn sure that these petitioners are going to be present in that rulemaking, in fact, they are, and are likely to challenge that rule. And maybe that's the appropriate time to consider this question.

And so the question will become, if the DC Circuit issues a narrow ruling that basically says, "You didn't preserve these arguments, vis-a-vis the model year 2023 to 2026 standards. Will the Supreme Court nevertheless take that up because they're concerned about the model year 2027 to 2032 standards and want to step in early?"



Decades ago, we would've said the Supreme Court never would've done something like that. But since West Virginia and the way they got involved to strike down this moribund Clean Power Plan, I could very well see this Court having an appetite to intercede early.

Jody: Right. There were good arguments, good threshold arguments in the West Virginia Case on standing grounds and other things. The administration had signaled it was not going to revive the Clean Power Plan, it was not going to implement it. It was going to do another rulemaking. And we would normally think the Supreme Court would say, "Okay, we're out. We don't need to do this." Rulemaking an old policy that's never going to be in place, and yet they found a way to get there. They took the case anyway. So, I'm with you in being worried about their interest in these kinds of cases. They seem very interested in the EPA's authority to regulate right now.

Jack, let me turn to you because there's another dimension of this larger conversation about transportation sector policy and the EV transition, that I think could affect things, and that's the UAW strike. And you've been patiently sitting here waiting for me to get to this issue, and I really want to get to it. Can you give us a little bit of background? What have you been covering? What have you been seeing? Where are we with the strike? Give people some context of why you think the strike is happening and how you think it's going.

Jack: Okay, well, why the strike is happening. I mean, of course the obvious reason is that the old contracts has expired. But we also have new leadership at the UAW that was elected in March, a new president, Shawn Fain, who was taking a much more aggressive attitude towards the car makers than his predecessors. The union has given up a lot in the last couple of decades to preserve the car industry, to prevent the Detroit car makers from going out of business 10 years ago. And in the meantime, the car makers have become very profitable and the union is saying, "Okay, now we want our share." And so they have several weeks ago, began targeted strikes against all three car makers. Not broad strikes with all workers, but picking out certain factories and then ratcheting up the pressure, as the negotiations have gone on. That's where we stand now.

Jody: So Jack, let me ask you this, one hears a narrative in this dispute. One sometimes hears that the fact that there is a commitment to shift to electric vehicles means that there will be fewer jobs, and that that is playing a role in the strike. There's almost among some folks, a tendency to blame electrification or blame the climate policy of the administration for some of this labor unrest. What do you think of that?

Jack: Well, I don't think it's the cause of the strikes or the cause of the labor unrest. I mean, the big cause is just how many concessions the union's made in the past and their quite understandable desire to get a bigger share of the profits, now that the companies are profitable again. But I think electrification is playing a very important role in the talks. It's true that it takes fewer workers to build an electric car. You have fewer parts, you don't have mufflers, you don't need a big transmission, you don't need a big water-cooled radiator. You basically just need a battery and some electric



motors. And that is a threat if you're an auto worker. As they're looking to the future, they're worried about how many workers are still going to be needed. And how do we protect ourselves as this transition goes on?

Jody: It confuses me a little though how to think about this coherently. Because don't we also anticipate more American jobs coming from some onshoring over time of the production of batteries? And perhaps even some onshoring of the production of manufacturing of the components? And perhaps even mining of minerals that are needed for electric vehicles? So isn't there some potential for there to be more jobs than we think we will have now or in the next few years, just over time?

Jack: That's certainly what the Biden administration is trying to do with the Inflation Reduction Act. There's standards that get stricter as time goes on for how much of a battery, how much of an electric car is produced in North America, in other words, United States, Canada, or Mexico. And for minerals for the supply chain, there's incentives for companies to buy from our trade partners and not from China.

China currently dominates the supply chain for electric vehicles. They make most of the batteries, they refine most of the lithium. And the inflation Reduction Act is very much designed to pry that dominance away from China and bring it to the United States or to our allies. And if that's successful, yes, you could wind up with as many jobs or more jobs. I haven't seen any studies that really give us a very clear answer about that question.

Jody: So this is where there's an intersection, I think, of the conversation we're having with Kevin and the conversation we're having with you, Jack. Because there's a short-term problem perhaps, at least the industry says this. There's a short-term problem meeting the standards to reduce GHGs from cars and trucks, if in fact you are limited to using components that are not from China or other countries. If you have to source them from free trade countries, the companies are in a bit of a bind there. And if the credits they get reduce, if they have to go outside of free trade countries, and if consumers won't get the credits to purchase the vehicles, unless the components are sourced from the right places, the companies may have some short-term difficulty, because we don't have the manufacturing capacity right now. So they might struggle for a little while, they say, to meet these standards.

On the other hand, there's how this plays into the strike and the future of jobs, right? Because it may be true that because we don't have these components manufactured here, we don't have the capacity yet. There may be fewer jobs in the short term, but more jobs in the long term, as a result of the IRA. So I guess what I'm saying, perhaps not as directly as I wish, is, the IRA might make it harder for the auto industry to meet standards in the shorter term. But it also is meant to increase jobs in the longer term. That's the industrial policy at work in the statute. Have I captured it, sort of, Jack?

Jack: Yeah, I think so. I mean, I think the only thing I disagree with is the short term versus long term from jobs. Because actually in the short term, I think most economists agree there will be more jobs, because the companies are still making cars with



internal combustion engines at the same time they're building new factories for batteries and electric cars. So in the short term, that means more jobs.

I think this sort of in the middle what happens long term, I think that's harder to say. To your point about the conflict, the bind that the car makers are in, it's true that the Inflation Reduction Act and also the infrastructure bill from two years ago, they're trying to do a bunch of different things at once, and not always in harmony. They're trying to take China out of the supply chain. At the same time, they want people to buy more electric cars. Taking China out of supply chain makes them harder to manufacture or more expensive. So, those things don't really line up very well. And I could kind of understand the car maker's argument.

Jody: Well, you just said it far more artfully than I tried to say it, and much more efficiently. So, thank you. I think that really captures it, and I really appreciate your correction there about jobs in the short term. Because it's true that the auto companies are actually gearing up to manufacture both more internal combustion engines and more electric vehicles, and we're seeing manufacturing plants and battery plants popping up all over the country.

Jody: And I wanted to ask you about this, Jack. I mean, you see Ford, for example, building an EV assembly plant and two battery plants in Tennessee. And a lot of people are commenting that we're seeing them in Republican states or red states as they say. And I wonder if you could comment on that dynamic that we're seeing lots of new facilities and largely in the so-called red states.

Jack: Yeah, that is an interesting phenomenon, and it will be interesting to see how it plays out because no Republicans voted for the Inflation Reduction Act, and yet most of the money is going to Republican states or sometimes purple states like Georgia, but it's going to Alabama, it's going to Mississippi, it's going to Tennessee. As you mentioned. I think Tennessee is getting the most of all, and Texas is one of the parties to the suit that Kevin was talking about, and yet Texas is also the site of a huge new Tesla factory. So you wonder at some point, are these Republican politicians going to start asking themselves, "Well, are we really against electric cars? Because it's bringing an awful lot of jobs to our districts."

Jody: Yeah, I mean, it's going to change the politics of these policies too, because suddenly if these states have now got new factories and facilities and they've got jobs as a result of manufacturing more and more batteries, more and more electric vehicles, aren't they going to be stuck? It's going to be hard for them to oppose the kinds of policies that are supporting their economy. So I think that's a sort of hidden piece of the IRA as it gets implemented.

Jack: When you're seeing people like Lindsey Graham in South Carolina, he's showing up for when a BMW is expanding its factory to build batteries and taking credit for that at the same time his rhetoric is against the IRA and against electric cars. So I think at some point the politicians are going to have to reconcile that.



- Jody: I mean, it was interesting, right, Jack, that we saw Glenn Youngkin in Virginia decide he doesn't want the state to host a plant. Can you explain this story that he basically turned away these jobs?
- Jack: Yeah. Well, I think there's some question whether it was going to come to Virginia in the first place, but he said that Ford was building a factory to make a specific type of battery technology for electric cars that at the moment is only made in China. And Ford was partnering with CATL, which is a Chinese company, the largest battery manufacturer in the world. CATL was not going to own the factory, but they were going to supply the technology and Youngkin seized on that and said, "No, we don't want a Chinese factory in Virginia." Instead, it's supposed to be built in Michigan, although Ford has put a hold on it for various reasons.
- Jody: So this is, I think, a very interesting dimension of how the IRA will play out and interact with the politics of the red and blue states, and we may well see bumps along the road, but I see a pathway here to more support for these policies. As long as these facilities get built, get up and running, and you see jobs in these communities, it's hard to argue with economic growth, don't you think, Jack?
- Jack: Yes. Although you would never underestimate the ability of some political leaders to take two positions at once. I mean, Ohio, huge auto making state, the senator there, Senator Vance was basically saying that the car maker should stop making electric cars. They should just make gasoline vehicles that electric cars were destroying jobs. And this is as Ohio is in the midst of a huge transformation of its factories to making electric cars that's creating a lot of jobs.
- Jody: Yeah. So let me just get back to a point, Jack, you made earlier about the ongoing presence of internal combustion engines. I think the combination of standards coming from EPA and market trends mean that of course we're going to see more electrification. And I think most estimates the companies have made, and the Biden administration wants to see, is that half of new vehicles will be EVs by 2030 or 2035, but because internal combustion engines have long lives, the car park doesn't turn over quickly. It still will take some time, right? They're still manufacturing them. They'll still be a significant share of cars on the road. They're not disappearing overnight. And so this is important to the narrative, Kevin, in the litigation that says they're trying to do something transformative. Well, there's still going to be a role for internal combustion engines.
- Kevin: Absolutely. And there'll still be a role for the way that EPA has always structured its standards with averaging banking and trading for the electric vehicles that are coming online to offset the emissions that are still occurring from the new internal combustion engine vehicles, which will continue to be manufactured for, as you said, more than a decade.
- Jody: So there will still be jobs, as Jack said, associated with that and jobs associated with the newer EVs. Jack, let me ask you this. How do you think, you may not want to



answer this, but how do you think the strike's going to end? What do you see coming down the line here?

Jack: Well, it hurts both sides. It's painful for both sides. I mean, I talked to a worker yesterday who's living on \$500 a week. She's a single mother with three children. So if you're on strike, this is painful. It's painful for the car makers. Just yesterday, the union extended the strike to the Ford plant that makes F-150 pickup trucks, which is Ford's most profitable bestselling vehicle. So there's an economic cause for both sides and a strong incentive for them to find some kind of agreement. On the other hand, Shawn Fain, the new president of the UAW, has set very high expectations for what he's going to get out of the car makers, and he has a lot to deliver to his members. So I can't really say how that's going to turn out. I tend to think that they'll find a solution within the next couple of weeks, but it's very, very difficult to say.

Jody: I wonder what we all think about how this complicates the Biden administration's climate policy? I don't know if you have thoughts on that, Kevin. I myself think it's a little complicating. I mean, the president wants to take credit for these historic pieces of legislation like the Inflation Reduction Act and the infrastructure bill, which really puts historic amounts of money into a clean energy transition. And then at least on the surface, the strike is introducing this anti-EV narrative, which I don't think is particularly helpful. The president of course, went to the picket line, the first time a president's ever done that, so they're trying to manage this, but I do think it's a bit complicating and could be in the short term harmful for the climate agenda. Kevin, can I just ask you what you think of all that?

Kevin: Well, I do think it's tricky for sure with the president joining a picket line for the first time ever at the same time that the agenda is really driving towards EVs and on-sourcing all of the components of EVs and batteries. I think the other really interesting dynamic, and I'd be curious for Jack's view, is that there are tremendous job opportunities and new factories that are being built in largely red states. And that was in fact raised in the litigation that we're talking about as a basis for saying that these states really weren't harmed by the drive towards electrification. But there's this other dynamic, I think that many of those states are right-to-work states. And so putting factories in those states could be viewed as possibly weakening the hand of labor. And I'd be really curious if Jack has any thoughts on that dynamic.

Jack: Well, I think that's very much a subtext of the negotiations that are going on now. I mean, the unions are demanding that these new battery factories, which are usually joint ventures with Korean battery makers, they want those wages to be at the same scale as at the vehicle assembly plants. They don't want to set up a low-wage sector in the South. So that's very much an issue in the talks and could be one of the things that stands in the way of a quick agreement.

Jody: So it could be, I don't want to be naive here, but I want to be optimistic there could be a win-win, right? Because if they do succeed in getting those wages at an acceptable level, it could be both good for labor, but also good for the advancement of EV



technology, right? We could end up with a win. And that would be a win for the Biden administration too, wouldn't it?

Jack:

Yeah, I think so. I mean, maybe the other thing that's important to mention here is I think the UAW, they want to organize those plants in the South. They've had some successes, so they very much want to send a message beyond Ford, Stellantis, and GM that, "Look, if you let us represent you, we can get you much better pay, much better benefits." So that's another element. Whether it's going to be positive for EVs, that's harder to say. The one comment I wanted to make earlier is that one of the costs of the strike is lost time for these established car makers who are already behind Tesla in technology in selling electric cars. Tesla has 60% of the electric car market in the United States. Nobody at Tesla is striking. They're continuing to make cars and sell cars. So I think for the car makers, there is a big risk there. I think one reason they're not objecting to these EPA rules is they just want regulatory certainty. They don't want to have to deal with any controversies. They just want to build their cars without having to worry about what's going on in Washington.

Jody:

Yeah, even back in the Obama administration. That was the mantra coming from industry, and that created an opportunity to set aggressive standards. As long as they're clear, predictable, and provide certainty, they'll figure out a way to meet them. That's always been my attitude, and we're sort of singing that same song again here. I think this conversation, I'm so glad to have you both together for it because it really underscores now how closely knit together thinking about economic development and labor and environmental progress and climate change, how it all goes hand in hand now.

And you really can't design policy about one without designing policy about the other, trying to move forward on all fronts. This is the first administration that's really approached these things in this comprehensive way, adopting a kind of industrial policy approach to climate change, where you care about who's manufacturing and where the manufacturing of the clean energy technology is going to be, and you're still pushing it forward at the same time to address emissions reductions and transition to a cleaner economy. I think it's a very interesting moment for those reasons. And the only thing that could get in the way, as far as I can tell is the United States Supreme Court, right, Kevin? Am I being overly pessimistic?

Kevin:

Well, I think you're being overly pessimistic, in so far as I don't think the Supreme Court could stop the changes that are occurring because of so many other forces, including the bipartisan infrastructure law, including the Inflation Reduction Act, including consumer demand and automaker's own announcements. We know where they're going and where they're heading, and while the Supreme Court might try to clip EPA's wings to be part of the equation and making that happen, this is going to happen independent of regulation.

Jody:

Well, I like that message. I think we'll leave it there. Jack, thank you so much for joining us for this episode. Kevin, thank you for coming back, and we'll keep track of



these events and maybe we'll have you back on for an update sometime soon. Thank you both so much.

Kevin: Was a pleasure. Thank you.

Jack: Thanks for having me, Jody.