ORAL ARGUMENT HELD SEPTEMBER 14, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, et al. Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 22-1031 (and consolidated cases)
ADVANCED ENERGY UNITED, et al. Intervenors.	

OPPOSITION OF STATE AND PUBLIC INTEREST RESPONDENT-INTERVENORS TO FUEL PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Fuel Petitioners' motion improperly seeks a third merits brief on (meritless) arguments that they failed to preserve in public comments, on the incorrect premise that their characterization of the Rule as an electric vehicle mandate was challenged for the first time at oral argument. Their motion should be denied.

I. Multiple Briefs Contested Fuel Petitioners' Claim that the Rule was a "De Facto Electric-Vehicle Mandate"

The essential premise of Fuel Petitioners' motion is that EPA's challenge to their characterization of the Rule as a "de facto electric-vehicle mandate"

constituted "new arguments." Mot. 1. It is on this basis, and this basis alone, that they now suggest supplemental briefing is warranted. Petitioners' counsel made similar assertions at oral argument. Oral Arg. Recording 2:08:55 ("No one on that side of the 'v.,' in all of the briefs in this case has tried to say, No, no, no, this is still an option, . . . you can improve your gas-powered vehicles and you can still manage to meet the standards."); *see also, e.g.*, 0:31:27 ("We've got a lot of briefs in this case, and none of them say [you can meet the standards without producing electric vehicles].").

Petitioners' assertions are demonstrably wrong. In our answering brief, State and Public Interest Respondent-Intervenors specifically contested Fuel Petitioners' characterization, citing EPA's brief as well as an amicus brief from the International Council on Clean Transportation (ICCT). State-PIO Intv. Br. 27 ("[A]s EPA explains, the Rule is not a mandate that 17% of new vehicles be electric or plug-in hybrids.") (citing EPA Br. 54-55; 86 Fed. Reg. 74,434, 74,484 (Dec. 30, 2021); ICCT Amicus Br. 15-19). We noted that the ICCT amicus brief, in particular, identified "viable compliance pathways [for automakers] *without any increased production of zero-emission vehicles*." *Id.* (emphasis added).

Indeed, all three Respondent-Intervenor briefs raised the exact difficulty that Fuel Petitioners were challenged about at oral argument: how to isolate the *Rule*'s effect on electric vehicle production (and thus, any claimed "mandate" effect)

given a broad industry-wide investment in zero-emission technologies. *See* State-PIO Intv. Br. 27 (Instead of an EPA-directed transition, "the record shows that *industry* is increasing its zero-emission vehicle production, and that consumer preferences have a strong role in accelerating this shift."); AAI Br. 3 ("The auto industry is already rapidly deploying electric vehicles in their U.S. sales fleets even apart from the Final Rule."); Indus. Intv. Br. 10 & n.3 (detailing automaker commitments to electrify fleets regardless of Rule).[1]

Fuel Petitioners' choice not to respond to these arguments in their reply brief—or to address them adequately at oral argument—is no ground to secure supplemental briefing now.

II. Because Fuel Petitioners Did Not Preserve These Arguments, It Would be Futile to Entertain Further Briefing

Supplemental briefing is all the more inappropriate here because Fuel Petitioners never preserved their arguments, as was required by the Clean Air Act's mandatory exhaustion requirement. 42 U.S.C. § 7607(d)(7)(B) ("Only an objection [that] was raised with reasonable specificity during the period for public comment

[1] Whether the Rule in fact requires manufacturers to deploy more battery-electric vehicles than they otherwise would is, ultimately, beside the point: The statute provides no sound basis to treat one subset of battery technologies differently from other emission-reduction technologies in EPA's standard-setting process; as explained, the Act authorizes EPA to define "any class or classes," 42 U.S.C. § 7521(a)(1), of "motor vehicles," *id*. § 7550(2); and expressly contemplates application of standards to motor vehicles using technologies that "*prevent* or control" pollution, *id*. § 7521(a)(1) (emphasis added). State-PIO Intv. Br. 17-19.

… may be raised during judicial review."); *see also Ross v. Blake*, 578 U.S. 632, 639 (2016) ("mandatory exhaustion statutes … establish mandatory exhaustion regimes, foreclosing judicial discretion"). Indeed, Congress imposed this mandatory requirement in part to prevent precisely this sort of situation. Had Petitioners properly raised these arguments during the comment period, as the Act required, the administrative record would have addressed the issue more directly, to aid this Court's review.

The exhaustion issue is not even a close one. Not only did Fuel Petitioners fail to present EPA their "de facto mandate" argument with "reasonable specificity"; but, as EPA and Respondent-Intervenors pointed out, no party raised "EPA's authority under Section 7521(a) to … consider electrification or electric vehicles when setting emission standards," or even argued that "the level of projected electrification … triggers the major-questions doctrine." EPA Br. 38-39; State-PIO Intv. Br. 5. Petitioners failed to identify any comment that remotely meets the reasonable specificity standard in their reply briefs. *See* Fuel Petrs. Reply 8. Nor did they identify any such comment during their eighty minutes of oral argument.

Accordingly, given this failure to preserve the arguments, Petitioners' request for more briefing to elaborate upon them would be futile, and their motion should accordingly be denied.

III. If the Motion is Granted, Respondent-Intervenors Should be Permitted to File a Responsive Supplemental Brief

Post-argument briefing is unwarranted here. If, however, the Court were to grant petitioners' motion, Respondent-Intervenors respectfully request the opportunity to file a responsive supplemental brief.

CONCLUSION

The motion should be denied.

FOR THE STATE OF CALIFORNIA

ROB BONTA
Attorney General of California
EDWARD H. OCHOA
Senior Assistant Attorney General
MYUNG J. PARK
GARY E. TAVETIAN
Supervising Deputy Attorneys General

/s/ Theodore A.B. McCombs
THEODORE A.B. MCCOMBS
MICAELA M. HARMS
M. ELAINE MECKENSTOCK
Deputy Attorneys General

Attorneys for State of California by and through its Governor Gavin Newsom, Attorney General Rob Bonta, and the California Air Resources Board

On behalf of State Respondent-Intervenors

/s/ Sean H. Donahue
SEAN H. DONAHUE
Donahue & Goldberg, LLP
1008 Pennsylvania Ave. SE
Washington, DC 20003
(202) 277-7085

Attorney for Environmental Defense Fund

On behalf of Public Interest Respondent-Intervenors

Certificate of Compliance

I hereby certify that the foregoing response is printed in 14-point, proportionally spaced font and contains 856 words.

/s/ Sean H. Donahue

Certificate of Service

I certify that on September 28, 2023, the foregoing response was filed via the Court's CM/ECF system, which will provide copies to counsel of record.

/s/ Sean H. Donahue