ARGUED SEPTEMBER 14, 2023
No. 22-1031 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

ADVANCED ENERGY UNITED, ET AL.,

Intervenors.

On Petition for Judicial Review of Final Action of the United States Environmental Protection Agency (No. EPA-HQ-OAR-2021-0208)

SUPPLEMENTAL BRIEF FOR RESPONDENT-INTERVENOR ALLIANCE FOR AUTOMOTIVE INNOVATION

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August 19, 2024

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GLOSSARY

ABT	Emissions Averaging, Banking and Trading
Auto Innovators	Alliance for Automotive Innovation
EPA	United States Environmental Protection Agency
EPA.Br	EPA's Answering Brief
EV	Electric Vehicle
GHG	Greenhouse Gas
Int.Br.	Answering Brief for Intervenor Alliance for Automotive Innovation
MY	Model Year
NRDC	Natural Resources Defense Council

INTRODUCTION

In accord with the Court's July 29, 2024 Order, Respondent-Intervenor Alliance for Automotive Innovation ("Auto Innovators") respectfully submits this supplemental brief addressing "to what extent, if any, the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), is relevant to the issues of statutory interpretation" in these consolidated proceedings. Auto Innovators limits this brief to the statutory interpretation issue that was the focus of its Answering Brief, *i.e.*, whether Clean Air Act section 202(a) authorizes EPA to establish fleetwide standards that include electric vehicles and provide for emissions averaging, banking and trading ("ABT").[1]

ARGUMENT

Loper Bright overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA's interpretation of title II of the Clean Air Act on the statutory interpretation issue addressed by

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[1] The Court's July 29 Order directed the filing of supplemental briefs on the same question regarding *Loper Bright* in Case No. 22-1080, and with respect to Petitioners' standing in light of *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024) in these proceedings and in Case No. 22-1080. Auto Innovators is not a party in Case No. 22-1080, and its principal brief in these proceedings did not include Petitioners' standing.

Auto Innovators did not turn or rely on *Chevron*. No *Chevron* deference is needed to establish that the Clean Air Act authorizes EPA standards that provide for ABT and that include electric vehicles.

I. Congress Delegated To EPA Authority To Use Definitions Of "Classes" Of Vehicles For Regulation Under Clean Air Act Section 202(a) That Include Electric Vehicles.

When "the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court … is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 144 S. Ct. at 2263. Almost fifty years ago, Congress called for "the expeditious introduction of electric and hybrid vehicles into the Nation's transportation fleet," and there is no gainsaying EPA's duty to regulate light-duty vehicle greenhouse gas ("GHG") emissions under Clean Air Act title II.[2]

Electric vehicles fit readily into title II's framework for GHG controls. Electric vehicles are "motor vehicles" within the definition of

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[2] 15 U.S.C. § 2501(a)(4); *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 113-14 (D.C. Cir. 2012), *aff'd in part, rev'd in part on other grounds sub nom. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

section 216(2), 42 U.S.C. § 7550(2). In order to "fill up the details of [the] statutory scheme,"[3] section 202(a)(1), 42 U.S.C. § 7521(a)(1), directs EPA to define the "class or classes" of motor vehicles to which the Agency's emissions standards are to apply. EPA has defined seven different classes of light-duty motor vehicles in its GHG regulations, based on the purpose and size of those vehicles. *See* Answering Brief for Intervenor Alliance for Automotive Innovation ("Int.Br.") 20-21. Electric vehicles do not differ from other types of vehicles in those respects.

In addition to leaving to EPA the "details" of defining the classes of vehicles subject to GHG emissions standards under section 202(a)(1), in section 202(a)(2) Congress delegated to EPA' s judgment an assessment of "the requisite technolog[ies]" to meet those standards.[4] Though views

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[3] *Loper Bright*, 144 S. Ct. at 2263 (internal quotation marks and citation omitted).

[4] *See* 42 U.S.C. § 7521(a)(2) (regulations under § 7521(a)(1) "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period"). EPA's exercise of technological judgment must be based on a proper record and be adequately explained and is "subject to the restraints of reasonableness." *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973).

may differ on the extent to which production and sale of electric vehicles will be required for a given manufacturer to meet EPA's MY 2023-2026 GHG standards, EV technology is a "requisite technology" for most, if not all, full-line automakers to meet those standards. Unless electric vehicles are included in GHG emissions compliance determinations, EPA's MY 2023-2026 GHG standards would be unachievable by the industry as a whole.[5]

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[5] Model year 2023 is now concluded. Model year 2024 is well underway, MY 2025 has begun for some vehicle manufacturers and is imminent for others, and technology and production plans for MY 2026 are largely finalized.

When filed in 2022, these proceedings sought review of EPA's model-year ("MY") 2023 and later GHG light-duty vehicle emissions standards. *Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards*, 86 Fed. Reg. 74,434 (Dec. 30, 2021). EPA recently amended its light-duty vehicle GHG standards for MY 2027 and later vehicles. *Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles*, 89 Fed. Reg. 27,842 (Apr. 18, 2024) (hereinafter the "*MY 2027 and Later Regulation*"). The *MY 2027 and Later Regulation* is the subject of other proceedings in this Court. *See Kentucky v. EPA*, No. 24-1087 (filed Apr. 18, 2024).

II. *Loper Bright*'s Sunset Of *Chevron* Does Not Disturb EPA's Longstanding Interpretations Of Title II That Incorporate Fleet-Average Standards That Include Electric Vehicles.

In interpretations of title II that have "remained consistent over time," *Loper Bright,* 144 S. Ct. at 2262, EPA has employed averaging in setting title II standards and has included electric vehicles in assessing the feasibility of compliance with those standards. Averaging combined with credit banking and trading permits "a manufacturer [to] apply its capital to those vehicles from which it can get the most cost-effective reductions or to those vehicles which have the longest remaining production lives."[6] The earliest averaging programs under title II are more than forty years old, and since the Clean Air Act Amendments of 1990, ABT has become ubiquitous and has included electric vehicles for nearly fifteen years. *See* Int.Br. 7-14. Beginning with EPA's first GHG regulations adopted in 2010, the Agency has consistently interpreted title

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[6] EPA, *Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements: Response to Comments* (Dec. 1999) 2-25; *see* Int.Br. 8, 14; *see also MY 2027 and Later Regulation* at 27,890 & n.462 (noting ABT programs that have included EVs); *see also id.* at 27,916 (reprising EPA's longstanding position that "ABT provisions are an integral part of the vehicle GHG program" that "give manufacturers an important tool to resolve any potential lead time and cost issues").

II to permit the inclusion of electric vehicles in automakers' ABT compliance plans.[7] Those interpretations "constitute a body of experience of informed judgment to which courts and litigants may properly resort for guidance." *Loper Bright,* 144 S. Ct. at 2262 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

As the parties' principal briefs have explained, the permissibility of averaging was tested and affirmed in proceedings that challenged EPA's criteria-pollutant emissions standards for heavy-duty vehicles. *See Nat. Res. Def. Council v. Thomas*, 805 F.2d 410, 425 (D.C. Cir. 1986); EPA.Br. 17-18, 64, 72; Int.Br. 7, 13-14, 18-19.[8] Assuming arguendo that the

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[7] *See* EPA's Answering Brief ("EPA.Br.") 15-18. It bears noting that EPA's rulemaking did not reopen its longstanding interpretations of title II. *See id*. at 37-38.

[8] A footnote in the *Thomas* decision assumed that "*some* vehicles or engines would not be required to comply with the [relevant] standards," and that such a possibility was "an additional argument against emissions averaging." 805 F.2d at 425 n.24. Even if that were correct with respect to the regulations under review in *Thomas*, that is not the case with EPA's GHG regulations, including those under review here. Class-wide averaging has never been a substitute for vehicle-specific standards, as EPA made clear at the start of its GHG regulatory program. EPA enforces both types of standards under title II. *See* 75 Fed. Reg. 25,324, 25,468 (May 7, 2010); Int.Br. 15-16; *see also* EPA.Br. 72-73.

Thomas decision relied on *Chevron* doctrine in deflecting NRDC's challenge to inclusion of averaging in the regulations under review, the Supreme Court has made it plain that *Loper Bright* does not "call into question prior cases that relied on the *Chevron* framework." *Loper Bright*, 144 S. Ct. at 2273; *see id.* ("The holdings of those cases that specific agency actions are lawful … are still subject to statutory *stare decisis* despite our change in interpretive methodology."). *Thomas* is consistent with the regulatory framework on which the auto industry has relied for decades for its product planning and compliance.

CONCLUSION

For the foregoing reasons and those stated in Auto Innovators' principal brief, the petitions for review should be dismissed.

Respectfully submitted,

s/John C. O'Quinn

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August 19, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Court's July 29, 2024 Order because it contains 1,430 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

August 19, 2024

s/John C. O'Quinn
John C. O'Quinn

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/John C. O'Quinn
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