

**ORAL ARGUMENT HELD SEPTEMBER 14, 2023****Case No. 22-1031 (and consolidated cases)**

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

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STATE OF TEXAS, et al.,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, et al.,

*Respondents.*

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**SUPPLEMENTAL REPLY OF  
STATE RESPONDENT-INTERVENORS**

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## GLOSSARY

Auto Br.	Final Answering Brief for Intervenor Alliance for Automotive Innovation (ECF No. 1996757)
Carper-Pallone Amicus Br.	Brief of Senator Thomas R. Carper and Representative Frank Pallone, Jr. as Amici Curiae in Support of Respondents (ECF No. 1988363)
EPA	U.S. Environmental Protection Agency
EPA Br.	EPA’s Final Answering Brief (ECF No. 1996730)
EPA Suppl. Br.	EPA’s Supplemental Brief (ECF No. 2070814)
Fuel Br.	Final Brief for Private Petitioners (ECF No. 1996915)
Fuel Suppl. Br.	Supplemental Brief for Private Petitioners (ECF No. 2070815)
ICCT Amicus Br.	Brief of Amicus Curiae International Council on Clean Transportation in support of Respondents (ECF No. 1988480)
Indus. Intv. Br.	Final Brief for Industry Respondent-Intervenors (ECF No. 1996860)
JA	Joint Appendix
PIO Suppl. Br.	Supplemental Brief for Respondent-Intervenor Public Interest Organizations (ECF No. 2070777)
Rule	U.S. EPA, “Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards,” 86 Fed. Reg. 74,434 (Dec. 30, 2021)

**GLOSSARY**  
**(continued)**

State Intv. Suppl. Br.	Supplemental Brief of State Respondent-Intervenors (ECF No. 2070749)
State-PIO Intv. Br.	Final Brief of State and Public Interest Respondent-Intervenors (ECF No. 1996908)
Texas Br.	Final Opening Brief for State Petitioners (ECF No. 1996773)
Texas Suppl. Br.	Supplemental Brief for State Petitioners (ECF No. 2070800)

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners struggle in their supplemental briefs to make *Loper Bright* support their major-questions arguments, which have little to do with the “best reading” of any statutory text. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). Rather than shedding light on the statute, those arguments attempt to add a carveout for zero-emission vehicles to Section 202(a) of the Clean Air Act. Those arguments—which Petitioners failed to exhaust in the comment period, State-PIO Intv. Br. 5-6—also depend on factual contentions that EPA judged very differently, and *Loper Bright* reaffirms that courts must review such judgments under the deferential arbitrary-and-capricious standard. Finally, Petitioners’ arguments against respecting EPA’s longstanding, consistent views on fleet-average standards and zero-emission technologies only confirm that Petitioners’ attempted distinctions from previous greenhouse-gas rules are unpersuasive.

## ARGUMENT

### I. THE MAJOR QUESTIONS DOCTRINE IS A TOOL OF STATUTORY INTERPRETATION, AND EPA HAS THE BEST INTERPRETATION

The major questions doctrine is “an interpretive tool” that “situates text in context,” including commonsense principles about the ways Congress delegates authority to administrative agencies. *Biden v. Nebraska*, 143 S. Ct.

2355, 2378 (2023) (Barrett, J., concurring) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); accord *West Virginia v. EPA*, 597 U.S. 697, 721-23 (2022). As discussed in *Loper Bright*, those agency delegations include grants of authority to regulate “with flexibility” subject to prescribed limits and to “fill up the details” of a statutory scheme. 144 S. Ct. at 2263 (internal quotation marks omitted); see *State Intv. Suppl. Br.* 6-9. In the “extraordinary cases” where it applies, *West Virginia*, 597 U.S. at 721, the major questions doctrine’s function “is simple—to help courts figure out what a statute means.” *Save Jobs USA v. DHS*, No. 23-5089, 2024 WL 3627942, at \*3 (D.C. Cir. Aug. 2, 2024). The doctrine “does not mean that courts have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency’s authority.” *Biden*, 143 S. Ct. at 2381 (Barrett, J., concurring); cf. *Loper Bright*, 144 S. Ct. at 2266 (“In the business of statutory interpretation, if it is not the best, it is not permissible.”).

The major-questions doctrine does not license the judiciary to add a “technology carveout” to Section 202(a) “that Congress eschewed.” EPA *Suppl. Br.* 11. Indeed, Petitioners’ proposed carveout for zero-emission vehicles is inferior and untenable. EPA *Br.* 40-46; *State-PIO Intv. Br.* 6-19. It contradicts both plain text and authoritative judicial interpretations of that



text. State Intv. Suppl. Br. 10-12; PIO Suppl. Br. 7-10. Congress *has* written into other sections of the Clean Air Act the kind of technology carveouts Petitioners seek, but it did not do so in Section 202(a). *See* Clean Air Act Amendments of 1990, Pub. L. 101-549, § 401, 104 Stat. 2613-15 (Nov. 15, 1990) (cabining EPA’s discretion over “best retrofit technology” for certain utility boilers as limited to low-NOx burners); *see Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) (“Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.”).

Thus, to the extent that the Court reaches Petitioners’ major-questions arguments, *Loper Bright* does not license courts to stray from the best reading of Section 202(a). And that reading authorizes EPA’s action here.

## **II. *LOPER BRIGHT* DIRECTS COURTS TO REVIEW EPA’S RECORD JUDGMENTS UNDER THE ARBITRARY-AND-CAPRICIOUS STANDARD**

As Petitioners make clear in their supplemental briefs, their major-questions arguments require the Court to venture far from the statutory text and into fact-intensive judgments about the state of the nation’s electric grids, the growth of electric vehicle charging infrastructure, and different ways that auto manufacturers can configure their production fleets to comply with tighter greenhouse-gas emissions standards. Without Petitioners’ fact-

bound premises—that the Rule will “effectively mandate ... electrification,” Fuel Suppl. Br. 9, or “crippl[e] the Nation’s electric grids,” Texas Suppl. Br. 13—Petitioners have no major-questions arguments. *See also id.* at 11-13; Fuel Suppl. Br. 13-14. But these factual premises face numerous problems, which *Loper Bright* highlights, rather than cures.

1. *Loper Bright* affirms that State Petitioners’ objections to EPA’s record judgments are subject to “deferential” arbitrary-and-capricious review for “reasoned decisionmaking.” 144 S. Ct. at 2261, 2263 (citing *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); 5 U.S.C. § 706(2)(A)); 42 U.S.C. § 7607(d)(9). *Loper Bright* offers no support for Petitioners’ attempt to effectively circumvent this standard by turning factual disagreements with EPA’s analysis into the premises of their major-questions arguments.<sup>1</sup>

2. State Petitioners forfeited the *State Farm* arguments necessary to establish their major-questions premises by not making them in their opening brief. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir.

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<sup>1</sup> The Court should reject State Petitioners’ attempt to cast *Loper Bright* as overruling the deferential review applicable to EPA’s “reasoned discretion.” Texas Suppl. Br. 10-11 (internal quotation marks omitted). *See* PIO Supp. Reply 8-9.

2008). EPA found that the Rule will not, in fact, cripple the electric grid or “dramatically increase the Nation’s reliance on foreign-controlled rare-earth metals.” Texas Suppl. Br. 3; *see also* EPA Br. 57-59; Indus. Intv. Br. 6-7, 10-15; *see especially* JA830, 839-40 (Department of Energy study finding sufficient generation capacity); JA940 (projecting 0.1-0.6% increase in electricity demand over 2023-2026); JA1075-76, 1103-06 (critical minerals); JA1071-73 (charging infrastructure); JA1079-80 & n.39, 1084 & n.46 (grid capacity). State Petitioners have made no showing that EPA’s evaluation of the Rule’s grid effects, its projections of charging build-out, or its analysis of battery supply chains were arbitrary and capricious. EPA Br. 59 n.14; State-PIO Intv. Br. 26; Indus. Intv. Br. 6-7.

Likewise, EPA also found that the Rule will not “force major car manufacturers to fundamentally rewrite their business models,” Texas Suppl. Br. 13, but instead aligns with these manufacturers’ preexisting business plans, JA53. *See also* Auto Br. 3 (“The auto industry is already rapidly deploying electric vehicles in their U.S. sales fleets even apart from the Final Rule.”). Again, the Court may displace EPA’s judgments here only if State Petitioners show they are arbitrary and capricious, and they have forfeited any such showing.

3. State Petitioners' account also leaves out the most recent, pertinent legislative actions concerning their major-questions premises: the Infrastructure Investment and Jobs Act and the Inflation Reduction Act, in which Congress itself directed hundreds of billions of dollars in capital investment, *cf.* Texas Suppl. Br. 12, to electric grid upgrades, charging infrastructure build-out, the domestic battery supply chain, and encouraging consumers to buy electric vehicles in anticipation of surging production. EPA Br. 8-10; State-PIO Intv. Br. 28; Indus. Intv. Br. 16-17; Carper-Pallone Amicus Br. 28-35. This is because Congress, like the domestic and global auto industry, sees zero-emission technologies as a major component of future fleets regardless of EPA's greenhouse-gas standards. *See* Auto Br. 3.<sup>2</sup>

4. Fuel Petitioners' major-questions argument—that the Rule imposes a “de facto electrification mandate,” Fuel Br. 3—similarly assumes a factual premise about how manufacturers can and cannot comply with the standards. But their “de facto electrification mandate” theory is unexhausted and thus forfeited. State Intv. Suppl. Br. 15; 42 U.S.C. § 7607(d)(7)(B).

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<sup>2</sup> The State Petitioners' reference to their principal brief for a “history of the electrification debate,” Texas Suppl. Br. 11-12, is not illuminating: they cite their account of the Interagency Working Group's development of the social cost of carbon—a distinct question from electric vehicles.

Unconstrained by any concrete articulation of their “de facto mandate” theory presented to EPA during the comment period, Fuel Petitioners continue to revise this theory even in their fifth presentation to the Court. This theory originally was that “[a]utomakers cannot feasibly comply with the standards unless they dramatically increase their production of electric vehicles.” Fuel Br. 10. But that premise is simply untrue. State-PIO Intv. Br. 27; ICCT Amicus Br. 15-19; *see also* Oral Arg. Tr. 9:15-10:14 (discussing Subaru). Now, in Fuel Petitioners’ supplemental brief (at 13), the theory is that “carmakers must average in some electric-vehicle ‘zeroes,’ ... in order to comply with the more stringent standards.”

Those are distinct concepts, however. Whether a compliant fleet will include “some electric-vehicle ‘zeroes’”—*e.g.*, any electric vehicle models the manufacturer *already makes*—is a separate question from whether the manufacturer must “dramatically increase their production” of zero-emission vehicles. A manufacturer that has already invested in zero-emission vehicles will likely prefer to sell more of those vehicles, and prefer compliance strategies that continue to leverage those investments. Such a manufacturer might even consider it unsound business to shift its focus to combustion-engine improvements instead. But none of that would indicate that EPA’s

rule has “forced” them, de facto or de jure, to scale up their zero-emission vehicle production.

Both premises—that manufacturers must build dramatically more zero-emission vehicles to comply with the standards, or that some electric vehicle zeroes (or credits) are necessary for any compliant fleet—are unexhausted, untested, and unclear. *See* Oral Arg. Tr. 85:1-20; State-PIO Intv. Br. 27. While Fuel Petitioners’ failure to exhaust even one of their theories prevented EPA from evaluating and building a record around either, State Intv. Suppl. Br. 15, both are manifestly matters for EPA’s technical judgment, to be reviewed (on the proper record and in the proper case) under the *State Farm* standard.

### **III. *LOPER BRIGHT* SUPPORTS JUDICIAL RESPECT FOR EPA’S LONGSTANDING AND CONSISTENT TREATMENT OF ZERO-EMISSION TECHNOLOGIES AND FLEET-AVERAGE STANDARDS**

Fuel Petitioners take a cramped view of the respect that courts give to agencies’ “body of experience and informed judgment,” *Loper Bright*, 144 S. Ct. at 2259 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), attempting to minimize that respect here by arguing that EPA’s interpretations are not contemporaneous with the statute’s enactment. *E.g.*, Fuels Suppl. Br. 11. Neither *Loper Bright* nor *Skidmore* conditions respect for agency views on contemporaneity. *Loper Bright*, 144 S. Ct. at 2259;

*Skidmore*, 323 U.S. at 140; *see, e.g., Alaska Dep't. of Env't. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) (affording *Skidmore* respect to EPA's "longstanding, consistently maintained" interpretation adopted six years after enactment). Rather, "[t]he weight of such a judgment' ... 'depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and *all* those factors which give it power to persuade, if lacking power to control.'" *Loper Bright*, 144 S. Ct. at 2259 (quoting *Skidmore*, 323 U.S. at 140) (emphasis added).

As to EPA's interpretation concerning fleetwide averaging, the fact that all three branches of Government—including every presidential administration since Reagan—have examined this aspect of EPA's program and either expanded it or left it undisturbed is surely one of those persuasive factors. *See* PIO Suppl. Reply 5-7. Nor does Fuel Petitioners' supposed "inconsisten[cy]," Fuel Suppl. Br. 12-13, hold up to scrutiny, PIO Suppl. Reply 5-7.

As to the agency's interpretation concerning zero-emission vehicles, the only supposed novelty that Fuel Petitioners identify is the numeric stringency of EPA's greenhouse-gas standards. Fuel Suppl. Br. 13-14. According to Fuel Petitioners, that stringency means "carmakers must

average in some electric-vehicle ‘zeroes,’” whereas before, standards were “achievable by internal-combustion-engine vehicles” only. *Id.* at 13. But that assertion—even if true—is plainly not a difference in interpretation. EPA has read the Clean Air Act the same way for decades; Fuel Petitioners challenge features of EPA’s greenhouse-gas program that are unchanged from its 2010 inaugural standards and appear in similar rules dating to the 1980s. EPA Br. 35; State-PIO Intv. Br. 4-5. Under Fuel Petitioners’ rubric, maintaining the status quo is the agency changing its mind. That paradox is a sure sign their *Skidmore* argument has taken a wrong turn.

### CONCLUSION

The petitions should be denied.



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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing motion complies with the Court's July 29, 2024 Order (ECF No. 2067052) because it contains 1,943 words. I further certify that this motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: August 29, 2024

/s/ THEODORE A.B. MCCOMBS

**CERTIFICATE OF SERVICE**

I certify that on August 29, 2024 I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all other participants in this case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: August 29, 2024

/s/ THEODORE A.B. MCCOMBS