ORAL ARGUMENT HELD SEPTEMBER 14, 2023

No. 22-1031 and consolidated cases

U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

States of Texas, Alabama, Alaska, Arkansas, Arizona, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and Utah,
Petitioners,

v.

U.S. Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator, U.S. Environmental Protection Agency,
Respondents.

Petition for Review of a Rule of
the U.S. Environmental Protection Agency

EPA's Supplemental Reply

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INTRODUCTION

The well-established standing principles applied in *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), support dismissing State Petitioners' claims. Like *Ohio*'s petitioners, State Petitioners failed to meet their standing burden.

Separately, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), casts no doubt on the 2021 rule's validity. Though the Court should not reach the merits, the best reading of the Clean Air Act supports EPA's authority here. Petitioners' readings, by contrast, are counter-textual and would frustrate Congress's objectives.

ARGUMENT

I. State Petitioners have not shown standing.

Standing is fact-specific and depends on evidence presented in each case. State Petitioners cannot salvage their opening brief's deficient standing presentation by citing *Ohio*. Even their supplemental brief does not show standing based on either alleged lost oil-extraction tax revenues or grid impacts. That brief cites no evidence that those revenues will decrease given the global market, or that a fall in *exporters'* profits will affect the *States'* revenues. *See* State Suppl. Br. 2 & n.3 (citing JA1102). And State Petitioners' professed generalized interest in "managing" electrical grids, *id.* at 3, remains vague and speculative, particularly given automakers' independent plans to increase electric-vehicle production.

II. *Loper Bright* does not diminish EPA's statutory arguments.

The Court should not reach Petitioners' unexhausted statutory arguments. Regardless, *Loper Bright* does not change the bottom line. EPA's reading of Section 7521(a)—as authorizing consideration of electrification technologies, fleetwide-average standards, and inclusion of electric vehicles in regulated classes—remains the best reading. EPA Suppl. Br. 7-17.

A. The major-questions doctrine does not apply.

To begin, Petitioners' invocation of the major-questions doctrine is misplaced. Fuel Suppl. Br. 3, 9; State Suppl. Br. 11. Not only did Petitioners fail to exhaust their major-questions concerns, *see* EPA Br. 39, the doctrine does not apply here.

The major-questions doctrine applies only in "certain extraordinary cases." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); EPA Br. 47-62. This case is not one of them: EPA acted within the heartland of its Section 7521(a) authority in setting standards that account for all feasible technologies. And far from asserting novel authority, EPA used the same authority it has been using to regulate the same source it has been regulating for decades. EPA Br. 13. Had EPA lacked authority because it asserted a "power of incredible consequence," Fuel Br. 16, surely at least one of the almost 200,000 commenters would have objected on that basis. Nobody did.

Nor does the record support Petitioners' assertion of the rule's supposedly enormous economic and political significance. EPA Br. 56-59. Besides, broad effects alone do not trigger the major-questions doctrine. *Id.* at 57.

B. EPA's interpretation of Section 7521(a) is the best one.

As *Loper Bright* recognized, statutes can give agencies "a degree of discretion" by using terms that leave them with "flexibility." 144 S. Ct. at 2263. Section 7521(a) does just that. It creates a framework in which EPA sets emission standards for classes of vehicles that emit harmful pollution, while authorizing EPA to "fill up the details"—including delegating to the agency technical tasks like how to organize motor vehicles into classes. *Id.*; EPA Suppl. Br. 8-14; *see* EPA Br. 41, 63 (explaining that Congress in Section 7521(a) anticipated technological advances and gave EPA discretion over standards' form and content).

Petitioners fail to squarely contest that Section 7521(a) gives EPA such flexibility. *See* Fuel Suppl. Br. 14. They instead say that any delegation of authority is not a "blank check" to set standards however EPA wants. *Id.*[1] True enough, and EPA has recognized that its Section 7521(a) authority is cabined.

[1] In contending that EPA exceeded its authority, Petitioners say that the rule regulates vehicles that emit no greenhouse gases. Fuel Suppl. Br. 14-15. In fact, battery vehicles, which are fully electric, do emit greenhouse gases (from their air-conditioning systems). EPA Br. 78.

E.g., EPA Suppl. Br. 9. For example, EPA cannot set standards that are technically infeasible. 42 U.S.C. § 7521(a)(2).

But in setting fleet-average standards that cover light-duty vehicles, including electric vehicles, EPA acted well within the bounds of its delegated authority. EPA Suppl. Br. 11-14; *see Loper Bright*, 144 S. Ct. at 2263; *contra* Fuel Suppl. Br. 14-15. Section 7521(a)(1) directs EPA to set standards applicable to emissions "from any class or classes" of new motor vehicles that cause or contribute to harmful air pollution. The phrase "class or classes" refers expressly to groups of vehicles. Section 7521(a) thus allows EPA to set standards for groups of vehicles—like fleet-average standards. This Court confirmed as much when it upheld averaging. *NRDC v. Thomas*, 805 F.2d 410, 425 (D.C. Cir. 1986). So did Congress, when in 1990 it chose to let EPA to continue using averaging. *See* EPA Br. 18 (discussing legislative history); *id.* at 12-14 (explaining that EPA's reading aligns with Section 7521(a)'s objectives and congressional intent). Petitioners ignore both points.

By contrast, Petitioners' preferred reading, that EPA can regulate *only* on a vehicle-by-vehicle basis, would in effect strike the words "class or classes" from the statute. Fuel Suppl. Br. 9-10. Their reading would also—implausibly—undercut Section 7521(a)'s technology-based premise, as well as limit automakers'

flexibility in compliance. EPA Br. 63-64, 77. The Court should reject Petitioners' attempt to rewrite statutory text and undermine Congress's objectives.

C. EPA's interpretation warrants respect.

Petitioners target the degree of respect due to EPA's interpretation that the statute authorizes averaging (including of electric vehicles).[2] Fuel Suppl. Br. 8-15. Setting aside that EPA did not even reopen that interpretation, Petitioners' attacks miss their mark. EPA's consistent and longstanding interpretation has all the hallmarks that give it the power to persuade. *See Loper Bright*, 144 S. Ct. at 2259.

First, EPA has long read Section 7521(a) to authorize it to decide the "appropriate form" of standards. *E.g.*, EPA Br. 63; *see* 48 Fed. Reg. 33456, 33458 (July 21, 1983) (speaking of the "wide discretion" that Congress gave EPA to set up an averaging program). That delegated authority and its range of discretion allows, but does not require, EPA to use averaging. *Contra* Fuel Suppl. Br. 12-13. EPA has thus read Section 7521(a) to authorize fleetwide averaging and has used averaging in countless vehicle-emission rules under Section 7521 *for over 40 years*. *See* EPA Br. 13. Regulated entities attest to the consistency and history of EPA's reading, stating that they have long "relied" on this "well-established regulatory approach." Auto Alliance Br. 9.

[2] Petitioners do not dispute that EPA's other interpretation—that Section 7521(a) authorizes it to consider electrification technologies in standard-setting—is entitled to respect. Fuel Br. 11.

Petitioners observe that EPA's interpretation was not issued contemporaneously with Section 7521's enactment. Fuel Suppl. Br. 11-12. But contemporaneity is not required for respect. *See Loper Bright*, 144 S. Ct. at 2258. Respect is due to agency interpretations that, like EPA's, are consistent, longstanding, and informed by specialized expertise. *See id.* at 2258-59; EPA Suppl. Br. 14-16.

And EPA never thought that the statute bars averaging. In urging this theory, Petitioners misread certain Federal Register notices. Fuel Suppl. Br. 12-13. In the 1980 notice that Petitioners spotlight, EPA considered whether to use fleet-average standards for the first time and explained that there were still implementation issues to work out. 45 Fed. Reg. 14496, 14502/1-3 (Mar. 5, 1980).[3] But nowhere did EPA say that Section 7521(a) forbids averaging.

Petitioners' emphasis on EPA's pre-1990 statements also ignores that in amending the Clean Air Act in 1990, Congress decided to keep the status quo under *NRDC*. EPA Br. 18. In so doing, Congress endorsed not only EPA's averaging program but the underlying statutory interpretation.

[3] One of those issues was that Section 7521 "assume[s] individual vehicle compliance with the applicable standards." 45 Fed. Reg. at 14502/2. That is, a standard based on fleet averages should not exempt individual vehicles from compliance. EPA thus developed a regulatory program—still used today—that allows averaging but also requires vehicle-by-vehicle compliance. EPA Br. 13, 15, 68-73.

Second, Petitioners are wrong that EPA's interpretation—that Section 7521(a) authorizes including electric vehicles in the regulated class—is of "recent vintage." Fuel Suppl. Br. 13. Decades ago, EPA defined the light-duty class to be motor vehicles with certain load capacities. 36 Fed. Reg. 22369, 22449/3 (Nov. 25, 1971); 46 Fed. Reg. 50464, 50476-77 (Oct. 13, 1981); 40 C.F.R. § 86.1803-01. That definition does not turn on how a vehicle is powered. So electric vehicles meeting the load-capacity requirements have long been part of the light-duty class. And as early as 2000, well before it started to set standards for greenhouse gases, EPA promulgated fleet-average standards for light-duty vehicles that accounted for zero-emission vehicles such as battery vehicles (which are powered solely by electricity). 65 Fed. Reg. 6698, 6746/3 (Feb. 10, 2000).

In greenhouse-gas regulations, electric vehicles have always been part of the regulated class. In 2009, EPA found that tailpipe and air-conditioning emissions from motor vehicles, including passenger cars and light-duty trucks, contribute to harmful air pollution. 74 Fed. Reg. 66496, 66499/1 & n.3, 66538/1 (Dec. 15, 2009). Electric passenger cars and light-duty trucks were part of classes covered by the endangerment finding and regulated under EPA's first set of greenhouse-gas standards in 2010, and have been in every set of standards since then. EPA Br. 16.

Finally, the 2021 rule creates no novel requirement that automakers "*must* average" in electric vehicles. Fuel Suppl. Br. 13.[4] Although the rule tightened standards, it did not mandate any particular emission-control technology, including battery vehicles. EPA Br. 54-55. Indeed, EPA projected that feasible compliance strategies need not use battery vehicles. *See* 86 Fed. Reg. 74434, 74485 (table 33) (Dec. 30, 2021) (projecting penetration rates for plug-in hybrids and battery vehicles, including projections for Subaru of 0 percent through 2025 and 1 percent in 2026).[5]

D. Petitioners' remaining arguments are meritless.

Petitioners' remaining arguments fare no better.

First, Petitioners conflate EPA's passing invocation of *Chevron* (now withdrawn) with EPA's invocation of its technical expertise. EPA's technical decisions remain subject to the deferential arbitrary-and-capricious standard after *Loper Bright*. *E.g.*, EPA Br. 25, 49; JA19, 201, 234; *see Loper Bright*, 144 S. Ct. at 2261; *Huntsman Petrochemical LLC v. EPA*, ___ F.4th ___, No. 23-1045, 2024

[4] The Court should not consider this mandate argument because it was not exhausted. Petitioners cite their post-argument motion to file a supplemental brief. Fuel Suppl. Br. 13. EPA opposed that motion and requested a chance to file its own brief if that motion were granted.

[5] In its newest rule, EPA found that it would be "technologically feasible" to meet model-year 2032 standards—which are stricter—without using battery vehicles. 89 Fed. Reg. 27842, 28087/3 (Apr. 18, 2024).

WL 3763355 at *3-4 (D.C. Cir. Aug. 13, 2024) (applying, after *Loper Bright*, "extreme degree of deference" to EPA's evaluation of scientific data within its area of expertise).

Second, EPA's rule did not cite *Chevron* as the basis for the challenged interpretation. *Contra* State Suppl. Br. 10 (citing JA19). The cited page of the preamble addresses interpretations not contested here.

Third, having failed to raise their interpretive concerns in comments as required, Petitioners cannot complain about EPA's "raising legal arguments that were not invoked in the rulemaking process." *Id.* at 15. Besides, EPA established the relevant interpretation years ago and did not reopen it here.

CONCLUSION

The Court should dismiss or deny the petitions for review.

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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this brief complies with the Court' s July 29, 2024, order because by Microsoft Word' s count, it has 1,883 words, excluding the parts of the brief exempted under Rule 32(f).

Finally, I certify that on August 29, 2024, I electronically filed this brief with the Court's CM/ECF system, which will serve each party.

/s/ Sue Chen