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

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF TEXAS, ET AL.,
Petitioners,

v.

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 Review from the United States Environmental Protection Agency
(No. EPA-HQ-OAR-2021-0208)

SUPPLEMENTAL REPLY BRIEF FOR PRIVATE PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

GLOSSARY

California Int. Supp. Br.	Supplemental Brief of State Respondent-Intervenors (Doc. 2070749)
EPA	U.S. Environmental Protection Agency
EPA Supp. Br.	EPA's Supplemental Brief (Doc. 2070814)
Private Pet. Br.	Final Brief for Private Petitioners (Doc. 1996915)
Private Pet. Reply Br.	Final Reply Brief for Private Petitioners (Doc. 1996916)
Private Pet. Aug. 19 Supp. Br.	Supplemental Brief for Private Petitioners (Doc. 2070815)

INTRODUCTION AND SUMMARY OF ARGUMENT

EPA correctly recognizes that *Ohio* v. *EPA*, 98 F.4th 288 (D.C. Cir. 2024), does not affect private petitioners' standing. It errs, however, in applying *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024), to this case. On EPA's telling (at 9), *Loper Bright*'s overruling of *Chevron* made no difference, as the agency still retains significant leeway to "fill up" the details of the statute here. To the contrary, *Loper Bright* made clear that agencies retain interpretive discretion only in narrow circumstances inapplicable here, such as where Congress expressly grants the agency the authority to define statutory terms, or uses flexible language like "appropriate" or "reasonable" to confer policymaking authority. Congress did not provide EPA with any such flexibility in the relevant Clean Air Act provisions. Nothing in the statute authorizes EPA to effectively mandate electrification using fleetwide averaging. Nor is EPA's newfound assertion of that authority entitled to any special weight. EPA finally retreats to rehashing its merits arguments, but those fail too. This Court should set aside EPA's rule.

ARGUMENT

I. *Ohio* Does Not Affect Private Petitioners' Standing.

No party has argued that private petitioners lack standing under *Ohio*. EPA contends (at 3) that the *state* petitioners "offered no evidence" that "their claimed injuries would be redressable given automakers' plans to increase production of electric vehicles." But the agency notably does not make the same argument against private petitioners. As private petitioners have explained (at 7), even if the rule somehow did not affect automakers' plans for electrification, they would have to produce more fuel-efficient internal-combustion-engine vehicles to comply, which would still injure private petitioners by reducing demand for their products.

The closest anyone comes to challenging private petitioners' standing is the National Grid intervenors. They posit that petitioners' claims "*may* suffer the same flaw" that this Court identified in *Ohio*, speculating that a decision setting aside EPA's rule might not change automaker behavior. Br. 12, 14 (emphasis added). But even they acknowledge that the two cases are "factually distinct." *Id.* at 14. Quite right. EPA itself projected that the rule will significantly depress demand for gasoline. *See* Private Pet. Aug. 19 Supp. Br. 6 (citing J.A. 14, 51, 60, 70). Accordingly, *Ohio* does not apply to this case.

II. *Loper Bright* Supports Petitioners' Arguments.

As private petitioners have explained (at 8-15), *Loper Bright* eliminates any possibility of *Chevron* deference, and confirms that EPA's interpretation gets no special weight. EPA makes three contrary arguments. First, EPA argues that it still gets some form of deference after *Loper Bright*, because the Supreme Court left agencies room to "fill up" statutory schemes like the Clean Air Act. Second, EPA argues that its interpretation of the Act is entitled to special weight under *Skidmore* v. *Swift & Co*, 323 U.S. 134 (1944). Third, the agency improperly relitigates threshold and statutory arguments from its merits brief. All three arguments are wrong.

A. EPA first argues that "*Loper Bright* does not change the bottom line" in this case because it is still entitled to some form of deference. Br. 7. EPA acknowledges that *Loper Bright* eliminates its "claim to deference under *Chevron*." *Id.* at 9-10 n.3. But it contends that after *Loper Bright*, the agency retains significant "discretion" to "fill up the details of [the] statutory scheme." *Id.* at 4 (citation omitted). According to EPA, that discretion includes the flexibility to set emission standards using fleetwide averaging and to incorporate electric vehicles in those fleetwide averages. *Id.* at 7-17. EPA's

argument misunderstands both *Loper Bright* and EPA's authority under Section 202 of the Clean Air Act.

Loper Bright did not replace *Chevron* deference with another regime of broad agency discretion—*Chevron* by another name. To the contrary, *Loper Bright* requires courts to apply the best reading of a statute. 144 S. Ct. at 2267. Sometimes, the best reading of a statute may be "that the agency is authorized to exercise a degree of discretion." *Id.* at 2263. But that is true only in specific circumstances, such as where a statute "expressly delegate[s]" to an agency the authority to define a statutory term, or uses "a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'" *Id.* at 2263 & nn.5, 6. Section 202(a) does neither.

No language in Section 202 "expressly delegate[s]" to EPA the authority to define the relevant statutory terms like "emission," "class," or "new motor vehicle," and EPA does not appear to contend otherwise. *See* 144 S. Ct. at 2263. Absent such an express delegation, EPA must interpret those terms according to their ordinary meaning. *See Telematch, Inc.* v. *USDA*, 45 F.4th 343, 348 (D.C. Cir. 2022). That ordinary meaning does not allow for forced electrification or fleetwide averaging. *See* Private Pet. Br. 36-61.

Nor does Section 202 contain any "term or phrase" that leaves EPA with "flexibility" to use averaging or include electric vehicles in those fleetwide averages. *Loper Bright*, 144 S. Ct. at 2263. This case is not about what standards are technologically feasible, or some such judgment call; it is about basic statutory questions, including (1) whether EPA may set average standards across fleets, and (2) whether EPA may set those fleetwide-average standards including vehicles that do not emit the relevant pollutants. Congress either gave the agency those powers or it did not; there is no flexibility in answering those two statutory questions.

Rather than granting EPA broad discretion, the statute *limits* EPA to setting standards for only those vehicles "which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1); *see* Private Pet. Br. 50-61. To be sure, Congress contemplated that EPA will exercise "*judgment*," but only about which vehicles contribute to harmful air pollution. Once EPA has made a judgment that a particular type of vehicle does *not* contribute to harmful air pollution, then those vehicles fall out of the category for which EPA has the authority to set emission standards. *See id.* at 52-57. Here, EPA has focused only on tailpipe emissions, and has thus "judg[ed]" electric

vehicles to produce zero greenhouse-gas emissions. *See* 40 C.F.R. § 86.1866-12(a). The statute thus leaves the agency no discretion to include those vehicles in its emission standards.

EPA and its supporting intervenors emphasize other language in Section 202 that supposedly confers discretion, but it is all inapposite. For example, EPA notes that emission standards take effect "after such period *as the Administrator finds necessary* to permit the development and application of the requisite technology." Br. 8 (citing 42 U.S.C. § 7521(a)(2)). That language of course grants EPA some flexibility to determine lead time for its standards, but lead time is not at issue in this case. EPA's intervenors likewise emphasize Congress's directive that EPA should "*by regulation prescribe*" standards and should give "*appropriate consideration* to the cost of compliance" when determining lead times. California Int. Supp. Br. 6 (citing 42 U.S.C. § 7521(a)(1), (2)). But no one doubts EPA's authority to make regulations, and again, lead times are not at issue. If anything, all these examples demonstrate that Congress knew how to grant EPA discretion and flexibility and chose not to grant EPA such flexibility to use fleetwide averaging or to consider electric vehicles.

B. EPA next argues that *Loper Bright* confirms that its statutory construction is entitled to *Skidmore* weight because it is "consistent, longstanding, and rooted in technical expertise." Br. 15. As petitioners have explained, that is wrong. EPA originally determined that it lacked authority to conduct any kind of fleetwide averaging, then concluded it had that authority because the statute was silent or ambiguous about averaging, and now contends that Section 202 affirmatively empowers it to use averaging. *See* Private Pet. Aug. 19 Supp. Br. 12-13 (citing regulatory history). That flip-flop is the opposite of a "consistent" and "longstanding" interpretation. Likewise, EPA's inclusion of electric vehicles in those averages is a relatively recent development and is not entitled to any *Skidmore* weight. *Id.* at 13.

EPA even argues (at 12) that its supposedly "longstanding" reliance on averaging is entitled to "statutory stare decisis" under *Loper Bright*. *Loper Bright* reasoned that prior *Chevron* Step Two decisions upholding "specific agency actions [as] lawful" are "still subject to statutory *stare decisis* despite [the Supreme Court's] change in interpretive methodology." 144 S. Ct. at 2273. EPA claims that this paragraph of *Loper Bright* immunizes fleetwide averaging from challenge, because this Court upheld a fleetwide-averaging program under *Chevron* Step Two in *NRDC* v. *Thomas*, 805 F.2d 410 (D.C.

Cir. 1986). But *Thomas* did not consider petitioners' statutory arguments, under *Chevron* or otherwise. Rather, *Thomas* upheld averaging against only a narrow, policy-focused challenge. *See id.* at 426. The Court expressly declined to rule on other textual "argument[s] against emissions averaging"—including the arguments petitioners raise here—because they were "never raised by any party." *Id.* at 426 n.24. Because *Thomas* left those arguments open, *stare decisis* does not preclude petitioners from raising them now.

C. Finally, EPA uses the rest of its brief to rehash arguments from its original merits briefs—with no apparent connection to *Loper Bright* or this Court's supplemental-briefing order. It repeats (at 5) its arguments that petitioners' injuries fall outside Section 202's zone of interests. But as petitioners have explained, they easily fall within the zone of interests of the Clean Air Act, which "seeks to further clean air while at the same time still allowing some productive economic activity, even though that economic activity may result in some emissions of pollutants." *Energy Future Coal.* v. *EPA*, 793 F.3d 141, 145 (D.C. Cir. 2015) (Kavanaugh, J.); *see* Private Pet. Reply Br. 4-7.

EPA also contends (at 5-7) that petitioners' arguments are untimely or forfeited, points that its supporting intervenors echo. *See, e.g.*, California Int.

Supp. Br. 13-18. In particular, EPA repeats its flawed argument (at 6) that commenters did not raise petitioners' statutory arguments during rulemaking. As petitioners have explained, that is incorrect and is in any event irrelevant under the "key assumptions" doctrine. *See* Private Pet. Reply Br. 9-10.*

EPA also contends (at 6) that commenters "failed to articulate their view that the level of projected electrification technologies and indirect effects on the economy triggers the major question doctrine, and thus did not give EPA the requisite opportunity to respond to their factual allegations and develop a record on those issues." EPA is simply wrong about the record. Whether or not commenters used the words "major question," they clearly articulated concerns that the standards would have vast economic and political significance by effectively mandating electrification. *See* J.A. 1076 (EPA's response to "comments suggesting that the rule will mandate electric vehicles" or force a "shift of our transportation infrastructure to EVs"). If EPA's responses were not thorough or persuasive, that is the agency's fault and not petitioners'.

* EPA invokes (at 6 n.1) *Huntsman Petrochemical LLP* v. *EPA*, No. 23-1045 (D.C. Cir. Aug. 13, 2024), for the proposition that this Court has abandoned the key-assumptions doctrine. But petitioners in that case did not rely on the doctrine, and the Court's decision did not mention it, much less nullify it.

Finally, EPA spends several pages (at 10-14) again arguing that it has the best reading of the statutory text. Petitioners have already refuted those arguments at length. The major-questions doctrine forecloses EPA's effort to force the electrification of the nation's vehicle fleet. *See* Private Pet. Br. 21-36. Even if it did not, the best reading of the Clean Air Act is that EPA may not set standards using fleetwide averaging or include "zero-emission vehicles" in any average emission standards. *See id.* at 35-61; Private Pet. Reply Br. 24-32.

CONCLUSION

This Court should set aside EPA's rule.

Respectfully submitted,

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AUGUST 29, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(f) and (g) and this Court's order of July 29, 2024, because it contains 1,950 words.

This brief also complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 14-point font using a proportionally spaced typeface.

s/ Jeffrey B. Wall
JEFFREY B. WALL

AUGUST 29, 2024

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of August, 2024, I electronically filed the foregoing supplemental reply brief with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

s/ Jeffrey B. Wall
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AUGUST 29, 2024