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, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF FOR INDUSTRY RESPONDENT-INTERVENORS

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GLOSSARY

Auto Innovators Br.	Brief of Intervenor Alliance for Automotive Innovation
EPA Br.	Brief of Respondents U.S. Environmental Protection Agency and Michael S. Regan
Fuel Br.	Brief of Private Petitioners
Private Petitioners	American Fuel & Petrochemical Manufacturers, Clean Fuels Development Coalition, Competitive Enterprise Institute, Diamond Alternative Energy, LLC, Domestic Energy Producers Alliance, Energy Marketers of America, ICM, Inc., Illinois Corn Growers Association, Illinois Soybean Association, Indiana Corn Growers Association, Indiana Soybean Alliance, Inc., Iowa Soybean Association, Kansas Corn Growers Association, Kentucky Corn Growers Association, Anthony Kreucher, Walter M. Kreucher, James Leedy, Michigan Corn Growers Association, Michigan Soybean Association, Minnesota Soybean Growers Association, Missouri Corn Growers Association, North Dakota Soybean Growers Association, Ohio Soybean Association, Marc Scribner, South Dakota Soybean Association, and Valero Renewable Fuels Company, LLC
State Br.	Brief of State Petitioners
State Petitioners	Texas, Alabama, Alaska, Arkansas, Arizona, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and Utah

INTRODUCTION

Section 202 of the Clean Air Act requires EPA to set emission standards for new motor vehicles and account for the development and application of the requisite technology when doing so. Consistent with that mandate, in 2021, EPA considered the feasible control technologies available—including vehicle electrification—and finalized new greenhouse gas ("GHG") emission standards for model year 2023–26 light duty vehicles. *See* Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74,434 (Dec. 30, 2021) ("Standards"). In their brief, Industry Respondent-Intervenors ("Respondent-Intervenors") supported EPA's arguments that the Court need not reach the merits of the petitions, and that the Standards are reasonable and do not pose a major question.

On July 29, 2024, the Court ordered the parties to file supplemental briefs addressing (1) whether the Court's decision in *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), is relevant to Petitioners' standing in these cases, and (2) whether the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), is relevant to the issues of statutory interpretation presented in these cases. For the reasons

explained below, the answers to those questions reinforce the conclusion that the Court should deny the petitions for review.

First, *Loper Bright* confirms that the Court should deny the petitions because the Clean Air Act expressly delegates discretion to EPA to prescribe emissions standards and designate the classes of regulated vehicles, and EPA engaged in reasoned decisionmaking within the boundaries of that delegated authority. Second, *Loper Bright* strongly suggests that there is no need for the Court to view this case through the lens of the major questions doctrine. Third, under *Loper Bright* and *Skidmore v. Swift Co.*, 323 U.S. 134 (1944), EPA's authority to consider electrification when setting GHG emission standards for motor vehicles under Section 202 is bolstered by its consistent historical practice of doing exactly that. Fourth, although *Ohio v. EPA* might suggest that Petitioners' injury cannot be redressed here, that issue is highly fact-specific.

In sum, *Ohio* and *Loper Bright* support the arguments put forth by EPA and Respondent-Intervenors in the briefing and at oral argument. The Court should deny the petitions.

ARGUMENT

I. The *Loper Bright* Analytical Framework Confirms That the Petitions Should Be Denied.

Although *Loper Bright* overruled *Chevron*, EPA and Respondent-Intervenors' defense of the Standards rests entirely upon a plain reading of the Clean Air Act, not on *Chevron* deference. *See Loper Bright*, 144 S. Ct. at 2273 (overruling *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Even so, *Loper Bright*'s statutory interpretation framework is instructive.

In *Loper Bright*, the Supreme Court reiterated that Congress may expressly delegate discretionary authority to an agency. *Id.* at 2263. Permissible delegations include those that "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme or to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" *Id.* (cleaned up). Moreover, *Loper Bright* cited approvingly to a broad delegation in Section 302 of the Clean Water Act that is similar to the delegation at issue here. 144 S. Ct. at 2263 n.6. Under that provision, "[w]henever, in the *judgment* of the [EPA] Administrator . . . , discharges of pollutants from a point source or group of point sources . . . would interfere with the

attainment or maintenance" of water quality assuring the protection of public health and other priorities, the Administrator "shall" establish effluent limitations "which can *reasonably* be expected to contribute to the attainment or maintenance of such water quality." 33 U.S.C. § 1312(a) (emphasis added). When the statute is best read to delegate discretionary authority to the agency, *Loper Bright* reaffirms that a reviewing court need only "ensur[e] the agency has engaged in 'reasoned decisionmaking'" within the boundaries of that delegated authority. 144 S. Ct. at 2263 (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). In short, this case poses no major question.

A. Section 202 of the Clean Air Act Expressly Delegates Authority to EPA to Set Emission Standards.

Congress permissibly granted EPA discretion to promulgate emission standards under Section 202 of the Clean Air Act. The statute's meaning is clear: Subject to technological and cost considerations, the Administrator has the authority to set emission standards for "any air pollutant *from any class or classes of new motor vehicles* or new motor vehicle engines, *which in his 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) (emphases added). When setting

those standards, the Administrator must consider the time "necessary to permit the development and application of the requisite technology" and give "appropriate consideration to the cost of compliance." *Id.* § 7521(a)(2).

The best reading of Section 202 is that it "delegates discretionary authority to an agency." *Loper Bright*, 144 S. Ct. at 2263. Thus, the long-held understanding that "emissions standards for new automobiles are promulgated at the federal level," and that Section 202 expressly "empowers" EPA to set such standards, *Ohio*, 98 F.4th at 294, is consistent with the Supreme Court's decision in *Loper Bright*. To "uphold[ ] the traditional conception of the judicial function" under these circumstances, this Court must only "ensur[e] the agency has engaged in 'reasoned decisionmaking'" within the boundaries of Section 202's delegated authority. *Loper Bright*, 144 S. Ct. at 2263 (quoting *Michigan*, 576 U.S. at 750). Because EPA acted within its authority under an express delegation and Petitioners have failed to demonstrate that EPA did not engage in reasoned decisionmaking, the Court should deny the petitions.

B. *Loper Bright* Confirms That the Rule Does Not Pose a Major Question.

Petitioners' challenge falls squarely under the analytical framework in *Loper Bright* and shows none of the hallmarks of a major question. *Loper Bright* acknowledges that Congress often enacts statutes that constitutionally delegate express authority and do not implicate the major questions doctrine. 144 S. Ct. at 2263. Major questions challenges are reserved for "'extraordinary cases' that call for a different approach" to analyzing the scope of delegated authority. *West Virginia v. EPA*, 597 U.S. 697, 721 (2022). This is not one of those cases.

Section 202 speaks for itself: Congress expressly empowered EPA to set emission standards for any class or classes of motor vehicles to prevent or control pollution. *See* 42 U.S.C. § 7521(a)(1). This is an "ordinary case" in which the text unambiguously and thoroughly answers the interpretive question and the broader context "has no great effect on the appropriate analysis." *West Virginia*, 597 U.S. at 721; *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (explaining that, unlike substantive canons such as the clear statement rule, "the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation"). Accordingly, the Court's

role—as in most cases challenging agency action—is to evaluate the petitions under an arbitrary and capricious standard of review. *See Loper Bright*, 144 S. Ct. at 2263.

By considering electrification technologies when setting GHG emission standards and determining compliance, EPA is neither claiming "unheralded regulatory power," nor relying on an "unprecedented" interpretation of its authority. *West Virginia*, 597 U.S. at 721–22 (internal quotations and citations omitted). First, as noted, the statutory text unambiguously grants EPA the authority to prescribe standards. The Act's reliance on EPA's "judgment" to determine when a class or classes of motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" is squarely in line with the examples of permissible delegations provided by the Supreme Court. *See Loper Bright*, 144 S. Ct. at 2263 n.6. Section 202 does not use "'modest words,' 'vague terms,' or 'subtle device[s],'" that may support application of the major questions doctrine. *Id.* at 2269 (quoting *West Virginia*, 597 U.S. at 723) (alteration in original).

Second, Section 202 is at the heart of the Clean Air Act's vehicle program. EPA has promulgated rules under this central provision for decades. For over half a century, fleetwide averaging has been the basis for setting and determining compliance with motor vehicle emissions standards. Moreover, since the Supreme Court held in *Massachusetts v. EPA,* 549 U.S. 497 (2007) that greenhouse gases are air pollutants under the Clean Air Act, all of EPA's GHG standards promulgated under Section 202 have considered electrification as a means of "prevent[ing] or control[ling]" GHG emissions. 42 U.S.C. § 7521(a)(1). EPA has not "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind." *West Virginia*, 597 U.S. at 728 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)) (alteration in original). While Petitioners contest the degree of emission limitation EPA selected, alleging that it transgresses EPA's authority by "forcing" electrification, EPA's Section 202 regulations have long created incentives for cleaner technologies and these Standards are no different in kind. *See id.* at 731 n.4 (noting that the major questions doctrine does not apply to agency

rules that simply "may end up causing an incidental loss of . . . market share").

Loper Bright thus confirms that this case does not implicate the major questions doctrine. This is just another garden variety example of Congress properly delegating authority by using a term or phrase that "leaves [EPA] with flexibility" to regulate, and EPA exercising that authority. *Loper Bright*, 144 S. Ct. at 2263.

C. EPA's Section 202 Authority Is Bolstered By the Agency's Longstanding Interpretations.

While the statutory text settles that the Standards do not pose a major question, EPA's consistent understanding of Section 202 provides further evidence that the Agency acted within its authority. *Loper Bright* confirms the rule in *Skidmore* that longstanding and consistent agency interpretations—like the one at issue here—are "especially useful in determining the statute's meaning." 144 S. Ct. at 2262.

The Standards at issue in this case rely on an interpretation of the Clean Air Act that has persisted across several presidential administrations. Fleetwide averaging has been the basis for setting and determining compliance with motor vehicle emissions standards under Section 202 for decades. And since the Supreme Court decided

Massachusetts, EPA has regulated GHG emissions from motor vehicles by setting standards that use fleetwide averaging while taking electrification into account. *See* EPA Br. 16 (collecting citations).

Furthermore, EPA's assessment that electrification technologies provide viable and cost-effective means to prevent or control pollution from motor vehicles "rests on factual premises within [EPA's] expertise." *Loper Bright*, 144 S. Ct. at 2267 (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983)). Under those circumstances, the Agency's interpretation is "especially informative" and has "particular 'power to persuade.'" *Id.* (quoting *Skidmore*, 323 U.S. at 140). EPA's understanding of Section 202 "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance[.]" *Id.* at 2262 (quoting *Skidmore*, 343 U.S. at 140).

Whether EPA can establish standards on a fleetwide-basis or consider electric vehicles has long been resolved. Notably, Petitioners failed to raise their objections in 2010, when EPA initially adopted this regulatory approach for GHG emissions and those objections would have been timely. *See* 42 U.S.C. § 7607(d)(7)(B) ("Only an objection to a rule

or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review."). Petitioners make no claim that their statutory objections are based "solely on grounds arising after" the 60-day period to challenge those earlier rulemakings elapsed. *See id.* § 7607(b)(1). Further, Petitioners failed to raise any of their arguments with "reasonable specificity" in this rulemaking, including the argument that a particular application of this longstanding regulatory approach was unlawful under the major questions doctrine. *See* 42 U.S.C. § 7607(d)(7)(B); *see* EPA Br. 38–39.

In this way, *Loper Bright* both confirms that the Rule does not pose a major question—*i.e.*, because it has long been well-established that Section 202 grants EPA the authority to include electrification and fleetwide averaging—and underscores the most glaring problem with these petitions. Petitioners' challenges to EPA's longstanding regulatory approach are time-barred, and their challenges to particular applications of that longstanding approach in this rulemaking are barred because they were not sufficiently raised to EPA. Petitioners forfeited their arguments against the Agency's approach and cannot raise them now.

II. Although *Ohio v. EPA* Might Support Dismissal of the Petitions, the Question is Highly Fact-Specific.

In addressing petitions concerning EPA's reinstated waiver of preemption to California, this Court held in *Ohio v. EPA* that petitioners had failed to make the requisite showing of redressability necessary to establish constitutional standing. 98 F.4th at 299–300 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Although Petitioners' claims here may suffer the same flaw, standing is fact-specific and the record here is distinct in certain respects.

In *Ohio*, this Court found that the petitioners' claimed injuries "'hinge[d] on' the actions of third parties—the automobile manufacturers who [were] subject to the" Standards. *Id.* at 302 (quoting *Chamber of Com. v. EPA*, 642 F.3d 192, 201 (D.C. Cir. 2011)). Petitioners there had failed to point to any evidence in the record suggesting that, if the waiver were vacated, vehicle manufacturers would likely redesign their vehicle lineups. *Id.* at 303. That lack of evidence was particularly striking given that respondents had repeatedly highlighted the lack of redressability of petitioners' injuries, yet petitioners failed to submit any affidavits remedying the problem. *Id.* at 304–05. Emphasizing that vehicle manufacturers face long-term planning constraints and the waiver at

issue extended only through December 31, 2025, the Court determined that there was "no basis" to conclude that petitioners' claims were redressable. *Id.* at 305.

As in *Ohio*, Petitioners here are not the object of EPA's regulation, so their injury would be redressed only if vacatur of the Rule were to cause third parties (*i.e.*, automobile manufacturers) to change course in a way that would redress their claimed injuries. State Petitioners assert that the Standards decrease their oil production tax revenue and harm their "quasi-sovereign interest in managing their electrical grids." State Br. 13. Private Petitioners allege economic injury from the Standards due to reduced demand for liquid fuels. Fuel Br. 20. Redressability therefore depends on whether at least one automobile manufacturer is likely to make more cars powered by internal combustion engines that consume liquid fuels.

Petitioners here must also show that an automobile manufacturer would likely make this change "relatively quickly." *Ohio*, 98 F.4th at 302. Manufacturers may begin producing and selling model year 2026 vehicles as early as January 2, 2025. *See* 40 C.F.R. §§ 85.2302, 85.2303, 85.2304 (defining "model year" as the manufacturer's annual production period,

which begins as early as "January 2 of calendar year preceding the year for which the model year is designated"). Admittedly, some vehicle manufacturers may start production later, but the planning still requires extensive lead time.

Finally, as in *Ohio*, the record provides indications that most vehicle manufacturers are unlikely to change course. The record suggests that the expected impacts of the Standards were in line with industry projections before the Rule. *See, e.g.*, 86 Fed. Reg. at 74,438 (noting that "[p]rojections of future EV market share also increasingly show rates of EV penetration commensurate with what we project under the final standards"). Further, the major automobile trade association intervened in support of EPA in this case, asserting that, "however this litigation concludes, widespread vehicle electrification is inevitable." Auto Innovators Br. 3.

Nonetheless, this case is factually distinct from *Ohio* in at least two respects. The scope of EPA's notice-and-comment rulemaking process here was broader than that in *Ohio*, which involved an adjudicative process limited to deciding whether to reinstate a waiver of preemption that it had previously rescinded. As a result, this Rule more extensively

analyzed the dynamics of the vehicle market in the years covered by the Standards. Additionally, the parties here have not as extensively examined the complex facts going to redressability as they did in *Ohio*. *Cf.* 98 F.4th at 304–05 (noting petitioners' failure to respond in their reply briefs despite extensive arguments by respondents).

The clearer failure by Petitioners is that they cannot show that they sufficiently raised their arguments to EPA as required by the Clean Air Act. All GHG emission standards adopted by EPA under Section 202 have reflected the same fundamental approach of including electric vehicles in determining compliance with fleet-average standards. Had Petitioners objected with "reasonable specificity" to EPA's consideration of electric vehicles or fleet-averaging in 2010 or during this rulemaking, EPA could have engaged with their arguments and Petitioners could have come to this Court. *See* 42 U.S.C. § 7607(d)(7)(B). Yet Petitioners never clearly asserted their view that EPA's longstanding approach, either in general or as employed in the Standards, was beyond its authority or implicated the major questions doctrine. *See* EPA Br. 38–39.

Just as Petitioners assumed this Court would intuit that their injuries are redressable, they assumed that EPA would intuit their concerns about the Standards—and the established regulatory approach underneath them. Not only does their failure to timely raise these arguments to EPA foreclose review, but it also lays bare the remedial conundrum at the core of this case. After all, vacatur of these Standards would only restore the 2020 Rule,[1] which suffers from the same alleged defects of which Petitioners complain.

Petitioners failed to do their homework here in multiple respects. But although *Ohio* might support dismissal, this fact-specific issue is less clear than the other reasons the petitions should be denied.

[1] The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (April 30, 2020).

CONCLUSION

The Court should deny the petitions for review.

Dated: August 19, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with Federal Rule of Appellate Procedure 32(f) and (g), along with the Court's July 29, 2024 Order, because it contains 2,987 words.

This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and Century 14-point font.

Dated: August 19, 2024

/s/ Kevin Poloncarz
Kevin Poloncarz

CERTIFICATE OF SERVICE

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

Dated: August 19, 2024

/s/ Kevin Poloncarz
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