ARGUED SEPTEMBER 14, 2023

No. 22-1031
Consolidated with Nos. 22-1032, 22-1033, 22-1034, 22-1035, 22-1036, and 22-1038

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, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

ADVANCED ENERGY ECONOMY, ET AL.,
Intervenors.

On Petitions for Review of a Final Action
of the United States Environmental Protection Agency

SUPPLEMENTAL REPLY FOR STATE PETITIONERS

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EPA	United States Environmental Protection Agency
EPA.Br.	EPA's Supplemental Brief, Document No. 2070814 (Aug. 19, 2024)
Final Rule	*Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emission Standards*, 86 Fed. Reg. 74,434 (Dec. 30, 2021)
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States.Br.	Final Opening Brief for State Petitioners, Document No. 1996773 (Apr. 27, 2023)
States.Rep.Br.	Final Reply Brief for State Petitioners, Document No. 1996778 (April 27, 2023)
State Petitioners	The States of Texas, Alabama, Alaska, Arkansas, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska,

	Ohio, Oklahoma, South Carolina, and Utah and the Commonwealth of Kentucky
States.Supp.Br.	Supplemental Brief for State Petitioners, Document No. 2070800 (August 19, 2024)

INTRODUCTION

The parties generally agree: "[N]either" *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024) (per curiam), nor *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), "affects the resolution of these petitions." Resp.StatesBr.1; *see also, e.g.*, EPA.Br.1, 4. *Ohio* "applied well-established standing principles to the unique facts of that case," which are "distinct from the facts at issue here." Pub.Int.Br.1, 2; *see also, e.g.*, Resp.Indus.Br.12. As a result, it "sheds little to no light on whether any Petitioner has established standing here." Resp.States.Br.1.

Furthermore, *Loper Bright* has "no bearing on the statutory interpretation arguments in this case," Coalition.Br.2; *see also, e.g.*, EPA.Br.1, which require vacatur of the Final Rule, States.Br.14-24. If the Court goes beyond the statutory-interpretation questions, EPA acknowledges that it has invoked the "*Chevron* framework," EPA.Br.9-10 n.3, and premised its assertion of authority on cases decided under that framework, EPA.Br.12. Because it did the same thing in the rulemaking process itself, JA19, *Loper Bright* supports vacatur. Respondents' arguments to the contrary are unpersuasive.

ARGUMENT

I. *Ohio* Does Not Affect this Court's Standing Analysis.

Although the parties dispute the ultimate result, everyone agrees that "*Ohio* does not change familiar standing principles." EPA.Br.2. Under those principles, "a petitioner whose standing is not readily apparent must show that it has standing in 'its opening brief'" and may do so either by "citing any record evidence relevant to its claim" or "appending to its filing additional affidavits or other evidence sufficient

to support its claim." *Ohio*, 98 F.4th at 300 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002)).

Respondents—many of whom participated in *Ohio*—further acknowledge that key to the Court's decision that the petitioners had failed to meet that standard there was "evidence before the Court, including an expert declaration submitted by California," that manufacturers were "already selling more qualifying vehicles in California than the State's standards require." Pub.Int.Br.3 (quoting *Ohio*, 98 F.4th at 304-05). Whether that evidence *should* have defeated standing in *Ohio* is the subject of a pending cert petition. *Ohio v. EPA*, No. 24-13. But not even California suggests that it has presented similar evidence here to "call[] redressability into doubt." Resp.States.Br.4. To the contrary, as the State Respondents admit, the administrative "record . . . addresses current market conditions and examines the likely effects of these standards in . . . future model years." *Id.* at 4. Under those circumstances, this Court's case law does not require any additional factual proffer. *See* States.Rep.2-4.

Respondents make two potential arguments to the contrary, neither of which has merit. *First*, Industry Intervenors assert (at 13) that "Petitioners here must also show that an automobile manufacturer would likely make any change 'relatively quickly'" and suggests that they cannot do so because "[m]anufacturers may begin producing and selling model year 2026 vehicles as early as January 2, 2025," now just months away. This argument, however, suffers a "basic flaw": Standing is assessed as of the time this suit was filed *two years ago*. *West Virginia v. EPA*, 597 U.S. 697, 719 (2022). It is *Respondents'* burden to show that the passage of time has rendered State

Petitioners' injury no longer redressable under the "doctrine of *mootness*, not standing." *Id.* No Respondent attempts to meet that burden.

Second, EPA suggests (at 3) that Petitioners always lacked standing because at the time they filed their complaint, "a slew of automakers had already announced plans to shift production to fully electric vehicles and others [had] planned major shifts to electrification technologies." But this argument obscures any notion of the timing of those shifts, which is significant because State Petitioners base their claims on risks to their power grids from the sudden influx of EVs. States.Br.13-14. More fundamentally, this argument ignores that Article III does not demand "total" redressability, only that *some* "injury of which [Petitioners] now complain will indeed be completely redressed by a favorable decision of this Court." *Larson v. Valente*, 456 U.S. 228, 242-43 (1982); *accord Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 797-98 (2021). EPA has admitted that "[c]ompliance with the final standards will necessitate *greater* implementation and pace of technology penetration" than the status quo. JA60. Because that compliance has significant costs, this Court may presume it will not be fully undertaken absent the Rule; that is sufficient to establish standing. States.Supp.Br.2-3.

II. To the Extent It Is Implicated, *Loper Bright* Confirms the Final Rule's Unlawfulness.

Loper Bright's decision also does not "affect[] the resolution of these petitions," State.Resp.Br.1, because *Chevron* never applied to State Petitioners' claim that "the question at issue"—whether to force electrification of the fleet—"is one of deep economic and political significance." *Loper Bright*, 144 S.Ct. at 2269 (quotation

marks omitted). This isn't an issue of agency deference but statutory interpretation, *Biden v. Nebraska*, 143 S.Ct. 2355, 2375 (2023), on which Respondents agree *Loper Bright* has "no bearing," Coalition.Br.2; *e.g.*, Resp.Indus.Br.2. That alone is sufficient to set aside the Rule. *E.g.*, *West Virginia*, 597 U.S. at 732. Respondents make four primary arguments why *Loper Bright* nonetheless supports their position. Each fails.

First, the Industry Intervenors assert (at 5) that *Loper Bright* confirms that this case does not implicate the major-questions doctrine because it is just 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.'" (quoting *West Virginia*, 597 U.S. at 721). It is hard to see how. After all, *Loper Bright* examined whether the Magnuson-Stevens Fishery Conservation and Management Act empowered a federal agency to "mandate that [fishermen] pay for observers required by a fishery management plan." *Loper Bright*, 144 S.Ct. at 2256. Although that question was indubitably important to the fisherman affected, the regulation in that case involved none of "[t]he basic and consequential tradeoffs involved in . . . a choice," *West Virginia*, 597 U.S. at 730, to force the electrification of nearly one in five vehicles at the risk of (among other things) destabilizing the nation's power grid and forcing dependency on necessary materials controlled by hostile powers. States.Br.24; States.Rep.Br.12.

Second, Respondents make much of *Loper Bright*'s reaffirmation that Congress can "expressly delegate discretion to EPA to prescribe emissions standards," Resp.Indus.Br.2; *e.g.*, State.Resp.Br.9—a proposition that no one has disputed. But

whether the Rule survives *Loper Bright* depends on what *type* of authority EPA exercised in promulgating it. That is, *Loper Bright* may have reaffirmed that a Court should "appl[y] deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific *facts*," 144 S.Ct. at 2259; but it squarely rejected the notion that the APA imposes the same "deferential standard for courts to employ in answering . . . *legal* questions," *id.* at 2261 (emphasis added).

In explaining its actions, the Final Rule invokes legal authority, JA19, 201, that EPA now admits depends on the "*Chevron* framework," EPA.Br.9-10. It is thus fundamentally unclear whether EPA adopted the Final Rule because the agency thought it was the "best reading of Section 7521(a)," EPA.Br.2, or merely one that "makes sense" and for which it was entitled to deference, EPA.Br.12. Because only one of those types of discretion survives *Loper Bright*, that lack of clarity alone is a problem that, under the APA, requires vacatur. States.Supp.Br.14-15; *e.g. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("reiterat[ing] that an agency must cogently explain why it has exercised its discretion in a given manner.").

Third, Respondents try to avoid that conclusion by seizing on the statement in *Loper Bright* that it "d[id] not call into question prior cases that relied on the *Chevron* framework." 144 S.Ct. at 2273. In their view, this statement means that EPA may exercise "its technical judgment in projecting the future development and application of emission controls, to push the auto industry toward cleaner

technologies," and thereby force electrification of the fleet. Resp.States.Br.11 (citation omitted); *see also, e.g.*, EPA.Br.12.

That non sequitur is driven by selective quotation. What the Supreme Court *said* was that "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite [the] change in interpretive methodology." *Loper Bright*, 144 S.Ct. at 2273. "Mere reliance on *Chevron* cannot constitute a special justification for overruling such a holding," the Court further elaborated, "because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.'" *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). That unremarkable principle does not help Respondents because they cannot point to any case holding that these "specific agency actions are lawful" under *either* step of the erstwhile *Chevron* framework. *Id.* Moreover, that a prior holding remains "good law" for *stare decisis* purposes, *id.*, does not mean that a court can or should extend that precedent when its legal underpinnings have been fundamentally undermined, *see Seila Law LLC v. CFPB*, 591 U.S. 197, 220 (2020); *cf. Agostini v. Felton*, 521 U.S. 203, 237 (1997). For example, even if the cases Respondents cite could support the notion that some form of fleetwide averaging "makes sense" EPA.Br.12; *but see, e.g.*, Priv.Pet.Rep.Br.7, 17-24, that does not mean that they support a holding that it "makes sense" to read the CAA to allow the EPA to unilaterally do away with the internal-combustion engine. And they certainly don't stand for the proposition that such a position is the "best reading" of the statute. *Loper Bright*, 144 S.Ct. at 2263.

Fourth, Respondents fall back on their argument that the Court should never reach the merits of Petitioners' claims because "*Loper Bright* reaffirms" the CAA's exhaustion requirement, Resp.Indus.Br.5; *accord* Pub.Int.Br.5, perhaps even rendering that requirement "more important" because, under *Loper Bright*, "the thoroughness of an agency's consideration is a factor that gives an agency's interpretation the power to persuade," EPA.Br.6-7. Wrong again. The agency's need to be thorough is nothing new. *E.g.*, *State Farm*, 463 U.S. at 48. Moreover, it has never been disputed that State Petitioners submitted multiple comments presenting arbitrary-and-capricious arguments, States.Br.23, or that the predicates of their claim that the Final Rule presents a major question were presented to the agency, *cf.* Resp.States.Br.15n.3; *see also* JA1016, JA1028; Industry.Merits.Br.8-9.

That not all of these comments came from the States Petitioners is irrelevant, *NRDC v. EPA*, 824 F.2d 1146, 1150-51 (D.C. Cir. 1987)—as is the fact that these comments omitted the phrase "major questions doctrine." Put simply, exhaustion does not impose a magic-words requirement. *See Ohio v. EPA*, 144 S.Ct. 2040, 2055 (2024) ("A party need not 'rehears[e]' the identical argument made before the agency."). And it would be odd to fault State Petitioners for not using the "major questions doctrine 'label'" in this instance given that it was not formally recognized until June 2022, *West Virginia*, 597 U.S. at 624, nine months *after* the close of the comment period for the Final Rule, JA2. *Huntsman Petrochemical LLC v. EPA*, No. 23-1045, 2024 WL 3763355 (D.C. Cir. Aug. 13, 2024), is not to the contrary because it merely applied existing precedent that "specifically held that the Act's mandatory exhaustion rule applies to nondelegation challenges," *id.* at *10. At no point did

Huntsman purport to overrule this Court's existing case law regarding how to satisfy that exhaustion rule. *Contra* EPA.Br.6 n.1. Nor could it have done so absent intervening Supreme Court or en banc authority. *E.g.*, *United States v. Bannon*, 101 F.4th 16, 21 (D.C. Cir. 2024). Because *Loper Bright* does not overrule this Court's decisions on the exhaustion rule, Petitioners' arguments are properly before the Court for the reasons already explained. Pet.Indus.Rep.7-10.

CONCLUSION

State Petitioners' petition should be granted and the Final Rule vacated.

Respectfully submitted.

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Certificate of Compliance

I hereby certify that this brief complies with Federal Rule of Appellate Procedure 32(f) and (g) and this Court's July 29, 2024 Order, because it contains 1,948 words, as counted by the Microsoft Word software to produce this brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). This brief also complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it was prepared in 14-point font using a proportionally spaced typeface.

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Certificate of Service

I hereby certify that I caused a copy of the foregoing brief to be filed on August 29, 2024, using the Court's CM/ECF system and that service was accomplished upon counsel of record by the Court's system.

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