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 of a Rule of the
Environmental Protection Agency

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENT-INTERVENOR PUBLIC INTEREST ORGANIZATIONS

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* Authorities on which Respondent-Intervenor Public Interest Organizations chiefly rely are marked with asterisks.

Statutes

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GLOSSARY

Act	Clean Air Act, 42 U.S.C. § 7401 *et seq.*
EPA	U.S. Environmental Protection Agency
EPA Br.	EPA's Answering Brief
EPA Suppl. Br.	EPA's Supplemental Brief
Private Pet. Suppl. Br.	Supplemental Brief for Private Petitioners
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)
State Intv. Suppl. Br.	Supplemental Brief of State Respondent-Intervenors
State Pet. Suppl. Br.	Supplemental Brief for State Petitioners
State-PIO Intv. Br.	Brief of State and Public Interest Respondent-Intervenors

INTRODUCTION AND SUMMARY OF ARGUMENT

As explained in Respondents' supplemental briefs, *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), supports EPA's interpretation in this case because it is the best reading of the statute and warrants the Court's respect. EPA has correctly and consistently maintained, for decades, that 42 U.S.C. § 7521(a) allows fleetwide averaging and does not exclude any technology, including zero-emission technology, from the agency's standard-setting authority.

Petitioners contend that *Loper Bright* is irrelevant because the Rule challenged here implicates the major-questions doctrine, and that EPA's reading deserves no respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). But Petitioners mistakenly base their major-questions argument on a fact-intensive (and unexhausted) question about the rule's stringency, rather than any novel assertion by EPA of its statutory authority. And Petitioners do not identify even any inconsistency by EPA that would undermine respect for its longstanding reading.

Finally, Petitioners misunderstand *Loper Bright* when they suggest that vacatur is warranted because EPA previously cited cases discussing discretion and deference. *Loper Bright* confirms that statutes—like § 7521(a)—may delegate discretion to an agency, and that the agency's exercise of such discretion is subject to deferential arbitrary-and-capricious review.

ARGUMENT

I. The Major-Questions Doctrine Is Inapplicable Here

The major-questions doctrine instructs courts, in "certain extraordinary cases," to "'hesitate'" before accepting an agency's "novel reading" of its statutory authority. *West Virginia v. EPA*, 597 U.S. 697, 716, 723-24 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). The doctrine is a "tool of statutory interpretation" that functions solely 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). Petitioners' invocation of the doctrine is therefore misguided here both because their statutory authority objections—including their major-questions arguments—are not properly before the Court, State-PIO Intv. Br. 3-6, and because their major-questions theory does not align with their interpretive arguments.

Petitioners have pressed two statutory authority objections in this Court, claiming that EPA may not (1) set fleet-average standards, or (2) include zero-emission technologies in such standards. Even assuming these objections are properly presented, *but see* EPA Suppl. Br. 5-7, Petitioners have never argued (nor could they) that the first question implicates the major-questions doctrine. *See* EPA Br. 62 n.16; State-PIO Intv. Br. 16-17. Any consideration of that statutory

interpretation issue, then—i.e., whether EPA has authority to set fleet-average standards under § 7521(a)—must proceed here without a major-questions inquiry.

Petitioners' other statutory objection—regarding EPA's authority to include zero-emission technologies in its § 7521(a) standards—does not implicate the major-questions doctrine either. EPA Br. 47-62; State-PIO Intv. Br. 19-29. Among other things, EPA's assertion of its authority is not "novel," "newfound," or "unheralded." *West Virginia*, 597 U.S. at 716, 724. Rather, EPA has always understood that § 7521(a) requires it to consider all available emission-reduction technologies and, accordingly, has incorporated zero-emission vehicles into its fleet-average standards for over two decades. *See* State-PIO Intv. Br. 4-5.

Petitioners contend that the Rule here is different because, in their view, "for the first time, carmakers *must* average in some electric-vehicle[s]" to comply with the standards. Private Pet. Suppl. Br. 13; *id.* at 9 (asserting that the standards "effectively mandate" electric vehicles). But that assertion is contested, *see* State Intv. Suppl. Br. 15, and, even if true, turns only on the *stringency* of EPA's standards, rather than any different *interpretation* of EPA's statutory authority—which is what the major-questions doctrine informs, *see Save Jobs*, 2024 WL 3627942, at *3. Put another way, EPA either has authority to account for zero-emission technologies in its fleet-average standards under § 7521(a), as it has done consistently across multiple presidential administrations for over two decades, or it

does not. Petitioners identify no statutory text that would distinguish between EPA's authority with respect to those prior rules and the one challenged here. And as EPA has explained, merely tightening prior standards under oft-invoked authority does not implicate the major-questions doctrine. EPA Br. 48-56.

The fact-intensive nature of Petitioners' major-questions argument also highlights their failure to follow the Clean Air Act's mandatory exhaustion requirement. To press an argument that the Rule effectively mandates zero-emission technologies (the basis of their major-questions theory), Petitioners had to raise that objection with "reasonable specificity" during the rulemaking, 42 U.S.C. § 7607(d)(7)(B), to give EPA an "opportunity to respond to their factual allegations and develop a record on those issues." EPA Br. 39. Commenters did raise such arguments during the rulemaking for EPA's more recent multi-pollutant standards for light- and medium-duty vehicles, and the agency responded at length. *See* 89 Fed. Reg. 27,842, 27,897-900 (Apr. 18, 2024). Opening briefs challenging that rule are due in this Court in just over a week. The Court should resolve Petitioners' statutory authority objections, including their major-questions arguments, in a case where they are properly raised. *See* EPA Suppl. Br. 7.

II. EPA's Longstanding, Consistent Interpretation Warrants Respect

The best reading of § 7521(a) is that it authorizes EPA to set fleet-average standards that include zero-emission technologies. Further, and contrary to

Petitioners' contention, *see* Private Pet. Suppl. Br. 11-14, EPA's position is precisely the sort of "longstanding, consistently maintained interpretation" that warrants the Court's "respect." *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 488 (2004).[1] In fact, because EPA has set fleet-average standards that include zero-emission vehicles for roughly a quarter-century, and no one previously contested its authority to do so—including in rulemaking comments here—it is Petitioners, not EPA, that press an interpretation "seemingly adopted for the first time in this case." Private Pet. Suppl. Br. 13.

Averaging. EPA has maintained, for over four decades, that fleetwide averaging falls within the discretion Congress afforded the agency in determining the form and content of standards under § 7521(a), as well as appropriate compliance mechanisms under § 7525. The prior EPA statements that Petitioners cite, Private Pet. Suppl. Br. 12-13, are all consistent with its position that averaging is authorized, but neither required nor forbidden, by the statute.

In fact, the regulatory history that Petitioners (selectively) recount reflects the "thoroughness" of EPA's consideration of the question, as well as its "body of

[1] *Alaska Department of Environmental Conservation* confirms that an agency interpretation need not be "contemporaneous" with a statute's enactment to merit respect. Private Pet. Suppl. Br. 11; *see* 541 U.S. at 486-87. A contemporaneous construction might be "especially" deserving of respect, *Loper Bright*, 144 S.Ct. at 2258, 2262, but it has never been a necessary condition. *See Skidmore*, 323 U.S. at 139-40; *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008).

experience and informed judgment" on the matter. *Skidmore*, 323 U.S. at 140. When commenters first suggested averaging in 1980, EPA observed that it raised then-"novel questions," 45 Fed. Reg. 14,496, 14,502 (Mar. 5, 1980), so EPA promptly opened a separate rulemaking to consider the issue more thoroughly, 45 Fed. Reg. 79,382 (Nov. 28, 1980). After such consideration, EPA determined that averaging was "consistent" with the statute and within its "authority" and "discretion." 48 Fed. Reg. 33,456, 33,456-58 (July 21, 1983). This Court then rejected a challenge to EPA's use of averaging—finding no statutory prohibition, and crediting EPA's position that it was "within the *discretion* of the agency." *NRDC v. Thomas*, 805 F.2d 410, 425 & n.24 (D.C. Cir. 1986). The Court also identified a question "for the agency's consideration and possible explanation in future proceedings," *id.*, and EPA subsequently did just that, 54 Fed. Reg. 22,652, 22,665-67 (May 25, 1989); 55 Fed. Reg. 30,584, 30,593-99 (July 26, 1990).

Congress, too, specifically considered EPA's averaging authority as part of the 1990 Clean Air Act Amendments, and decided to leave the agency's discretion intact. *See* EPA Br. 18. In fact, Congress also addressed the question that EPA and this Court had previously identified—about whether the Act contemplates only "individual vehicle compliance with the applicable standards," 45 Fed. Reg. at 14,502—by enacting a provision directing EPA to prescribe § 7521(a) standards that required a specified percentage of a manufacturer's fleet to meet the standard

for a given model year: e.g., 40% in 1994, and 80% in 1995. *See* Pub. L. No. 101-549, § 203(a), 104 Stat. 2399, 2474 (1990) (codified at 42 U.S.C. § 7521(g)). This provision confirmed EPA's authority to evaluate a manufacturer's compliance with § 7521(a) standards at the fleet—and not only individual vehicle—level.

Zero-Emission Technology. EPA's position on zero-emission technology is also consistent and longstanding, and Petitioners do not seriously contend otherwise. EPA has included zero-emission vehicles in its fleet-average standards since at least 2000, *see* State-PIO Intv. Br. 4-5, and Petitioners identify no instance when EPA ever suggested that § 7521(a) excludes such technology (or any other emission-reduction technology) as categorically off limits. Instead, they rehash their contention that the Rule effectively mandates zero-emission vehicles for the first time. *See* Private Pet. Suppl. Br. 13-14. As explained above, that assertion—even if true—is about the standards' stringency, not about EPA's interpretation of its statutory authority. *Supra* 3-4. So the assertion cannot show any interpretive inconsistency that would undermine "respect" for EPA's reading.

III. State Petitioners Misunderstand *Loper Bright*'s Impact

State Petitioners contend that *Loper Bright* "necessitates vacatur" because EPA's preamble and brief cited cases governed by the *Chevron* framework and "invoke[d] concepts of deference." State Pet. Suppl. Br. 1-2, 10, 14-15. This argument is doubly wrong.

First, *Loper Bright* "do[es] not call into question prior cases that relied on the *Chevron* framework." 144 S.Ct. at 2273. Cases decided under *Chevron* thus remain good law, *see* EPA Suppl. Br. 12, and can help inform the Court's interpretation of analogous statutory provisions, *see* State Intv. Suppl. Br. 12-13.

Second, Petitioners are wrong about the relevant portions of EPA's preamble and brief. In those instances, EPA invoked deference for its technical judgments "under arbitrary-and-capricious review," EPA Br. 49 (citing *NPRA v. EPA*, 287 F.3d 1130, 1135 (D.C. Cir. 2002)); JA19 (same); *see also* EPA Br. 25-26 (citing *Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015)). *Loper Bright* confirms that such review is "deferential." 144 S.Ct. at 2261.

EPA also explained, relying on pre-*Chevron* cases, that § 7521(a) affords the agency "discretion" when assessing technical feasibility and deciding how to group vehicles into classes, "subject to the restraints of reasonableness." JA19 (citing *NRDC v. EPA*, 655 F.2d 318, 328, 338 (D.C. Cir. 1981)). Again, that is consistent with *Loper Bright*, which explained that the "best reading of a statute"—like § 7521(a)—may be that it "delegates discretionary authority to an agency," and that the exercise of such discretion is reviewed for "'reasoned decisionmaking.'" 144 S.Ct. at 2263 (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)).

Finally, State Petitioners have it backward when they suggest that the Court should vacate the Rule because EPA may not "rais[e] legal arguments that were

not invoked in the rulemaking process." State Pet. Suppl. Br. 15 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The briefing in this case covers issues that were not addressed in the rulemaking because *Petitioners* did not raise their objections during the comment period, as the Clean Air Act requires. 42 U.S.C. § 7607(d)(7)(B). The remedy for that problem is not vacatur, but disposing of Petitioners' statutory authority objections for failure to exhaust.

CONCLUSION

The Court should dismiss or deny the petitions.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Court's Order of July 29, 2024. According to Microsoft Word, the portions of this document not excluded by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1) contain 1901 words.

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

Dated: August 29, 2024

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