

ORAL ARGUMENT NOT YET SCHEDULED
Case No. 24-1129 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEBRASKA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
et al.,

Respondents.

PROOF BRIEF OF STATE AND PUBLIC INTEREST
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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, the undersigned counsel provides the following information for all consolidated cases.

A. Parties and Amici

1. All parties, intervenors, and amici appearing in these consolidated cases are listed in the Initial Brief for State Petitioners (ECF#2080261), Initial Brief for Private Petitioners (ECF#2080266), and EPA's Proof Answering Brief (ECF#2094124), except for the following:

Amici for Respondents:

National League of Cities and the U.S. Conference of Mayors; American Thoracic Society, American Academy of Family Physicians, American Academy of Pediatrics, American College of Physicians, American Medical Association, and other major medical organizations; Margo T. Oge and John Hannon; Climate Scientists Michael Oppenheimer, Noah S. Diffenbaugh, Christopher B. Field, Stephen W. Pacala, Daniel P. Schrag, and Susan Solomon; International Council on Clean Transportation and University of California, Davis Institute of Transportation Studies; Institute for Policy Integrity at New York University School of Law; National Parks Conservation Association; and Constitutional Accountability Center.

2. The Respondent-Intervenor Public Interest Organizations joining this brief are Alliance of Nurses for Healthy Environments, American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Community Action and Environmental Justice, Clean Air Council, Environmental Defense Fund, Environmental Law & Policy Center, Natural Resources Defense Council, Public Citizen, Rio Grande International Study Center, and Sierra Club. All are non-profit public interest organizations; none of them has any parent corporation; and no publicly held entity owns 10 percent or more of any of them.

B. Rulings Under Review

The agency action under review is entitled, “Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3,” published in the Federal Register at 89 Fed. Reg. 29,440 (Apr. 22, 2024).

C. Related Cases

The petitioners in *Kentucky v. EPA*, No. 24-1087 (D.C. Cir.), which concerns EPA’s multi-pollutant emissions standards for light-duty and medium duty vehicles, overlap significantly with the petitioners here, and they bring many of the same arguments. See Case No. 24-1087, ECF#2073629, ECF#2073654. However, neither set of petitioners has identified these cases as related.

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GLOSSARY

Act	Clean Air Act, 42 U.S.C. § 7401 <i>et seq.</i>
EPA	U.S. Environmental Protection Agency
EPA Br.	EPA’s Answering Brief
Fuel Br.	Brief for Private Petitioners
JA	Joint Appendix
Nebraska Br.	Brief for State Petitioners
Oge-Hannon Amicus Br.	Brief of Amici Curiae Margo Oge and John Hannon in support of Respondents
RIA	Regulatory Impact Analysis (Mar. 2024), EPA-HQ-OAR-2022-0985-3858
RTC	Response to Comments (Apr. 2024), EPA-HQ-OAR-2022-0985-4122
Rule	U.S. EPA, “Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3,” 89 Fed. Reg. 29,440 (Apr. 22, 2024).

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1965, federal motor vehicle standards under Section 202 of the Clean Air Act have been a cornerstone of Congress’s efforts to reduce dangerous air pollution. Congress charged EPA with eliminating billions of tons of smog precursors, soot, and greenhouse gases from the nation’s air by regulating emissions from classes of vehicles based on feasible technologies. Under that mandate, EPA has, for over fifty years, regulated pollution from heavy-duty trucks—including, e.g., shuttles, school buses, vocational trucks (such as delivery trucks, refuse-collection trucks, and street sweepers), and tractor-trailer or “semi” trucks that move freight long distances. Then and now, the harm of truck pollution has come from the aggregate emissions of millions of vehicles.

In the Rule under review, which updates greenhouse-gas emissions standards for trucks, EPA has continued to employ Section 202 to mitigate increasing threats to public health and the environment from this enormous and growing pollution source. In challenging the Rule, Petitioners claim EPA lacks authority to regulate electric vehicles or set fleet-average standards. Those claims are untimely because they contest longstanding elements of EPA’s regulations. The Rule adopts no new interpretation of the Act; rather, the Rule abides by the plain meaning of Section 202 and increases the standards’ stringency based on manufacturers’ increased capability to prevent and control pollution, which varies

by vehicle type. Thus, standards for model year 2027 delivery trucks are 17% more stringent than prior standards, while updated standards for sleeper-cab tractor-trailer trucks do not even begin until 2030 and are then 6% stricter than prior sleeper-cab standards. 89 Fed. Reg. 29,440, 29,450 (Apr. 22, 2024).

Petitioners urge a radical rewriting of the statute that would exclude from EPA’s authority three established heavy-duty technologies—battery-electric, fuel-cell, and plug-in hybrid powertrains—and prohibit *all* fleet-average standards. But reading Section 202 to inhibit the deployment of proven technologies would be antithetical to the Act’s text and history, as well as its “primary goal” of pollution prevention. 42 U.S.C. § 7401(c).

With no text to support their proposed technology exclusion, Petitioners invoke the major questions doctrine. That doctrine, which the Supreme Court has explained is reserved for extraordinary cases, disfavors interpretations of statutory text that give an agency unprecedented, extravagant powers that Congress did not clearly provide. Petitioners, however, never tie their major-questions arguments to any interpretive question. Instead, they try to frame their challenges as a dispute over “mandat[ing] electric vehicles,” Fuel Br. 20, or “ban[ning]” combustion-engine technologies, Nebraska Br. 18. But the Rule does neither. In fact, due to trucks’ lengthy operational lives, EPA projects that 93% of the on-road fleet in 2032 will remain combustion-engine vehicles. 89 Fed. Reg. at 29,568. At bottom,

Petitioners attack EPA's decision to continue regulating truck classes under fleet-average standards at a time when electric vehicles make up a growing share of those classes. That is not a major question. The Rule is firmly grounded in EPA's authority and a robust evidentiary record.

STATEMENT OF THE CASE

The statutory and regulatory background is set forth in EPA's Statement of the Case.

ARGUMENT

I. PETITIONERS' STATUTORY AUTHORITY ARGUMENTS ARE UNTIMELY

Insofar as Petitioners challenge elements of EPA's program that have existed for decades, the challenges are untimely under 42 U.S.C. § 7607(b)(1). EPA Br. 28-31; *see Growth Energy v. EPA*, 5 F.4th 1, 21-22 (D.C. Cir. 2021) (2019 challenge to program element adopted in 2007 untimely). Truck emissions standards have utilized fleetwide averaging for forty years. EPA Br. 29. In regulating vehicle emissions, EPA has accounted for electric vehicles' zero tailpipe emissions within fleet averages since 2000. *Id.* Because the Rule reopened neither element, the Court should dismiss Petitioners' statutory arguments.

II. SECTION 202 DOES NOT EXCLUDE ZERO-EMISSION TECHNOLOGIES

Section 202 authorizes standards that reflect the emission-reduction capabilities of advanced vehicle technologies, including zero-emission technologies like the battery-electric and fuel-cell-electric powertrains found in

electric vehicles.² Petitioners' contrary arguments distort the provision's text, ignoring the long history of electric vehicles and emissions control that informed Congress's choice *not* to limit the agency to combustion-engine technologies.

Congress adopted almost all of Section 202(a)(1) and (2)'s current language in the Motor Vehicle Pollution Control Act of 1965, Pub. L. No. 89-272, § 101, 79 Stat. 992, 992, and the Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690. In the 1960s, as today, the vehicle-pollution problem was of paramount importance. Together with industrial emissions, the rapidly growing vehicle population had created air pollution that killed hundreds of people, made thousands sick, and turned urban areas into “vast aerial garbage heap[s].”³ Meanwhile, California's groundbreaking vehicle emissions program had spurred dramatic technological breakthroughs. Industry witnesses told Congress their engineers were fundamentally reconceiving vehicle and engine design to reduce emissions.⁴ When Congress demanded technology-based standards to reduce

² The battery-electric powertrain is an integrated system delivering energy stored in batteries to the vehicle's wheels through an electric motor; the fuel-cell-electric powertrain delivers energy stored in hydrogen fuel cells. *See* 89 Fed. Reg. at 29,463, 29,791.

³ 111 Cong. Rec. 25,065 (1965).

⁴ Hearings before the Comm. on Public Works, 88th Cong. 860, 862 (1964) (1964 Senate Hearings).

pollution from one of the nation's largest pollution sources, it understandably made no carveout to exclude consideration of the most effective technologies.

A. Section 202 Authorizes Standards that Reflect the Increased Application of Pollution-Control Technologies

The Rule is squarely within EPA's authority. Section 202 directs EPA to prescribe standards "applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [its] 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). EPA must afford manufacturers the lead time "necessary to permit the development and application of the requisite technology," with "appropriate consideration" of compliance costs. *Id.* § 7521(a)(2). And EPA's standards must apply to vehicles and engines "for their useful life," "whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution." *Id.* § 7521(a)(1).

By providing for lead time "necessary [for] the development and application of the requisite technology," Section 202 expressly authorizes standards that "requi[re]" technology and obligate the industry to "appl[y]" those technologies to a greater extent than it previously had. *Id.* § 7521(a)(2). Indeed, the first Section 202(a) standards, for model year 1968, required the complete elimination of crankcase emissions (the unburned fuel-air mixture that escapes the engine's

crankcase), effectively requiring blowby systems to capture those emissions on all new light-duty vehicles. 31 Fed. Reg. 5170, 5171 (Mar. 30, 1966). EPA has also prescribed standards—upheld by this Court—premised on *anticipated* technology. *NRDC v. EPA*, 655 F.2d 318, 326-27, 332-33 & n.25 (D.C. Cir. 1981). This longstanding practice confirms what Section 202’s text makes clear: the standards’ stringency is determined according to the reductions that vehicle and engine technologies can feasibly achieve. *Id.* at 327-28, 336.

Congress has embraced this consistent view of Section 202 and directed EPA to push technologies further. In the 1977 Clean Air Act Amendments, Congress, impatient with the lack of progress in controlling truck pollution, imposed technology-forcing standards requiring, for specified pollutants, the “greatest degree of emission reduction achievable through the application of technology which [EPA] determines will be available.” Pub. L. No. 95-95, § 224, 91 Stat. 685, 765 (*codified at* 42 U.S.C. § 7521(a)(3)(A)(i)); *see also NRDC v. Thomas*, 805 F.2d 410, 414-16 (D.C. Cir. 1986). In the 1990 amendments, Congress reaffirmed EPA’s authority to adopt standards more protective and technologically ambitious than those Congress prescribed. *See* 42 U.S.C. § 7521(i)(1)-(2), (i)(3)(B)-(C) (affirming that EPA retained “authority under subsection (a) to promulgate more stringent standards” than those prescribed in § 7521(g)).

As Section 202(a) standards have done for over fifty years, the Rule challenged here identifies reductions attainable from feasible technology and accordingly updates the standards' stringency. *See* EPA Br. 37-38. The Rule thus falls squarely within EPA's authority.

B. Section 202 Does Not Exclude Non-Polluting Propulsion Systems

Section 202 does not exclude electrified powertrains—or any other technology. In 1965, vehicle pollution was a dynamic scientific field, and Congress committed the technological basis of emissions standards to reasoned agency decision making so that standards would keep pace with “changing circumstances and scientific developments” and avoid “obsolescence.” *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). Congress also purposely chose capacious language to ensure standards would reflect the full breadth of vehicle technologies, from add-on “devices” to “vehicles and engines ... designed as complete systems.” 42 U.S.C. § 7521(a)(1). Consistent with this plain language, EPA has never carved out any technology—including non-polluting propulsion systems such as electrified powertrains—from its standard-setting considerations. On the contrary, EPA has increasingly relied on electrified powertrains' capabilities as those technologies have matured.

1. As automakers explained in hearings on the 1965 Motor Vehicle Pollution Act, the “rapid evolution in air pollution technology” indicated the

“[t]echnical details of exhaust-emission standards should not be written into law,” but instead determined in regulation.⁵ At the Johnson Administration’s request, the House revised the Senate bill’s prescriptive standards into an express delegation to set standards administratively, so that standards would be “upgraded and improved as the state of the art permits.”⁶

Section 202’s final text also included language to ensure the technological bases for standards would be comprehensive. In providing that standards shall apply to vehicles “whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution,” 42 § 7521(a)(1), Congress confirmed that the technologies it expected automakers would use to achieve those standards could range from installable “gadget[s]”⁷ to integral, complex systems informing the entire vehicle’s design.⁸ EPA Br. 34-37.

⁵ See, e.g., Hearings before the Comm. on Interstate & Foreign Commerce on S.306, 89th Cong. 282 (1965) (1965 House Hearings).

⁶ Hearings before the Comm. on Public Works on S.306, 89th Cong. 13 (1965); compare S.306, 89th Cong. 4-5, (Jan. 7, 1965) with S.306, 89th Cong. 21 (Aug. 31, 1965).

⁷ 1965 House Hearings at 288.

⁸ See, e.g., 1964 Senate Hearings at 860, 862 (Harry Williams, Auto Mfr. Ass’n) (“Literally, the advent of the vehicle emissions problem has added a new dimension to the design of automobiles. ... Now all automotive engineers assess new engine and vehicle designs by a fourth major criterion—vehicle emissions.”).

2. In particular, Section 202 contemplates the development and application of low- and non-polluting powertrains as “complete systems ... to prevent or control” pollution. 42 U.S.C. § 7521(a)(1). Congress even *removed* bill language that would have restricted EPA’s authority to gasoline- and diesel-fueled propulsion systems. Senator Muskie’s original bill provided standard-setting authority for “gasoline-powered” and “diesel-powered vehicles” only.⁹ But the House removed those limits and instead defined “motor vehicle” as “*any self-propelled vehicle designed for transporting persons or property on a street or highway.*”¹⁰

By broadening the definition of “motor vehicle”—and thus the scope of Section 202(a) authority—beyond gasoline- and diesel-fueled vehicles, Congress deliberately left room for the development of non-polluting propulsion systems, including electrified powertrains. See EPA Br. 33. Electric vehicles were a well-understood technology in 1965; in fact, they predate Ford’s Model T.¹¹ Electric vehicles fell squarely within the natural meaning of “any self-propelled vehicle.”

⁹ S.306, 89th Cong. 1, 4-5 (Jan. 7, 1965).

¹⁰ S.306, 89th Cong. 21, 27 (Aug. 31, 1965) (emphasis added); 111 Cong. Rec. 25,073 (Sept. 24, 1965) (amending title to remove restriction to gasoline and diesel vehicles).

¹¹ U.S. Dep’t of Energy, *The History of the Electric Car* (Sept. 15, 2014), <https://www.energy.gov/articles/history-electric-car>; see also J. Ingraham, ‘60 *Electric Automobile Shown; Cent-a-Mile Operation Claimed*, N.Y. Times (Mar. 22, 1960); Oge-Hannon Amicus Br. 19.

While combustion-engine vehicles had taken over the market by midcentury, Congress's awareness that the entire market had already once transitioned between propulsion technologies further explains its choice not to fix fuel or engine technology into the statute.

Subsequently, in the 1970 amendments, Congress directed federal resources toward “inherently low-polluting propulsion technology,” Pub. L. No. 91-604, § 10, 84 Stat. 1702, because of its potential to meet Section 202(a) standards. See 42 U.S.C. § 7521(e) (prescribing how “new power source[s] or propulsion system[s] for new motor vehicles” should be certified to meet standards).¹² The development of those systems was considered essential, given contemporary reports that the booming vehicle population would eventually cancel out emissions reductions from then-current control technology.¹³

3. As electrification technologies developed (first for light-duty vehicles, then expanding into the heavy-duty market, *see* Oge-Hannon Amicus Br. 4-5), the stringency of EPA's standards reflected those technologies' ability to deliver

¹² *See also* Joint Hearings before the Comm. on Commerce and Public Works on S.451 and S.453, 90th Cong. 69 (1967) (Alan Boyd, Sec'y of Transp.) (recommending research on electric vehicles as “a practical means of meeting standards of air pollution established by the Federal Government”); 39 Fed. Reg. 21,068 (June 18, 1974) (certifying six battery-electric models as meeting 202(a) standards through inherently low-emitting propulsion systems).

¹³ *Environmental Pollution: A Challenge to Science and Technology*, Report to the H. Comm. on Science & Astronautics 20 (1966).

unparalleled emissions reductions. Electrification technologies have correspondingly played an increasing role in EPA’s feasibility analyses and industry compliance strategies—particularly over the last two decades. RTC at 105-06, 1343 (JA__-__, __). EPA’s most recent Rule—which reflects the same technologies and their emission-reduction capabilities—represents no change in EPA’s longstanding practice under its Section 202(a) authority, only the maturity of those technologies.

C. Petitioners’ Arguments for a Technology Exclusion Are Unavailing

Petitioners’ attempt to write a special exclusion for the most effective emission-reduction technologies into Section 202 contradicts both the Act’s text and its “primary goal” of “pollution prevention.” 42 U.S.C. § 7401(c). Although they couch their arguments in terms of “counting [electric vehicles] as zeros” in fleet-average standards, Fuel Br. 40, in reality, Petitioners seek a categorical carveout for battery-electric, fuel-cell, and plug-in hybrid powertrains, arguing that EPA may “set standards *only* for” vehicles lacking those technologies, *id.* at 9 n.3, 42-43. Petitioners’ argument would not allow EPA to factor automakers’ anticipated use of those technologies into any Section 202(a) standard’s stringency. *See id.* at 49. Congress never enacted this radical position into law, and Petitioners offer no valid reason for this Court to suddenly adopt it.

1. Petitioners' argument fails on Section 202(a)'s text, which provides that standards "shall be applicable" to vehicles whether they are "designed as complete systems or incorporate devices to prevent or control such pollution." 42 U.S.C. § 7521(a)(1). This language unambiguously extends EPA's regulations to electric, fuel-cell, and hybrid vehicles, which are "designed as complete systems" to "prevent" pollution. *Supra* 10-11.

Petitioners try to avoid that text's natural meaning by suggesting that "prevent" refers only to measures that allow pollution to form and then "block or capture" it. *Fuel Br.* 50. Under that reading, however, "prevent" offers no distinct meaning from "control." Even according to Petitioners' own dictionary, "prevent" covers non-polluting propulsion systems that "keep [pollution] from happening," as distinct from "control" methods that "check" emissions after they occur. *Id.* (quoting 1969 dictionary); *EPA Br.* 41-42.

Contemporary usage reinforces that distinction. President Johnson's 1967 message to Congress, for example, observed that the "sheer number of motor vehicles may, within a decade or two, defy the best pollution *control* methods we can develop," therefore necessitating "[n]ew types of internal combustion engines—or indeed new propulsion systems."¹⁴ Contemporaneous regulations

¹⁴ Message from the President regarding Air Pollution, 90th Cong. 5 (Jan. 30, 1967) (emphasis added); *accord* 111 Cong. Rec. 25,064 (Sept. 24, 1965) (statement of Rep. Reuss) ("As the automobile population rises ... the problems

using the “prevent or control” formulation also illustrate that it naturally includes efforts to avoid the formation of harmful conditions altogether. *See, e.g.*, 32 Fed. Reg. 8622 (June 15, 1967) (discussing measures to “prevent or control” fires in aircraft engines); 27 Fed. Reg. 2152 (Mar. 6, 1962) (requiring efforts to “prevent or control” drinking water pollution). So too, Section 202(a) standards naturally encompass technologies that eliminate pollution before it forms. 42 U.S.C. § 7401(a)(3) (“pollution prevention” includes the “elimination, through any measures, of the amount of pollutants produced or created at the source”).

While Petitioners manufacture a distinction between vehicles equipped with “technologically achievable emission controls,” on the one hand, and electric vehicles, on the other, Fuel Br. 44-46, electrified powertrains have long been understood to be emission-reduction technologies, *supra* 13-14. Indeed, battery- and fuel-cell-electric vehicles are merely the strongest form of such systems, and “nothing in the statute suggests that certain kinds of electrified technologies are appropriate for consideration while other kinds of electrified technologies are not.” 89 Fed. Reg. at 29,463. Petitioners’ arguments on this point are internally incoherent: they offer no reason why strong-hybrid powertrains are “emission

inherent in *controlling* hydrocarbons and carbon monoxide from the current type of spark ignition engine may necessitate the development of propulsion systems for automobiles radically different from those which are currently in use.” (emphasis added)).

controls,” but plug-in hybrid powertrains—which have combustion engines and associated exhaust emissions—are categorically different technologies somehow excluded from Section 202. EPA Br. 41-43. In fact, *all* electrified powertrains are systems that “prevent” pollution, by using battery power to reduce demand on a gasoline or diesel engine, and thus all comfortably fall within Section 202’s scope as a matter of text and purpose alike.

2. Petitioners’ reading relies on a dubious grammatical parsing of Section 202’s endangerment and contribution clause to argue that standards cannot apply to any vehicle that does not emit specific pollutants. Fuel Br. 41-44. As EPA explains, this argument becomes unintelligible when applied to plug-in hybrids, which have tailpipe emissions. EPA Br. 59-60. More fundamentally, Petitioners misread that provision. Section 202 directs EPA to regulate dangerous emissions *from classes* of vehicles; it does not require that every individual vehicle itself cause or contribute to endangerment. *Id.* at 43-44.

Petitioners observe, correctly, that “the object of EPA’s standards must ‘in [EPA’s] judgment cause, or contribute to, air pollution.’” Fuel Br. 41 (quoting 42 U.S.C. § 7521(a)(1)). But this Court has already explained that “motor-vehicle emissions” are what must cause or contribute to the dangerous pollution. *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 117 (D.C. Cir. 2012), *cert denied in relevant part*, 571 U.S. 951 (2013). Thus, “the object of EPA’s

standards” is emissions. *See* 42 U.S.C. § 7521(a)(1) (“standards applicable to the emission of any air pollutant”).

The question, then, becomes: emissions *from what*? The text provides a ready answer: EPA must set standards for “the emission of any air pollutant *from any class or classes* of new motor vehicles or new motor vehicle engines.” *Id.* (emphasis added). This integrated clause confirms that the emissions from the relevant *class* (or group) of vehicles must cause or contribute to endangerment, but not necessarily that, within that class, every individual vehicle’s emissions must do so. EPA has *always* interpreted the provision this way. 89 Fed. Reg. at 29,460. And that makes sense: this best reading is consistent with Congress’s focus on aggregate emissions from the growing vehicle population. To make Petitioners’ contrary argument work would require striking out “any class or classes of.”

Petitioners insist that the phrase “cause, or contribute to” must modify a plural noun—not the singular “emission”—and invoke the last antecedent rule to argue “new motor vehicles,” not “classes of new motor vehicles,” must be that plural modificand. *Fuel Br.* 41-44. But they are wrong at both steps. First, the singular/plural forms of “cause,” “contribute,” and “emission” reveal nothing of Congress’s intent here, where the two verbs have flipped back and forth between

singular and plural between amendments, with no evident change in meaning,¹⁵ and the statute likewise uses “emission” and “emissions” interchangeably.¹⁶ Further, even if the “cause, or contribute to” phrase could modify either “classes” or “vehicles,” the last antecedent rule does not favor the latter because “class or classes of new motor vehicles” is a “concise and ‘integrated’ clause” that “hangs together as a unified whole, referring to a single thing.” *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 583 U.S. 416, 440 (2018). Petitioners’ arguments thus give no reason for this Court to depart from its prior reading of Section 202(a)(1).

3. While Petitioners focus on certain electrified powertrains, their arguments would preclude EPA from accounting for *any* technology that achieved 100% pollution reduction. Even a perfect catalytic converter that eliminates all pollution from combustion-engine exhaust¹⁷ could not inform the standards’ stringency under Petitioners’ reading, because vehicles with such technologies “do not emit pollutants.” Fuel Br. 43. Nor could EPA consider hydrogen-fueled

¹⁵ Compare Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690 (1970) (“causes or contributes to”), with Pub. L. No. 95-95, § 401(d)(1), 91 Stat. 685, 791 (1977) (“cause, or contribute to”).

¹⁶ Compare 42 U.S.C. § 7521(a)(1) (standards “applicable to the emission of any air pollutant”), with *id.* § 7521(a)(3)(A)(i) (standards “applicable to emissions of hydrocarbons”); compare also *id.* § 7521(b) (“emission standards”), with *id.* § 7521(c)(1) (“emissions standards”).

¹⁷ That possibility is plausible: the 2014 Tier 3 standards reflected advanced catalyst systems that “maintain[] zero or near zero running [criteria] emissions.” 79 Fed. Reg. 23,414, 23,461-62 (Apr. 28, 2014).

internal combustion engines—a rapidly developing technology, similar to diesel-combustion engines, that EPA deems to have zero greenhouse gas emissions. *See* 89 Fed. Reg. at 29,489-90.

When EPA sets standards, the vehicles to which such a perfect converter or hydrogen-fueled engine (or a battery-electric powertrain) could be applied *are* pollution-emitting vehicles. *See id.* at 29,472-73. Petitioners insist that when EPA calculates the stringency of its standards, it cannot consider the vehicles that *will* or *would* apply such technology to comply with those standards. Fuel Br. 49-50. But Petitioners cannot explain why Congress would have directed EPA to consider technologies that achieve 0-99%, but not 100%, pollution reduction. 89 Fed. Reg. at 29,464, 29,472. The statutory text confirms that Congress did not. For example, Section 202(a)(3) mandates, for certain pollutants from trucks, the “greatest degree of emission reduction achievable.” 42 U.S.C. § 7521(a)(3)(A)(i). If available technology can achieve 100% reduction at reasonable cost, EPA *must* account for such technology in its standards. Petitioners’ reading of 202(a)(1) is irreconcilable with that mandate.

Petitioners ultimately defend their reading with a non-answer: “Congress was concerned not only with emission reduction but also with technological feasibility and ‘allowing some productive economic activity.’” Fuel Br. 49. But Petitioners’ reading excludes zero-emission technology regardless of feasibility or

economic productivity. And it does so even in the situation where—as here—the record supports both feasibility and even net technology cost savings. 89 Fed. Reg. at 29,455-58; RIA § 6.2 (JA___).

4. As a fallback, Petitioners briefly contend that, even if Section 202’s “cause, or contribute to” clause applies to emissions from vehicle classes rather than individual vehicles, EPA cannot classify emitting and non-emitting vehicles together; they argue that “a class of objects that does something” indicates that “*all* members of the class do that thing.” Fuel Br. 43. EPA’s classification satisfies that requirement: all members of each particular truck class fall within a specific gross vehicle weight rating. EPA Br. 39. Not surprisingly, EPA has never taken up Petitioners’ circular proposal—to make a contribution finding for a class defined by its contribution. EPA instead uses a stable class definition “based on weight and functionality,” then regulates that class “based upon its consideration of all available technologies.” 89 Fed. Reg. at 29,472.

III. SECTION 202 AUTHORIZES FLEET-AVERAGE STANDARDS

1. Section 202 reflects Congress’s concern with pollution from the total vehicle population, rather than from individual vehicles. By requiring standards applicable to emissions “from any class or classes” of new motor vehicles, the statute directs EPA to regulate this pollution source in aggregate. 42 U.S.C. § 7521(a)(1). Fleet-average standards are consistent with that text; they carry out

Congress's mandate to reduce aggregate emissions from "classes"—i.e., groups—of new vehicles. *Id.*

Fleet-average standards also carry out Congress's directive to provide manufacturers lead time and give "appropriate consideration" to their "cost of compliance." *Id.* § 7521(a)(2). Averaging allows manufacturers to phase in technologies in a way that is "economically efficient, ... supports vehicle redesign cycles, and responds to market fluctuations," in turn resulting in overall "emissions reductions at lower cost and with less lead time." 89 Fed. Reg. at 29,471. By securing greater emission reductions at lower cost, fleet-average standards benefit manufacturers, consumers, and public health.

2. The longstanding, thoroughly considered nature of EPA's averaging program reinforces its validity. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). That is especially so here, where both this Court and Congress have affirmed EPA's averaging authority.

In 1980, at automakers' suggestion, EPA began studying whether fleet-averaging was consistent with the Act. 45 Fed. Reg. 14,496, 14,502 (Mar. 5, 1980); 45 Fed. Reg. 79,382, 79,383 (Nov. 28, 1980). After careful consideration, EPA adopted a two-tiered program, under which compliance was measured at both the fleet-average and individual vehicle levels. Individual vehicles would meet an emission limit specific to their engine family—and be subject to all of the Act's

testing, certification, and warranty requirements—while an automaker’s overall production fleet would have to meet the regulatory standard based on a weighted average of its vehicles’ family emission limits. 48 Fed. Reg. 33,456, 33,456-58 (July 21, 1983).

In 1985, EPA adopted heavy-duty standards in which compliance was measured at both the fleet-average and individual vehicle levels. 50 Fed. Reg. 10,606 (Mar. 15, 1985). This Court upheld EPA’s averaging program while raising some questions “for the agency’s consideration and possible explanation in future proceedings.” *Thomas*, 805 F.2d at 425, n.24. EPA subsequently considered and addressed those concerns in expanding the averaging program to include banking and trading. 54 Fed. Reg. 22,652, 22,665-67 (May 25, 1989); 55 Fed. Reg. 30,584, 30,593-94 (July 26, 1990). Specifically, in 1990, EPA noted that the program’s two-tiered approach ensured it could continue to hold each vehicle accountable to an identifiable limit under the Act’s compliance provisions, while providing flexibility to manufacturers and achieving Congress’s intended pollution reductions in the aggregate. 55 Fed. Reg. at 30,594.

Later that year, in the 1990 amendments, Congress specifically considered—and declined to curtail—EPA’s averaging program. EPA Br. 52. Since then, Congress has repeatedly recognized and incorporated EPA’s fleet-average approach under Section 202 into various other statutory programs. *See id.*

3. Petitioners point to nothing in Section 202 that would prohibit fleet-average standards. Nor do they dispute the long-recognized benefits of averaging or contend that it is contrary to Section 202's stated objectives. Instead, Petitioners claim only an implied prohibition in the compliance and enforcement provisions of Sections 205-207, which, they assert, contemplate compliance only at the individual vehicle level. *See* Fuel Br. 33-37.¹⁸

Petitioners' premise—that averaging is mutually exclusive with vehicle-specific compliance—is wrong. As noted above, EPA's averaging program has always operated at both the fleet and individual vehicle levels. *See* 89 Fed. Reg. at 29,472 (explaining that, under EPA's averaging regulations, “compliance and enforcement do in fact apply to individual vehicles”); *accord* 75 Fed. Reg. 25,324, 25,472 (May 7, 2010). EPA sets a fleet-average standard ensuring total reductions, while holding individual vehicles to specific emissions levels, whether expressed as “family emission limits,” “bins,” or “in-use standards.” *See* EPA Br. 53-54. This two-tiered structure is consistent with Congress's instruction that EPA devise a

¹⁸ Petitioners' reference to 42 U.S.C. § 7521(a)(3)(B)(ii), Fuel Br. 37, does not support their argument. That provision sets a numeric upper bound (4.0 grams of nitrogen oxides per brake horsepower hour) on Section 202(a) standards for certain truck classes “under paragraph (1).” And Congress added subsection (a)(3)(B) via the 1990 amendments after explicit consideration of EPA's averaging program. *Supra* 23. Accordingly, EPA's rulemaking implementing that provision, 58 Fed. Reg. 15,781 (Mar. 24, 1993), continued to provide for fleet-averaging to meet the 4.0-grams standard.

compliance program that EPA “deems appropriate” to conform to the relevant standards. 42 U.S.C. § 7525(a)(1). Petitioners construct a false dichotomy between fleet-average standards and vehicle-specific standards, when the real question is whether the Act prohibits standards that require compliance at *both* the fleet and vehicle levels. It does not.

IV. THE MAJOR QUESTIONS DOCTRINE DOES NOT APPLY

The major questions doctrine does not aid Petitioners. That doctrine states that in “certain extraordinary cases,” courts should “hesitate” to accept an agency’s “novel reading” of its authority if it goes beyond what “Congress could reasonably be understood to have granted.” *West Virginia v. EPA*, 597 U.S. 697, 716, 723-24 (2022). The doctrine is not a free-floating substantive limit on an agency’s exercise of its authority, but rather, as this Court has explained, a “tool of statutory interpretation” that functions solely to “help courts figure out what a statute means.” *Save Jobs USA v. DHS*, 111 F.4th 76, 80 (D.C. Cir. 2024).

Petitioners never identify what statutory text should be interpreted under the doctrine. EPA Br. 58-60. Instead, Petitioners premise their major-questions theory—and claim of novelty—on the contention that EPA is attempting to “mandate” electric vehicles. Fuel Br. 20, 28-31; Nebraska Br. 17-19. But the Rule does not mandate any particular technology and is demonstrably achievable through many different technological pathways. EPA Br. 65. The Rule is a

straightforward application of Section 202—employing the same regulatory approaches, and the same consideration of all available technologies, that EPA has exercised under that provision for decades. *Supra* 6, 8-9, 13-14; EPA Br. 60-68. Any purported novelty under Petitioners’ theory would thus be the result of the Rule’s *stringency*—not a newfound *interpretation* of the statute by EPA. See EPA Br. 65.

By contrast, Petitioners’ new interpretation of Section 202 would be transformative: it would prevent manufacturers from using any zero-emission vehicles as a compliance “flexibility” under EPA’s standards. Fuel Br. 28-29. Petitioners’ interpretation—whose only textual hook is the “subtle device” of two verbs’ plural form, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)—would frustrate the statute’s purpose, transform the regulatory focus from pollution-prevention to fuel-protection, and wipe out decades of industry investment. It is Petitioners’ interpretation—not EPA’s—that warrants judicial skepticism.

V. THE RECORD SHOWS THAT COMPLIANCE IS FEASIBLE

Petitioners attack as arbitrary and capricious EPA’s determination that its standards are feasible. Nebraska Br. 21-25; Fuel Br. 53-62. But EPA thoroughly explained its reasoning, and substantial record evidence supports EPA’s conclusion. EPA Br. 73-98.

1. EPA reasonably concluded that the necessary public charging infrastructure will be available within the available lead time. *See* 89 Fed. Reg. at 29,520; *contra* Fuel Br. 58-62. Most electric trucks will charge at privately constructed depots. RIA at 317, 330 (JA_, _); RTC at 890, 928 (JA_, _). The exceptions are long-haul tractor-trailers, which will rely more on public charging. 89 Fed. Reg. at 29,518; RIA at 328 (JA__); RTC at 928-29 (JA_-). EPA projects that up to 85% of the demand from those trucks could be met by building charging stations along freight corridors in certain States. 89 Fed. Reg. at 29,514, 29,518; RTC at 916, 1065 (JA_, _).¹⁹ There is substantial record support showing that a relatively small number of stations (100 to 210) would be needed by 2030. RIA at 119 (JA__); RTC at 891-92 (JA_-).

To assess feasibility, EPA modeled the cost of 20-megawatt stations equipped with a mix of 1-megawatt and 150-kilowatt chargers. RIA at 296, 328 (JA_, _). This was reasonable, given that commercial standards for 1-megawatt chargers exist, multi-megawatt chargers have been deployed at public charging stations, and multi-megawatt public charging stations are already in operation or soon to be operating. RIA at 107, 113-14 (JA_, __-__); *contra* Fuel Br. 60.

¹⁹ *See also* Ragon et al. (2023) (EPA-HQ-OAR-2022-0985-3658) at 15, 25 (JA_, _); Int'l Council on Clean Transp. Comments (EPA-HQ-OAR-2022-0985-1553) at 10-11 (JA_-); Joint Office of Energy & Transportation (2024) (EPA-HQ-OAR-2022-0985-3475) at v-ix (JA_-).

Moreover, EPA's analysis was likely conservative. While *some* public charging stations with capacity of up to 14 megawatts will be needed by 2030, the average station along freight corridors will only require 600 kilowatts of capacity in 2025 and 6.2 megawatts in 2030. Ragon et al., *supra*, at ii, 16 (JA___, ___). There is ample record evidence that lower-capacity public charging stations are both feasible and sufficient. *See, e.g., id.* (JA___, ___); RIA at 112-14, 119 (JA___-___, ___).

EPA explains that a 200-kilowatt charging station could take 3-8 months to deploy, while a 1-megawatt charging station could take 1 year, and a 10- to 20-megawatt charging station could take 2-5 years. RIA at 126-27 (JA___-___); RTC 1070 (JA___). Given that adoption rates for long-haul electric trucks are projected to remain very low through 2030, 89 Fed. Reg. at 29,567, there is plenty of time to build sufficient public charging infrastructure to meet demand. Transmission and distribution “buildout need not occur nationwide, nor all at once,” 89 Fed. Reg. at 29,512, and—like building charging infrastructure, *see id.* at 29,518-19—grid buildout can occur in stages focused on the busiest freight corridors, and increasing over time as the standards' stringency increases. Moreover, new charging stations may be sited advantageously such that no significant grid buildout is needed. *See* RTC at 1079 (JA___).

States along freight corridors are already preparing for, investing in, and constructing electric truck charging infrastructure.²⁰ In fact, sixteen States plus the District of Columbia are jointly developing a strategy for funding and deployment of electric truck charging infrastructure. Multi-State Memorandum of Understanding (EPA-HQ-OAR-2022-0985-3291) (JA___). Thus far, state regulators have approved around \$1.7 billion of investor-owned utility funding for heavy-duty charging infrastructure, RTC at 893-94 (JA___-___), and States and municipalities have committed another \$2.6 billion, Energy Innovation Comments (EPA-HQ-OAR-2022-0985-2705, Att. 2 (linking Atlas Public Policy January 2024 report)) (JA___-___). These state plans are in addition to the nearly \$20 billion of private investments in public charging infrastructure through 2023. Int'l Council on Clean Transp. Comments (EPA-HQ-OAR- 2022-0985-1553) at 9-10 (JA___-___); *see also* 89 Fed. Reg. at 29,519-20; EDF Comments (EPA-HQ-OAR-2022-0985-1644) at 61-65 (JA___-___).

Thus, the record amply supports EPA's conclusions regarding the availability of public charging within the Rule's lead time.

²⁰ 89 Fed. Reg. at 29,519-20; Ragon et al., *supra*, at 1, 25 (JA___, ___); EDF Comments (EPA-HQ-OAR-2022-0985-1644) at 67-68 (JA___-___); *see also, e.g.*, Joint Office of Energy & Transportation, *State Plans for Electric Vehicle Charging* (2024) (EPA-HQ-OAR-2022-0985-3275) (linking to plans for states with some of the busiest freight corridors, e.g., California, Colorado, Illinois, Oregon, Michigan, Texas, and Washington) (JA___-___).

2. Fuel Petitioners suggest that EPA “rel[ies] primarily on” the existence of California’s Advanced Clean Trucks rule, which requires increasing percentages of zero-emission trucks over time, to justify the Rule. Fuel Br. 13, 24. But Petitioners cannot and do not frame their objection regarding EPA’s treatment of the Advanced Clean Trucks rule as a problem with EPA’s *feasibility* determination. In fact, EPA’s HD TRUCS model conservatively starts with a representative *combustion-engine* truck in each category, then evaluates the costs and effectiveness of applying zero-emission technologies to achieve the standards. 89 Fed Reg. at 29,485. Thus, in modeling feasible compliance pathways, EPA did *not* rely on any existing or anticipated zero-emission trucks produced in response to state programs like Advanced Clean Trucks.²¹ A series of peer-reviewed analyses in the record—projecting significant zero-emission truck penetration rates in the next decade, based on economic factors alone and absent any state or federal regulation—further support EPA’s feasibility determination. *See* 89 Fed. Reg. at 29,666-67.

Instead, Petitioners objection to the inclusion of Advanced Clean Trucks applies only to EPA’s cost-benefit analysis, which EPA does “not ... rely on ... in identifying the appropriate standards.” 89 Fed. Reg. at 29,454. The cost-benefit

²¹ Furthermore, the record includes analyses showing that, for most truck classes, the standards can be met without any zero-emission truck sales at all. EDF Comments (EPA-HQ-OAR-2022-0985-2700) at 1-2 (JA__-__).

analysis required by Executive Order 12866 helps agencies better understand the real-world impacts of their rules, and EPA appropriately identified a real-world baseline that includes the Advanced Clean Trucks program. 89 Fed. Reg. at 29,665; RIA at 567 (JA___). Far from being unrealistic (Fuel Br. 24), this baseline properly reflects state law and an already growing zero-emission truck population.

In sum, substantial record evidence supports EPA's determination that its standards are feasible.

CONCLUSION

This Court should deny the petitions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of the applicable rules and this Court's briefing format order dated September 3, 2024 (ECF No. 2072931). 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 5989 words. Combined with the word count of the other Respondent-Intervenors briefs, this does not exceed the 14,700 words the Court allocated to all Respondent-Intervenors.

I further certify that this brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: February 7, 2025

/s/ Micaela M. Harms

MICAELA M. HARMS

*Attorney for Respondent-Intervenor
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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2025, I electronically filed the foregoing **PROOF BRIEF OF STATE AND PUBLIC INTEREST RESPONDENT-INTERVENORS** with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

I further certify that all parties are participating in the Court's CM/ECF system and will be served electronically by that system.

Dated: February 7, 2025

/s/ Micaela M. Harms

MICAELA M. HARMS