ORAL ARGUMENT HELD ON SEPTEMBER 14, 2023

U.S. COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

State of Texas, et al., Petitioners, v. U.S. EPA, et al., Respondents.	Case No. 22-1031 and consolidated cases

**EPA's OPPOSITION TO MOTION
FOR LEAVE TO FILE SUPPLEMENTAL BRIEF**

The Fuel Petitioners' motion for leave to file a post-argument supplemental brief should be denied for multiple independent reasons. If the motion for leave is granted, EPA requests an opportunity to file a responsive supplemental brief.

1. As an initial matter, the Federal Rules of Appellate Procedure and this Court's rules of practice do not provide any presumptive opportunity for supplemental briefs. Thus, where supplemental briefs are submitted after oral argument, it is normally only at the direction of the Court. The only authority Fuel Petitioners cite is one in which the *Court* ordered supplemental briefing. Mot. 1.

By contrast, where a party lodges a supplemental brief unilaterally, it does so in violation of its original briefing deadline and word limits. Granting Fuel

Petitioners' motion here would set a precedent for future unsolicited requests for supplemental briefing following argument. The Court should grant such a motion only if the reasons for granting doing so are compelling. Fuel Petitioners do not justify their highly irregular request.

2. The Court should deny the motion for leave because it should not reach the issues Fuel Petitioners propose to address in a supplemental brief. As discussed at oral argument and in EPA's brief (at 29-39), several threshold bars on judicial review preclude consideration of any statutory issues. Particularly relevant here, petitioners failed to raise any statutory objections to EPA's consideration of electrification or electric vehicles during the rulemaking with the "reasonable specificity" required by 42 U.S.C. § 7607(d). While EPA can address the new arguments in Fuel Petitioners' brief if necessary, the Court should deny Fuel Petitioners' motion for leave to file because those arguments are forfeited.

The proposed supplemental brief serves to highlight why rejection of Fuel Petitioners' statutory arguments for failure to raise them during the rulemaking is appropriate. The reason why Fuel Petitioners are reduced to struggling to impose their non-expert interpretation of sundry parts of the preamble and other parts of the administrative record is that no one claimed before EPA, as Fuel Petitioners do now, that the rule extended beyond the scope of EPA's authority under the theory that it was an effective mandate for electrification. Had Fuel Petitioners properly

exhausted the issues they ask this Court to decide now, EPA could have then squarely addressed them, including by providing analysis specifically responsive to any such contentions.

It would be inappropriate and contrary to Section 7607(d) for the Court to address those issues now, without benefit of such an EPA analysis, especially where Fuel Petitioners candidly concede they expect to exhaust the issues properly in future rulemakings. Oral Arg. 21:04-21:26. As EPA explained in its brief, and reaffirms now, Fuel Petitioners "failed to articulate their view that the level of projected electrification and indirect effects on the economy triggers the major-questions doctrine," and thus did not give EPA the requisite "opportunity to respond to their factual allegations and develop a record on those issues." EPA Br. 39.[1] Their failure does not warrant a post-argument supplemental brief, but instead denial of the petition for review as to the issues they forfeited.

3. Fuel Petitioners' request also fails on its own terms. It rests on the contention that this deviation from normal appellate procedure is justified by EPA's supposed prior deviation—namely EPA's advancement of a new position

[1] As EPA explained at oral argument, Fuel Petitioners were required to put EPA on notice of interpretive issues. Oral Arg. 1:25:35-1:30:40. That means that Fuel Petitioners were required to notify EPA, with reasonable specificity, of any factual assertion it believed relevant to EPA's statutory authority, and also to explain, with reasonable specificity, how the assertion affected EPA's authority as a legal matter. Fuel Petitioners did not do either with regard to their claim that the rule effectively mandates electrification in a manner that implicates the major questions doctrine.

that the challenged emission standards "do not operate as a de facto electric-vehicle mandate." Mot. 1.

That contention misunderstands how these proceedings have transpired. *Fuel Petitioners* are advancing the claim that EPA's rule presents an effective mandate. The Court tested that premise at argument in questions posed to Fuel Petitioners and EPA. Plainly, nothing barred the Court from exploring the parties' respective positions on this claim at argument and requesting clarification and amplification on certain points. And it was likewise plainly appropriate for EPA to answer the Court's questions. Oral Arg. 1:30:50-1:38:30; *see also* 1:45:25-1:51:54. EPA's doing so provides no reason for a supplemental brief where Fuel Petitioners had every opportunity in two briefs and at oral argument to explain the basis for their claim.

In any event, Fuel Petitioners err in claiming that EPA's responses to the Court's questions constituted a "new" position in any relevant sense, as EPA's brief joined the issue whether Fuel Petitioners substantiated that the rule mandates electrification, in either a legal or a practical sense. As EPA said in its brief:

> Petitioners contend that the major-questions doctrine applies because EPA claimed the power to "phase out combustion-engine vehicles in favor of electric ones." *The phase-out happens, they say, because the rule effectively "mandate[s]" greater electrification. This argument misunderstands* both *the 2021 rule* and *West Virginia*.

Respondents' Br. 54 (citations omitted and emphasis added). EPA's brief then explained that while the rule tightened standards, it did not mandate which technology automakers use, let alone how much of it to use, to meet the emission standards, leaving that decision to the automakers. *Id*. at 54-55; *see also id.* at 21 (explaining that projected market penetration rates of technologies "have no legal effect, as automakers can choose other compliance strategies"), 80 (similar). Contrary to Fuel Petitioners' motion, there has been no procedural irregularity justifying an extraordinary supplemental brief.

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The Court should deny the motion and strike Fuel Petitioners' supplemental brief. If the Court nonetheless finds supplemental briefing appropriate, EPA requests an opportunity to file a responsive supplemental brief within 21 days after the Court's order.

Respectfully submitted,

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Certificates of Compliance and Service

I certify that this filing complies with Fed. R. App. P. 27(d)(1)(E) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this filing complies with Fed. R. App. P. 27(d)(2)(A), because by Microsoft Word's count, it has 986 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Finally, I certify that on September 27, 2023, I filed the foregoing with the Court's CMS/ECF system, which will notify each party.

/s/ Daniel R. Dertke
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