

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 ----- X
4 STATE OF TEXAS, et al., :
5 Petitioners, :
6 v. : Nos. 22-1031, et al.
7 ENVIRONMENTAL PROTECTION :
8 AGENCY and MICHAEL S. REGAN, :
9 ADMINISTRATOR, UNITED STATES :
10 ENVIRONMENTAL PROTECTION :
11 AGENCY, :
12 Respondents. :
13 ----- X

12 Thursday, September 14, 2023
13 Washington, D.C.

15 The above-entitled matter came on for oral
16 argument pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGES SRINIVASAN, KATSAS and PAN

19 APPEARANCES:

20 ON BEHALF OF THE FUEL PETITIONERS:

21 JEFFREY B. WALL, ESQ.

22 ON BEHALF OF THE STATE PETITIONERS:

23 LANORA C. PETTIT, ESQ.

24
25 **eScribers, LLC**

7227 North 16th Street, Suite #207

Phoenix, AZ 85020

Tel: (800) 257-0885

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ON BEHALF OF THE RESPONDENT EPA:

SUE CHEN, ESQ.

ON BEHALF OF RESPONDENT-INTERVENORS:

SEAN DONAHUE, ESQ.

C O N T E N T S

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P R O C E E D I N G S

1
2 THE CLERK: Case No. 22-1031, et al., State of
3 Texas, et al, Petitioners v. Environmental Protection Agency
4 and Michael S. Regan, Administrator, United States
5 Environmental Protection Agency; and Case No. 22-1080, et
6 al., Natural Resources Defense Council, Petitioner v.
7 National Highway Traffic Safety Administration, et al.

8 JUDGE SRINIVASAN: Good morning, counsel. Mr.
9 Wall please proceed when you are ready.

10 ORAL ARGUMENT OF JEFFREY B. WALL, ESQ.

11 ON BEHALF OF THE FUEL PETITIONERS

12 MR. WALL: Chief Judge Srinivasan, and may it
13 please the Court, this case is West Virginia all over again.
14 EPA is using an old provision in a new way and set standards
15 so stringent that manufacturers are effectively forced to
16 electrify their fleets. Now to be sure, EPA hasn't required
17 full electrification in one fell swoop, although it has made
18 clear that day is coming; but West Virginia was just the
19 opening the salvo to it. The point is that the power the
20 EPA asserts here is hugely significant. It is the power to
21 do away with the internal combustion engine which would
22 affect millions of jobs, restructure entire industries and
23 affect our relationships with hostile powers. The questions
24 don't get any more major.

25 EPA has nothing close to clear congressional

1 authorization. The Clean Air Act doesn't even authorize EPA
2 to set standards based on fleet-wide averaging. At the very
3 least, the statute doesn't authorize EPA to set standards
4 that can be satisfied only by averaging a whole bunch of
5 zeros for electric vehicles; and even if EPA's maneuver were
6 somehow authorized by the statute, it would still violate
7 the EPA because the agency improperly calculated EV
8 emissions and erred in assessing the costs and benefits of
9 the rule. I welcome the Court's questioning.

10 JUDGE KATSAS: How are they using the new, how are
11 they using power in a new way? I mean the bottom line or
12 where they're going seems quite dramatic; but one difference
13 with West Virginia is in West Virginia, they sort of
14 redesign how the scheme was operating; whereas here, the,
15 the credits and the trading, and the averaging are long-
16 established, as was inclusion of electric vehicles in the
17 class; and then there's just a question of stringency and
18 they're turning the knob up from a four to an eight, and
19 that's very costly; but it's not a difference, it's not a
20 sharp difference in kind.

21 MR. WALL: So, I think the situations are
22 parallel, and it is a difference in kind. I think the knob
23 goes from zero to eight because before it was a compliance
24 flexibility; and what I mean by that was the EPA set a
25 standard and manufacturers could meet it in different ways.

1 They could meet it by enhancing the technologies on internal
2 combustion engines; or they had the option if they wanted to
3 manufacturer more electric vehicles and meet the standard
4 that way.

5 What the Agency has done here for the first time,
6 Judge Katsas, is set the standard so high that even they
7 don't dispute the only way to meet it is to do, in effect,
8 what the factories had to do in West Virginia. You've
9 either got to switch your power source, or you, and
10 manufacture more electric vehicles; or you got to buy
11 credits from Tesla.

12 JUDGE SRINIVASAN: Well, why do you say they don't
13 dispute that? I, I thought that is a source of dispute. I
14 mean it seems like this framing question is pretty important
15 whether what they've done now is a difference in kind or a
16 difference in degree because your major questions, again, is
17 predicated on assumption that it's a difference in kind,
18 understandably. And if I'm understanding it correctly, the
19 nub of your argument that it's a difference in kind is that
20 for the first time, EPA is setting a target that's only
21 achievable by use of the alternate technology; but they,
22 where do they say that, where they join issue with you in
23 that characterization?

24 MR. WALL: So, at pages 55 and 56 of the brief,
25 Chief Judge Srinivasan, they say, look, we don't mandate the

1 technology that the automakers have to employ; and, and
2 that's true in a sort of a misleading sense. If you look at
3 the rule, the rule says, pages 5 and 52, they're driving
4 electrification. What I mean by that, the best place to
5 look is if you look at page 908 of the Joint Appendix.
6 There are two charts, two tables, 4-27 and 4-28. One shows
7 what they believe the market penetration rate for EVs will
8 be absent the standard; and that's 7 percent by the last
9 model year. And the other chart shows what they believe
10 manufacturers will have to do in order to comply with their
11 new standards.

12 JUDGE SRINIVASAN: No, no, but, but there's a
13 difference between what they have to do and what they will
14 do; and that, that's what I'm wondering is it's one thing to
15 say that the only way to comply with the standard is by use
16 of EVs; it's another thing to say, well, you could comply in
17 other ways, too; but manufacturers are going to choose to do
18 it by use of EVs.

19 MR. WALL: So, Chief Judge Srinivasan --

20 JUDGE SRINIVASAN: Can I just ask, let me just
21 ask, do you think that there's no, that's not a distinction;
22 or do you think that that is a distinction and where they
23 are is acknowledging that the only way to comply is by using
24 these?

25 MR. WALL: I think that can't be a distinction

1 that matters --

2 JUDGE SRINIVASAN: Okay.

3 MR. WALL: -- because I can't believe that West
4 Virginia would have come out differently if the EPA had
5 promulgated a rule that everybody acknowledged forced the
6 factories to switch from coal and natural gas to renewables,
7 and that was the only way to comply; but then they said,
8 well, on its face, it doesn't actually make you do that even
9 though we acknowledge that you have to do it in order to
10 comply. It would still have been a major question and they
11 still would have lacked statutory authority. So, I don't
12 think the distinction can matter to either of the relevant
13 legal questions.

14 JUDGE PAN: So, counsel, what about the example of
15 Subaru because the record indicates that Subaru has no
16 electrical vehicles, but can comply with these standards
17 through 2025? So, that seems to indicate that you don't
18 have to go to electrification in order to comply with these
19 standards.

20 MR. WALL: I can't speak to Subaru in particular
21 because, you know, it hasn't joined the litigation. What I
22 can tell you is we have made it a point in the, you know,
23 throughout the briefing to say that manufacturers generally
24 will have to make more EVs to comply; and as I say at page
25 908 of the JA, and in the rule itself at pages 5 and 52,

1 their words are this drives electrification 2 1/2 times what
2 the market rate would otherwise be. So, even if there may
3 be some manufacturer that could comply, just like maybe one
4 energy company in, in, in West Virginia could have complied,
5 I don't think they're disputing that the major questions
6 doctrine is applied on an industry-wide basis. And here,
7 the industry as a whole will have to transition to electric
8 vehicles in order to satisfy these standards; and that will
9 be even more true down the road because they've already
10 announced that they want the penetration rate to be 67
11 percent by the early 2030s; and, obviously, there's as
12 parallel case this Court will hear tomorrow where California
13 has said it's going to a hundred percent. So, it's not like
14 we have to sort of speculate about where this road leads.

15 JUDGE PAN: So, the premise of your, your
16 argument, though, is that this will force this
17 electrification; that is the major question that you posit?
18 But isn't Subaru evidence of the fact that this standard
19 does no such thing, it just sets an emission standard and
20 there's flexibility on how you comply with it, and there's
21 evidence that you can comply with it without
22 electrification?

23 MR. WALL: So, Judge Pan, it's, I, I, it's the
24 same answer I gave earlier. I, I can't go automaker by
25 automaker and tell you exactly how each one will have to

1 comply.

2 JUDGE PAN: I'm not saying you need to do that.
3 I'm just saying isn't this evidence that there's, that your
4 premise is faulty?

5 MR. WALL: I don't think, and we'll see this
6 morning, but I don't think that the Government disputes, I
7 don't take the rule to dispute that automakers, generally,
8 I'm not sure about Subaru in particular, that automakers
9 generally will have to manufacture electric vehicles at 2
10 1/2 times the rate that the market would otherwise support.
11 Absent the rule, you'd have 7 percent of the overall fleet;
12 and their rule says we're driving that to 17 percent. So,
13 that's a 10 percent increase. Just like in the Clean Power
14 Plan case, it was an 11 percent increase. I mean it is the
15 exact same thing.

16 JUDGE SRINIVASAN: Suppose the reason that, you
17 keep saying have to and I think what you mean is choose to,
18 but there's no difference between choose to and have to,
19 right? And I think is that a fair characterization at
20 least?

21 MR. WALL: I think that's fair.

22 JUDGE SRINIVASAN: Okay. So, suppose the reason
23 that manufacturers choose now, whereas they wouldn't have
24 before, is because battery costs are really, or have gotten,
25 have gone way down, or EVs, then for your purposes that

1 still doesn't matter?

2 MR. WALL: It still doesn't matter because it's,
3 it, it's like saying that if some of the industry had chosen
4 to voluntarily comply in West Virginia, that the major
5 question would have been different, or the statutory
6 question would have been different. The question isn't how
7 much power the Agency has exercised in a particular instance
8 or exactly how much pain that imposes on regulated parties.
9 For purposes of the doctrine, the question is, what is the
10 scope of the power that the Agency is asserting? And the
11 power they assert is to force a transition from one kind of
12 vehicle to another, from zero to a hundred; and I don't
13 think the Government can disclaim this morning. That's the
14 scope of the power. If they're right here, they could drive
15 a transition fully from internal combustion vehicles to
16 electric vehicles; and our point is just, just like the cap-
17 and-trade system in West Virginia, it's not like Congress
18 admits to this. It's looked at EVs repeatedly; it said
19 we'll study them; it's rejected mandates; it's cleaned up
20 liquid fuel; and in 2021, in the Infrastructure Act, right
21 before the EPAs administrative fiat, it ordered a new round
22 of fact-finding by multiple agencies. It said we want more
23 facts in front of us before we make a decision. And so,
24 from all of that, we think it's clear that Congress hasn't
25 given the power to the agency to effect this kind of a

1 transition.

2 JUDGE SRINIVASAN: Can I, can I just, I don't want
3 to derail it because I know we're going to have lots of
4 questions on, on this Act; but I just want to at least
5 address the questions of whether we, we should even be
6 looking at this; and so, there's two things in particular
7 that I'll just, you know, for you. One is timeliness
8 because of the cases that we have that you're well-aware of
9 --

10 MR. WALL: Right.

11 JUDGE SRINIVASAN: -- to the effect that if
12 there's something that the rule is doing that is just
13 repeating what a rule in the same area has done before, and
14 that's something that needed to have been raised at the time
15 that the initial was promulgated, you're aware of that; and
16 that applies both to the electrification piece and to the
17 averaging piece.

18 And then the other thing I'd like to get to is
19 preservation and whether, and especially on major questions.
20 Why isn't it the case that nobody said anything about major
21 questions; and I, I, we can have a debate about exactly when
22 that term became a term that really became part of the
23 lexicon enough that somebody should use the term, but the
24 concept wasn't new. And that was never raised before the
25 Agency to give the Agency a chance to address it in the

1 rulemaking process. So, maybe take them in that order,
2 timeliness and then preservation.

3 MR. WALL: So, I thought you might have some
4 threshold questions; and I have three quick points on
5 timeliness, two on preservation and, and hopefully we'll get
6 to them all at some point. On timeliness, what I would say
7 is this Court said, if it's the same approach, but here they
8 didn't just use averaging. They used averaging to force
9 electrification, which is a new thing. Even if you
10 disagreed with me on that, my second point is I don't think
11 that anybody could challenge it because NHTSA has the power
12 to fleet-wide average. Now it doesn't have the power to
13 fold-in EVs, but it can fleet-wide average; and these
14 rulemakings had always been done in tandem; and this Court
15 said in 2011 in the Chamber of Commerce case, if you have
16 two sets of standards and they independently require the
17 same thing, you can't challenge the one if you're not
18 challenging the other. And we couldn't have challenged
19 NHTSA's ability of fleet-wide averaging. And even if you
20 disagree on both, you know, on both of those things, Chief
21 Judge Srinivasan, I'd say the Court has been clear about the
22 constructive reopening doctrine. If you really change the
23 stakes of judicial review, you constructively reopen. That
24 makes a ton of sense. Agencies can do things all the time
25 in small ways that don't hurt people and don't give them any

1 incentive to sue; and then they can use the same power in a
2 really major way that does change the stakes; and,
3 obviously, then parties should be able to come in and sue.

4 JUDGE SRINIVASAN: But then where, where do, where
5 have we construed constructive, constructive reopening in
6 that way?

7 MR. WALL: So --

8 JUDGE SRINIVASAN: So, what would we, we just had
9 a decision pretty recently in this peer case that talks
10 about the scope of the constructive reopening doctrine in
11 pretty narrow terms. I mean it has to be, fit within some
12 pretty narrow parameters.

13 MR. WALL: So, I, I, I sort of think peer is not a
14 very good case because in peer, sort of regulations that had
15 been promulgated decades ago and then never touched; and so,
16 I don't think there was really a very good or serious
17 argument for reopening. The Kennecott Copper case that
18 we've got in our reply at page 9, I think is one where the
19 court said, look, if you literally alter the stakes of
20 judicial review and, again, that makes a lot of sense. We
21 don't want agencies to rush in and challenge every time an
22 agency does some little thing wrong if they don't really
23 have skin in the game; but if you really change the stakes
24 of what you're doing, then you should be able to come in and
25 sue, and that's what happened here. Yes, they've been

1 averaging for a long time, but that was a sort of
2 deregulatory or industry-favorable shield to allow a
3 compliance flexibility; and then they took that shield and
4 they turned it into a sword to make everybody convert from
5 one kind of vehicle to another by putting a lot of zeroes
6 into the equation for EVs; and that seems to me to
7 fundamentally change the stakes of judicial review.

8 On preservation, Your Honor, these arguments have
9 been around since Thomas in the mid-1980s. So, it seems a
10 little rich for me to the Agency to come in and say like,
11 hey, we didn't have any idea that our statutory authority
12 was in play; but I still think we did enough in the comments
13 to say you don't have the statutory authority for a trading
14 program or a subsidy program; but, again, if you --

15 JUDGE SRINIVASAN: Is that all you need to, the,
16 yes, there's lines in there that talk about statutory
17 authority; but is it really as simple as, the whole point of
18 it is you're supposed to put the agency on notice of the
19 particular thing that's being raised so that they have an
20 opportunity to address it. I mean it's sort of like having
21 a line at the meeting that says we think this is generally
22 unlawful. There you're on notice of all the ways in which
23 it's unlawful. It doesn't really help the agency very much.

24 MR. WALL: I would take that point and concede in
25 another context here where the ability to do averaging has

1 been on the table for decades, but nobody has since
2 challenged it because it was favorable to the industry. It
3 seems to me the Agency has been on notice for a long time,
4 but its authority was at play; but, again, I don't need the
5 Court to --

6 JUDGE SRINIVASAN: I don't understand that.
7 What's, what's the point, that no one, there at no point in
8 the rulemaking process did somebody specifically say, hey,
9 here's the issue we have with your rule?

10 MR. WALL: So, I think they did say you lack
11 statutory authority. I think to your earlier question, they
12 didn't come in and say major questions. Now was the major
13 questions doctrine fully formed at the time? But I take the
14 point that the idea and the concept were sort of out there
15 in the law. I don't think that you have to put agencies on
16 notice of the law. You don't have to come in and say, hey,
17 Chevron is the standard review, or Clear Air for facts. The
18 major questions doctrine is the law, that the governing law
19 that this Court applies.

20 I do think we needed to put them on notice of our
21 objection to their statutory authority under that governing
22 law. I think we did that, but I don't need the Court to
23 agree with me on that because the Court has been clear that
24 quite independent of the exhaustion requirement which deals
25 with whether we are entitled to raise and have something

1 heard on judicial review. The agencies have a burden to
2 come forward and put forward a non-arbitrary rule; and to do
3 that, they've got to be willing to examine the fundamental
4 assumptions that underly the rule; and the Court said
5 multiple times, your statutory authority is one of those.
6 And I don't see any reasonable argument on the other side
7 that they're going to be able to get out of what this Court
8 has called the key assumption doctrine. I mean the whole
9 point of the rule is we're going to force electrification by
10 making you fold-in more electric vehicles; and I don't see
11 how the Agency could come to this Court and say, you know,
12 we didn't consider that; we didn't have a burden to consider
13 it; and nobody raised it during the rulemaking; so, you,
14 Court can consider it. It seems to me this Court has
15 correctly said, no, no, independent of what comments
16 somebody makes in front of the Agency, the Agency has to
17 examine its fundamental assumptions when it puts forward a
18 rule for it to be not arbitrary; and we, Court, always have
19 the authority to review that independent of whether a party
20 has a right to insist that we do it.

21 JUDGE KATSAS: The problem with that argument is
22 it seemed to suggest that no statutory authority or
23 statutory, no statutory argument is ever subject to an
24 exhaustion requirement, which really can't be right.

25 MR. WALL: So, I don't, I wouldn't go that far,

1 Judge Katsas. I think there are lots of statutory --

2 JUDGE KATSAS: There's no statutory authority.

3 It's an essential element of their burden to -- it's an
4 essential element of their burden to explain their authority
5 to do what they are doing.

6 MR. WALL: I think for the core stuff, yes. I see
7 daylight between those two things. I think there may be
8 statutory questions that come up in a rulemaking that don't
9 go to the core of the rule and that the Court might be
10 prepared to say are not foundational in a way that triggers
11 the key assumption doctrine. This just wouldn't be the case
12 because the whole core of the rule is, can we take our
13 averaging approach which, granted, they've used since the
14 80s; but can we take that now and now set the standard so
15 that you could comply with your improving the way that you
16 burn fuel in an internal combustion engine; can we force,
17 mandate a transfer to electric vehicles? And that's the
18 core of what this rule does; and so, whatever you think that
19 the key assumption doctrine covers, I think it has to cover
20 this.

21 JUDGE SRINIVASAN: Does it mean then for, for, the
22 premise of the key assumption doctrine is that the Agency
23 kind of is always on notice it has to, it has to discuss
24 these things because that's just general background stuff
25 that the Agency should always wrestle with. If, if it's

1 always going to be the case that somebody can make an
2 argument that a difference in degree, that something that
3 one side might characterize as the difference in degree is
4 actually a difference in kind such that major questions
5 applies, does that mean that every time an Agency
6 promulgates anything they got to deal with the possibility
7 of a major questions argument?

8 MR. WALL: So, I, I, again, I don't think so; but
9 for a close related answer to the one I gave to Judge
10 Katsas, which is, I mean we've all seen a bunch of
11 rulemakings and there are lots of statutory questions that
12 come up; and I just don't think it would be persuasive to
13 say that all of them are foundational to what the rule does
14 or that all of them trigger a major question; but I do think
15 that here you have what is a fairly unique case where the
16 Agency didn't examine the core of what the rule does in the
17 face of some Supreme Court cases that to me sure seemed to
18 say this is a major question. I mean if it is a major
19 question in the vaccine mandate case, or the student loan
20 case to take an accepted power and use it in a new way, I've
21 got to think it's a major question to take an invented power
22 and use it in a new way. I mean whatever they think about
23 averaging, they can't say the statute addresses it. The
24 best the Government can bring themselves to say is it's
25 silent and, hence, we read that as a delegation to be able

1 to do this program. And whatever that is, it's not clear
2 congressional authorization. That doesn't mean you need to
3 touch averaging; but I do think it means that the Court
4 should say major question, can't force electrification in
5 the way that you're doing with the averaging, full stop and
6 that takes care of the --

7 JUDGE SRINIVASAN: You're, you're also making an
8 argument that even aside from major questions, that there's
9 no authority to average and there's no authority to take
10 account of EVs?

11 MR. WALL: That's right, but the easiest way to
12 resolve the case, Chief Judge Srinivasan, is not to go
13 straight to the statutory arguments de novo; but to say it's
14 a major question as the Supreme Court --

15 JUDGE SRINIVASAN: Right. No, that --

16 MR. WALL: -- has understood it.

17 JUDGE SRINIVASAN: -- the, I understand the reason
18 you have sequenced it in the way that you have in your
19 presentation both this morning and in the papers; but in
20 terms of preservation and timeliness, and those things, you
21 also have these other arguments that stand alone.

22 MR. WALL: That's right. We, we think it's a
23 major question and that makes it easy. You can just say no
24 folding in the EVs and that takes care of this case; but,
25 yes, if you disagree with us on that, we are saying

1 straight-up the statute does not allow averaging and it does
2 not allow you to fold the electric vehicles into the class
3 because the class in 202(a) is the class of vehicles and
4 engines that emit the relevant pollutant --

5 JUDGE SRINIVASAN: Now as to those arguments, if
6 you just strip away major questions for now, just indulge me
7 for a second with the assumption. So, we strip away major
8 questions for now and we're just dealing with the core
9 statutory arguments. As to those, what about timeliness and
10 preservation?

11 MR. WALL: So, it's the same answer I gave earlier
12 which is I think that they took a fundamentally different
13 approach here which both changes the timeliness rule and
14 constructively reopens; and I don't know that we could have
15 challenged the use of averaging at all, as I say, because
16 they had always done it side-by-side with NHTSA. So, I
17 don't, I don't think it changes the answer on timeliness at
18 all; and I'd say the same thing on preservation. We raised
19 the statutory authority arguments, but if you disagree with
20 us, it's still a fundamental assumption. Even if you don't
21 think it's a major question just straight-up on the statute,
22 it's still the core of the rule. It's still a fundamental
23 assumption that they're able to do this under whatever you
24 think the right statutory interpretation of the rule is.
25 They've, they've done, they've done something. They've

1 commanded the industry that what used to be an option is now
2 --

3 JUDGE SRINIVASAN: So, every single time, it
4 doesn't, we could, we could do this for the next 25 cycles
5 and, and it's, they keep doing the same thing every single
6 time; and then on the 25th cycle, which is in like 2164,
7 they still got to do the same thing?

8 MR. WALL: Well, Your Honor, from here on out, I'm
9 pretty sure that the comment records will reflect every
10 single one of the things we're talking about today, but I
11 sort of take the point; but, again, I think that this is a
12 fairly rare case. It's not like the key assumptions
13 doctrine gets triggered every day. The Court doesn't apply
14 it all that often, but it sort of said, look, if, if you
15 didn't examine your statutory authority to do the core of
16 the thing you did, yes, that's something that we as a Court
17 have the power to consider, notwithstanding the exhaustion
18 requirement. That seems to me entirely right. And so, the
19 question is, is 202(a) clear that when you have a class of
20 vehicles that you want to set a standard for, that only some
21 vehicles in the class need to admit the relevant pollutant;
22 and as long as that's true, you can dump other stuff into
23 the class that doesn't.

24 I don't think it's close to clear and I don't even
25 think it's the most natural reading of the provision. When

1 I refer to a class and I define it by a characteristic, I'm
2 saying that you have to have the characteristic to be in the
3 class. If I say the class of drugs that produces drowsiness
4 in the FDA's judgment, and then I told you that class
5 includes drugs that are stimulants, you'd think I was nuts.

6 JUDGE PAN: So, let me ask you this. It, it seems
7 to me the EPA has been tasked with setting these standards;
8 and they've done so four times since 2010 using the same
9 framework that they applied in this case; and, really, your
10 complaint is with the level that they set. And what would
11 you have them do? They, they are required to set some
12 level. Are you saying that they need to, when they set
13 their level, try to hold back and set a lower level if it's
14 going to encourage electrification because what are they
15 supposed to do in executing their mandate to set these
16 standards?

17 MR. WALL: So, Judge Pan, I don't, I, I want to
18 fight the premise just a little bit, right? I don't think
19 we're just coming in and complaining about stringency. If
20 they had done what they had always done before and set the
21 standard in a way that it could have been complied with
22 without electrification, just enhance gasoline technologies,
23 we could have come in and made a complaint likes yours. I
24 think it would have been less powerful; but like, look, we,
25 we might be able to clean-up fuel in this way, but it would

1 be really --

2 JUDGE PAN: But they, they don't have --

3 MR. WALL: -- hard.

4 JUDGE PAN: -- a requirement to set it in a way
5 that avoids electric vehicles, unlike maybe NHTSA does; but
6 EPA doesn't have that. They can consider electrification.

7 MR. WALL: But that's the oddity, Judge Pan, of --
8 that's why I think the major questions doctrine here had so
9 much force. They don't have clear congressional
10 authorization to mandate the transition; and the oddity of
11 what the --

12 JUDGE PAN: I'm sorry, but you're, you're, you are
13 wetted to this premise that the core function of the statute
14 is to encourage electrification. My question is, they have
15 to set a standard and they're supposed to set a standard
16 that protects public health; and there's no requirement that
17 they not consider electrification as one of the factors in
18 setting their standard. So, what are they supposed to do?
19 You're, are you saying that they need to decide what the
20 ultimate standard is and then scale it back to avoid
21 encouraging electrification?

22 MR. WALL: No, I'm saying they've always set the
23 standard in a way that you didn't have to transition power
24 sources. You could satisfy it by --

25 JUDGE PAN: In a way, stringency?

1 MR. WALL: Well, it's a difference in kind, right?
2 It's just like in the Clean Power Plan case. It's just like
3 asking, wait a minute, how does --

4 JUDGE PAN: Well, the Clean Power Plan case, they
5 had to do a completely different thing. They had to go to
6 different sources. This, this Agency is doing what it has
7 always done before, it's just setting a level, a more
8 stringent level that you say forces electrification; and I
9 don't think that's clear at all based on the fact that we
10 have at least one automaker in the record who can comply
11 with these standards without electrification; and there's no
12 mandate that they not consider electrification when they set
13 the standard.

14 MR. WALL: So, all respect, Judge Pan, that's
15 exactly the argument the Government made in West Virginia.
16 It said we're just setting a best system of emission
17 reduction for stationary sources and factories; and, yes,
18 maybe they're going to have to transition from one to the
19 other, but that's traditionally what we've done; and we're
20 just cleaning up factories and we found a way to make them
21 even cleaner.

22 JUDGE PAN: But there's no mandate here that you
23 must go to electrification. They're just setting a standard
24 and saying, meet these standards however you can. It can be
25 electrification; it can be not electrification, as Subaru

1 demonstrates.

2 MR. WALL: Sure. Just like in the cap-and-trade
3 case in West Virginia, you can meet it in lots of different
4 ways. You can change your power system; you can buy
5 credits; it's up to you. You can do whatever you want. And
6 the court said, no, no, no --

7 JUDGE SRINIVASAN: So, so, is there a difference
8 between we want the switch and maybe the switch is going to
9 come about? So, in West Virginia, the premise was that the
10 switch was something that the Agency wanted. Here, I still
11 don't see where the Agency is saying they want the switch,
12 at least, I mean I know that there were some things that
13 were said by, by elected officials; but in terms of the rule
14 itself, if you can point me to something, great, please do;
15 but there seems to me to be potentially a difference between
16 we're trying to impose, we're trying to bring about this
17 shift and here's how we're trying to bring about the shift;
18 or, yeah, you might choose to do it this way because battery
19 costs have gone way down. I get that, but we're not going
20 to ignore that reality. That's just the reality of the
21 world; and so, this is the new percentage figures that are
22 going to result; but you don't have to do that, you can do
23 it some other way. We think it's, you know, totally within
24 your bailiwick to do it another way. You might want to
25 choose to do it this way, but we're agnostic as to that.

1 MR. WALL: Just like in West Virginia, there is no
2 other practical way to comply, Your Honor. They said in the
3 rule, and, and they're right, that they're driving
4 electrification. I don't think, I mean we'll see what the
5 Government says this morning, but they didn't say in their
6 brief --

7 JUDGE SRINIVASAN: Where did they say that? The,
8 I saw the word driven. Did they say, did they actually --

9 MR. WALL: It's in a rule, I believe it's at page
10 5; and then they've, they recognize it again at pages 51 and
11 52.

12 JUDGE SRINIVASAN: And give me, is that, I'm very
13 curious about the best statements in the rule; and if those
14 are, if those are the ones, then I'm, I'll take a close
15 look.

16 MR. WALL: So, look, I, I, I really think the best
17 evidence is at page 908 of the JA because there they give
18 you the actual numbers; and I don't --

19 JUDGE SRINIVASAN: Those are the tables, right?

20 MR. WALL: Those are the tables.

21 JUDGE SRINIVASAN: Yeah. Yeah.

22 MR. WALL: And they say market rate is going to be
23 at seven by the end. We're pushing it to 17. We're --

24 JUDGE SRINIVASAN: But that's different from
25 wanting that to come about and it's, it, that, that

1 absolutely shows. I don't think anybody disputes, and EPA
2 is not going to dispute, that there's a difference between 7
3 percent and 17 percent; and that's, those tables bear that
4 out, as I understand it, right? I've looked at those tables
5 and that's what they do is they show --

6 MR. WALL: Right.

7 JUDGE SRINIVASAN: -- that actually the incidents
8 of EVs is going to go up as a consequence of the rule; but
9 in terms of the Agency wanting to bring about that change by
10 the rule as opposed to saying that's what's going to happen
11 based on a number of factors, is there -- you, you may think
12 that doesn't matter, but if someone, for someone who might
13 think that it does matter --

14 MR. WALL: So --

15 JUDGE SRINIVASAN: -- or it could matter.

16 MR. WALL: -- I, I guess the reason I find the
17 question a little confusing, Your Honor --

18 JUDGE SRINIVASAN: Yeah.

19 MR. WALL: -- is the first table on 908 and what
20 they're talking about; and the, the top of the right-hand
21 column on page 5 of the JA is what the market rate would be
22 absent the standard.

23 JUDGE SRINIVASAN: Yeah.

24 MR. WALL: So, that's what manufacturers and
25 consumers would do absent the standard; and then they say

1 with the standard, we're going to drive that number up to 17
2 percent. We're going to achieve an additional 10 percent
3 that would not happen absent the standard, forcing us to
4 make more EVs in order to be able to comply with the more
5 stringent standard. So, I understand that as a have to, not
6 a, a want to. If it were a want to, the 7 percent would be
7 higher. That's what auto manufacturers would otherwise want
8 to do absent the standards. So, I, I don't, I don't, I, I
9 don't see them sort of based, I mean they can debate whether
10 it's 7 percent or 8 percent, or all the, whether it's 2 1/2
11 times or all the rest; but I, you know, it is notable that
12 the Government does not in the voluminous briefing in this
13 case say anywhere, no, no, you can comply with this just by
14 enhancing your technologies on internal combustion engines.
15 I, I don't think it can be done.

16 JUDGE SRINIVASAN: You can't --

17 JUDGE KATSAS: So, it's, so, it's not just the
18 shift from seven to 17, right? That might happen just from
19 a change of incentives. It's, you need to show more, which
20 is you need to show that you can't, there is no feasible
21 alternative to comply with the standards like bracket, which
22 that they say will produce 17; but no feasible way to comply
23 with the standards other than electrifying part of the
24 fleet?

25 MR. WALL: I don't see any evidence in the record,

1 and the Government hasn't pointed to any in its briefs that
2 you can comply with this standard other than by some measure
3 of electrification and we can debate what that percentage
4 is. And for major questions purposes, Your Honor, it's,
5 again, it's not just how much of a shift are they affecting
6 here. Is it 10 percent? Is it a smaller number? Do we
7 think that actually the momentum in the EV market moves us
8 close to 17 percent? The power that they're claiming is the
9 power to put zeroes into the standards for all the EVs that
10 they want to see on the roads, which is why they have now
11 issued an NPRM and are moving toward finalizing rule that
12 says 67 percent. Nobody is going to say that by 2032 the
13 market would otherwise be at 67 percent. The power that
14 they're claiming is the power to mandate a transition. Now
15 that, this rule does that at least in some measure; but if
16 there were any doubt about the power that they're claiming,
17 they've now sort of said the quiet part out loud.

18 JUDGE SRINIVASAN: Well, you, the location
19 mandated transition, there's a difference between mandating
20 that you comply by use of EVs and predicting that that's the
21 way you'll comply, even though you could comply in other
22 ways. There's at least a, a real-world difference between
23 those two. You may think there's not a legal difference for
24 our purposes, but there's actually a difference between
25 those two.

1 MR. WALL: They had always treated this as a
2 compliance, compliance flexibility. It was something you
3 could do, but didn't have to do. And it was totally open to
4 the Government to do that here and they could have defended
5 in this Court on the factual ground if they wanted to try.
6 Look, this is just still a compliance flexibility. You
7 don't have to have EVs to meet that. And we've got a lot of
8 briefs in the case and what none of them say is what I just
9 said.

10 JUDGE KATSAS: When we're considering is it a must
11 or is it a may, can we look outside the formal rulemaking
12 record to other statements by government officials? I mean,
13 as you know, there are cases about, you know, statements by
14 a president before he became president, right? Those don't
15 count. Can we look to statements, you know, orders by the
16 President in an executive order and/or statements by the
17 Agency had in connection with the rule's promulgation; or
18 are those just like Trump v. Hawaii?

19 MR. WALL: Oh, no, no, I think statements made
20 before somebody got to the agency --

21 JUDGE KATSAS: Okay. No, I, but --

22 MR. WALL: -- are, are different; but, but can you
23 look at what the Agency is doing? Yes. I mean as the Chief
24 Justice sort of famously remarked, courts are not required
25 to exhibit the kind of naivete that even ordinary citizens

1 lack. Like if you want to know what power the Agency
2 possesses, can you look at what the Agency is doing with the
3 power in the real world? Yes. I think it would be naive
4 not to. I don't need that here because this rule forces
5 electrification. But I, I don't think the Court should
6 stick its head in the sand for the power that the Agency is
7 claiming.

8 JUDGE KATSAS: I guess I'm trying to tie, I'm
9 trying to tie down whether it really does force
10 electrification because the, the mere fact of a shift from
11 seven to 17, it's probative; but it doesn't conclusively tie
12 that down for me.

13 MR. WALL: So, I mean I, they said in the rule,
14 Judge Katsas, they're driving electrification, and they're
15 going beyond what the market would otherwise achieve. They
16 --

17 JUDGE KATSAS: Driving, is that JA-5, or --

18 MR. WALL: I believe. I'll have the exact cite on
19 rebuttal.

20 JUDGE KATSAS: Okay. We'll check it. I'll check
21 it.

22 MR. WALL: But it's either five or 51, but I'll,
23 I'll have it on rebuttal; and I, I, you know, I don't, once
24 you say here's what the market would otherwise do, here's
25 what we are requiring you and the one is higher than the

1 other, that's a mandate. We can call it whatever we want,
2 but it is no longer an option because something that you
3 have to do, that you would not have otherwise done, and
4 that's what makes this rule different; and it's why it
5 changes everything for timeliness, for preservation, for
6 major questions. It's different from what the Agency has
7 always done.

8 JUDGE PAN: But do you agree that the Agency could
9 encourage electrification, what they can't do is mandate it?

10 MR. WALL: I think, I wouldn't, Judge Pan, because
11 I read 202(a) to say you set the standard of the class of
12 vehicles that emit the relevant pollutant. The --

13 JUDGE PAN: Right. And if the standard happens to
14 encourage electrification, that would be okay?

15 MR. WALL: I mean that is an option they've given
16 to manufacturers before. I would say the statutory text
17 says look at the class of vehicles that emit the relevant
18 pollutant. Here you say that's no EVs, you say that
19 internal combustion engines, set the standard for that
20 class. Now we would say at that point you can't average,
21 right, it's got to be individualized vehicle; but if you
22 disagree with me on, on the averaging, then, you know, we,
23 we could sort of, once they made up the power to average, we
24 could talk about can you use EVs as a compliance flexibility
25 or not --

1 JUDGE PAN: My, my question --

2 MR. WALL: -- but they --

3 JUDGE PAN: -- is just, does your argument hinge
4 on a conclusion by us that these standards force
5 electrification? Encouraging electrification would be okay,
6 right; you say they've done that before; and it's only a
7 major question if they're forcing electrification because
8 that's your premise that to force electrification would be a
9 major question that Congress did not clearly authorize; but
10 encouraging electrification, that would be okay, right?

11 MR. WALL: So, it hinges on a lesser version of
12 it, Judge Pan, which is it is a major question and they
13 don't have clear congressional authorization to force a
14 transition to EVs.

15 JUDGE PAN: Right.

16 MR. WALL: Right. Now I don't need you to
17 conclude that they don't, right; just I, I just need you to
18 say the standard is clear congressional authorization; and
19 whatever the best reading of the statute, it is not clear
20 that the Agency can do this.

21 JUDGE PAN: Right. But if they're not doing that,
22 they're not forcing, then there's no major question?

23 MR. WALL: If it's just a sort of compliance,
24 flexibility in the way that it was in the past, we still
25 have all of our arguments about averaging and we still have

1 all of our textual arguments on 202(a); but I'll grant if
2 not forcing the transition, the major questions argument is
3 a lot --

4 JUDGE SRINIVASAN: I'm, I'm still, I'm still not
5 getting the, that now that we've distilled in this void
6 between force and encourage, we keep coming back to the same
7 thing where we are on the spectrum. If the Agency sets a
8 standard and what they say is, once we put this standard in,
9 the way that people are going to comply with the standard is
10 by choosing the electrification route because it turns out
11 to be \$1 cheaper to do that. They could do the other. They
12 could do the other, they definitely could; but if we're
13 going to predict what's going to happen, they're going to
14 shift towards electrification because it's \$1 cheaper. Is
15 that forcing or encouraging?

16 MR. WALL: If it is just an option for
17 manufacturers as one among many, but they don't need to do
18 anything with electrification?

19 JUDGE SRINIVASAN: Well, what I mean by don't need
20 to do is they're not legally mandated to do anything by
21 electrification.

22 MR. WALL: Or practically mandated?

23 JUDGE SRINIVASAN: Okay. Well, well, that's what
24 I'm asking you then. If it's a dollar cheaper to do it by
25 electrification, does that mean they're practically mandated

1 to do it by electrification?

2 MR. WALL: I, I, I think here because there isn't
3 any way to comply other than by going to EVs, I don't think
4 the Court has to get into that hypothetical. Whether that's
5 a practical mandate or not, I think the argument would not
6 be nearly as strong, Your Honor.

7 JUDGE SRINIVASAN: Well, what, then what's the
8 difference between mandated and encouraged if a dollar is,
9 doesn't fit on the encouragement line?

10 MR. WALL: Because it's the same as West Virginia
11 in the sense that the only --

12 JUDGE SRINIVASAN: Well, then there is no
13 difference between mandating and encouraging.

14 MR. WALL: I think there is. The --

15 JUDGE SRINIVASAN: What is it? Give me the, give
16 me the hypo that's encouraging, but not mandated?

17 MR. WALL: Oh, if you offered as a compliance
18 flexibility, it may turn out that it's cheaper for
19 manufacturers to move to EVs than it is to adopt some
20 enhanced gasoline technology.

21 JUDGE SRINIVASAN: That's what I'm just saying.
22 It's, it turns out that it is cheaper by a dollar.

23 MR. WALL: But it, it, it may be, but where I --

24 JUDGE SRINIVASAN: It may be what? That may be
25 encouraging or --

1 MR. WALL: I think you could try to call that
2 encouragement, sure. I think it --

3 JUDGE SRINIVASAN: What, if that's not, then what
4 is encouragement as opposed to mandated?

5 MR. WALL: So, I think there are lots of different
6 ways that they have encouraged EVs. Congress has done it
7 lots of different ways, right? It's built charging
8 stations; it's given tax credits to adopt EVs. You know,
9 it, there's, there's a lot that Congress and the Agency have
10 done both as a matter of sort of administrative fiat and
11 statute to get people to move. I think what's new about the
12 rule is it's requiring a transition; and to me, that looks
13 just like West Virginia.

14 JUDGE SRINIVASAN: That's what I, I mean you keep
15 using the word requirement.

16 MR. WALL: But not, not because on its face it
17 legally says you have to, right? Their right in a sort of
18 technical sense at page 55 of their brief, they did not say
19 you have to do this. What they did was they put a lot of
20 zeroes in the standard such that the only way to meet the
21 standard is to manufacture vehicles that they consider to
22 have zero GHG emissions.

23 JUDGE SRINIVASAN: But it's not the only way to
24 meet the standard. If, if, if you can meet the standard
25 otherwise, but it's a lot more costly to meet the standard

1 otherwise, you would still say that that's mandated?

2 MR. WALL: I think that you could still say it's
3 mandated. I think it's a harder case than this one where as
4 a practical matter it isn't possible to comply without
5 moving to electric vehicles. Now none of that, Judge
6 Srinivasan, Chief Judge Srinivasan, is how the statute is
7 supposed to work, right?

8 JUDGE SRINIVASAN: Uh-huh.

9 MR. WALL: Just to be clear before I, I sit down,
10 the way the statute is supposed to work is you look at the
11 class of vehicles emitting the relevant pollutant; you set a
12 standard that's technologically feasible for that class; and
13 then you determine compliance on an individualized basis.
14 All of this only comes up for two reasons: One, they have
15 folded vehicles into the class that shouldn't be there under
16 202(a) because they do not, in the administrator's view,
17 emit the relevant pollutant; and then they have started
18 averaging across the class to, in order to be able to say,
19 well, some vehicles don't meet and others do.

20 JUDGE SRINIVASAN: So, on that I get the
21 underlying arguments. On the major questions overlay, which
22 is an essential piece of your, not essential in the, in the,
23 in the strip sense, but very pronounced feature of your
24 argument, is there a difference for your purposes between a
25 dollar cheaper to do it by EVs and actually there's no way

1 to comply except by going to EVs?

2 MR. WALL: I think there is a difference for the
3 major questions doctrine between setting the standard in a
4 way that the only way you can comply is by moving to
5 electric vehicles more than you and the market otherwise
6 would and setting the standard in a way where some
7 manufacturers might as a compliance option choose to adopt
8 more electrification.

9 JUDGE SRINIVASAN: But that, but that means, we
10 keep, we keep coming back to the same thing. That means
11 that some manufacturers are going to choose to do it, even
12 though they could do it for a dollar cheaper? Is that, is
13 that necessary?

14 MR. WALL: I, again, not on this record and not in
15 this case; but what I was trying to say was --

16 JUDGE SRINIVASAN: Uh-huh.

17 MR. WALL: -- in this case, it's an obvious
18 mandate because they've outstripped the means of compliance
19 with advanced gasoline technologies. If they were setting
20 the standard in a way that you really could comply with
21 advanced gasoline technology, but you could also comply with
22 electrification and maybe electrification was preferable
23 for some reason --

24 JUDGE SRINIVASAN: Including cost?

25 MR. WALL: -- including cost, I think the major

1 questions argument would be not as strong as it is here. I
2 think it would still be on the table; but I think this is
3 the stronger version of it.

4 JUDGE SRINIVASAN: Okay. So, so, that, that's
5 how, I'm sorry --

6 JUDGE KATSAS: Now you're saying the strongest
7 form of your argument for compulsion is, I think, is, it is
8 not technologically feasible to comply with these standards
9 without some degree of electrification?

10 MR. WALL: That's right. You cannot do it with
11 gasoline-powered vehicles.

12 JUDGE KATSAS: But cannot is a, is a technological
13 issue; it's not a --

14 MR. WALL: That's right.

15 JUDGE KATSAS: -- it's not a, you know,
16 effectively prohibitive --

17 MR. WALL: You --

18 JUDGE KATSAS: -- economic issue?

19 MR. WALL: You cannot squeeze enough improvement
20 out of the internal combustion engine the next three model
21 years to meet the standard. You have to do one of two
22 things: Manufacture more electric vehicles or buy credits
23 from someone like Tesla who manufactures electric vehicles.

24 JUDGE SRIVINIVASAN: And you understand that to be
25 the, that the upshot of this rule?

1 MR. WALL: That is the upshot of this rule --

2 JUDGE SRINIVASAN: Okay.

3 MR. WALL: -- in practical effect. That that is
4 what manufacturers will have to do.

5 JUDGE SRINIVASAN: When you say in practical
6 effect --

7 MR. WALL: I mean --

8 JUDGE SRINIVASAN: The, the, that, that is a --

9 MR. WALL: The rule --

10 JUDGE SRINIVASAN: -- practical point is that you
11 practically --

12 MR. WALL: That's right.

13 JUDGE SRINIVASAN: -- can't comply?

14 MR. WALL: I, I just mean to the extent that what
15 the Government says is on the rule on its face we didn't
16 tell you what you had to do --

17 JUDGE SRINIVASAN: Yes.

18 MR. WALL: -- to comply.

19 JUDGE SRINIVASAN: I take that point, yeah. And
20 it's not a legal mandate?

21 MR. WALL: That's right.

22 JUDGE SRINIVASAN: But, but --

23 MR. WALL: That's right. It does not, it, it did
24 not say on the face of the rule thou shalt build more EVs.
25 They set the standard in a way that you can only comply by

1 doing that.

2 JUDGE SRINIVASAN: Technologically, you can only
3 comply? Not most cost-efficiently you comply, comply; but
4 technologically --

5 MR. WALL: Right.

6 JUDGE SRINIVASAN: -- you cannot meet it unless
7 you go into electric?

8 JUDGE KATSAS: Suppose they had, suppose EPA had
9 found that electric vehicles emit greenhouse gases in tiny
10 amounts because I forgot what the air conditioners leak, or
11 something, and put them in the class on that basis; and then
12 encouraged/force electrification. What happens, what would,
13 how would you analyze that?

14 MR. WALL: So, one sort of factual, Judge Katsas,
15 and one legal answer that the sort of factual quibble is
16 that, that substance in the air conditioning units are
17 hydrofluorocarbons. They can have a hydrofluorocarbon rule
18 and they could sweep in all cars with air conditioners that
19 use that, electric or non-electric; but it would just be a
20 rule for the air conditioning unit. It wouldn't drive
21 electrification in terms of like tailpipe emissions.

22 To your legal question, no. If they tried to say,
23 look, we think EVs emit greenhouse gases in some way out of
24 the air conditioning unit or what have you, and we're just
25 going to dump them into sort of a suite of rules, including

1 the tailpipe rule, even though we think they don't emit
2 anything out of the tailpipe, right, then I think they'd
3 have a real problem.

4 Now if they want to start saying that electric
5 vehicles do have emissions because they want to look at the
6 whole lifecycle, then I think that'd be a very different
7 rule, totally different factual record and all the rest.
8 The problem they have here is that they've got a problem
9 either coming or going. If they say they won't emit the
10 relevant pollutant as they have, they're not covered by
11 202(a). They're in the class. And as soon as they say,
12 well, they do emit the relevant pollutant, well, then the
13 rule just doesn't look anything like this one. The rule
14 treats them as not doing that. So, I don't think they can
15 defend it on the ground that, in fact, they do; and,
16 therefore, come within the class. The rule says it doesn't.
17 They'd be arbitrary and capricious for them to now say, oh,
18 in fact they do. They've got to make a choice one way or
19 the other and their choice was to say they have no
20 emissions; we're not looking at the upstream stuff. As soon
21 as they do that, they're outside the scope of 202(a); and
22 that, by the way, Judge Srinivasan, is all the Court needs
23 to say to resolve the case. This is a major question under
24 West Virginia and Student Loans. This is an old power, but
25 at a new, very consequential way; and 202 is not clear that

1 you can use averaging in that way. That is the most
2 straightforward way to resolve the case.

3 JUDGE PAN: Could I ask you about the zone and
4 interest issue because I think there's a pretty substantial
5 argument that none of the Petitioners have statutory
6 standing because they're not within the zone of interests
7 protected by the Clean Air Act; and, in particular, the Fuel
8 Petitioners. We have a, a precedent Delta Construction that
9 suggests that they don't have statutory standing.

10 MR. WALL: So, Judge Pan, I want to convince you
11 the argument is not substantial. In Delta Construction, you
12 were trying to increase the regulatory burden on someone
13 else. In the two cases where fuel manufacturers, one a
14 biofuel manufacturer in Energy Future Coalition, the other a
15 traditional fuel manufacturer in ethel, when they walked in,
16 and as here, were contesting the regulatory burden on
17 themselves. In both cases, this Court said they were within
18 the zone of interest and they could challenge emission
19 standards in Title II. I don't see any reason to treat this
20 case differently.

21 I mean then Judge Kavanaugh's reasoning in Energy
22 Future Coalition seems to me exactly on point.

23 JUDGE PAN: Well --

24 MR. WALL: He said Title II draws a balance
25 between air quality improvement and productive economic

1 activity because it asks you to measure technological
2 feasibility and compliance costs, and we police that
3 balance.

4 JUDGE PAN: So, it seems to me that there is a bit
5 of a tension between Energy Future Coalition and Delta
6 Construction; but Delta Construction is the earlier decided
7 case. So, to the extent that they would conflict, we would
8 apply Delta Construction; and in both Delta Construction and
9 Energy Future Coalition, we had fuel companies who, like
10 this one, has an interest. Your Fuel Petitioners, their
11 interest is always favoring fuel energy over electrical; and
12 so, for them, their interest really is one-sided and not
13 aligned with the interests of a Clean Air Act.

14 MR. WALL: So --

15 JUDGE PAN: So, the Clean Air Act, like the
16 interests of the Clean Air Act is to make the air more clean
17 and preserve economically feasible options for the regulated
18 entities, the automakers. The automakers in this case and
19 intervene on behalf of the EPA, so it's not clear to me that
20 the Fuel Petitioners' interests are aligned with the
21 interest of the statute; and I think that this Delta
22 Construction precedent seems to dictate that they do not
23 have statutory standing and it controls over Energy Future
24 Coalition, which I think does support our view.

25 MR. WALL: So, three quick points, Judge Pan.

1 JUDGE PAN: Uh-huh.

2 MR. WALL: For some automakers who have intervened
3 on the other side, as they say in their brief, because
4 they've made investments and they don't want to, in
5 electrification, and they don't want to be at a competitive
6 disadvantage. There are automakers like Toyota, Subaru,
7 that are not on the other side of the case. Second, I don't
8 --

9 JUDGE PAN: They're not, they haven't intervened
10 on behalf of your clients?

11 MR. WALL: That's right. They're just not in the,
12 they're not in the litigation one way or the other. I just
13 wanted to say the automakers are not a monolith.

14 JUDGE PAN: I'm, in terms of just deciding whether
15 the interests are aligned, there's no automaker on your
16 side?

17 MR. WALL: Well, that's right; but that's, the
18 question is whether we fall within the zone of interest.
19 So, my second point was, I don't see a conflict between
20 those cases on their reasoning because what Delta says is,
21 you can't walk in if you're not challenging your own burden
22 and just complain that there's a lesser burden on somebody
23 else; but what Energy Future and Ethel Corp. say is, but if
24 you're walking in as here to say the Agency is imposing a
25 regulatory impediment to the use of your product, well, you

1 do get to sue; and then the third point is Judge Kavanaugh's
2 reasoning for that, he did not construe the Clean Air Act as
3 narrowly as I think the question suggests. He did not say,
4 oh, this is really just about as much air quality
5 improvement as you can squeeze out technologically. He
6 said, if you look at Title II as a whole, it balances
7 improving emissions with encouraging and allowing productive
8 economic activity; and it asks the Agency to balance between
9 those two. If we didn't fall within the zone of interest,
10 one side of that balance would go unprotected, excuse me,
11 because you couldn't challenge the standards as being too
12 strict; you could only, as the Government says, challenge
13 them for being too lax; and that, I think, would sort of
14 turn the zone of interest into a one-way ratchet. And the
15 Supreme Court has been very clear --

16 JUDGE PAN: Well, if you were an automaker, you
17 could challenge it because they are people who are, their
18 interests are addressed by the statute. It seems to me, and
19 I'd like you to address this, that Ethel was a different
20 case; and Delta Construction even explicitly distinguished
21 it by saying that's a case in which the interest being
22 asserted was compliance with the statute. So, if you are a
23 company like a fuel company that wants to challenge this, if
24 your interest being asserted is complying with the
25 regulation, that's aligned with the interest of the statute.

1 So, that's a special case for a fuel company in the Clean
2 Air Act context.

3 In Energy Future Coalition, that case relied on
4 Ethel without explaining why; but it didn't raise the same
5 type of claim. So, the way this all shakes out from my
6 reading of the cases is that Delta Construction is the one
7 that seems to directly address what your clients are trying
8 to do here, and Delta Construction precludes statutory
9 standing.

10 MR. WALL: So, I guess I'd say one broad and one
11 specific thing. The broad thing, Judge Pan, is at least as
12 I read the cases from the Supreme Court in this Court over
13 the last 20 years, they've gotten progressively softer about
14 what we used to call prudential standing, or zone of
15 interest; and the language has been ratcheted down pretty,
16 pretty consistently to say you just have to be arguably
17 within the zone of interest. It's not a demanding
18 requirement and so we're going to look at sort of the
19 statute broadly understood, and that's what Energy Future
20 did.

21 And the second is, I don't think the Court should
22 sort of say, oh, well, you're outside, but the automakers
23 would be inside. I think all the Government's arguments
24 would apply equally to the automakers. If they were here
25 saying this is too hard, this is too expensive, the

1 Government would say, those are pecuniary interests; they're
2 not in line with the statute; the statute just asks what's
3 technologically feasible.

4 JUDGE PAN: The statute regulates automakers; so,
5 automakers are, they automatically are in. So, but you are
6 sort of a, a component of combustion-driven engines. So,
7 can any manufacturer of a component of a combustion-driven
8 engine have statutory standing from your view?

9 MR. WALL: If they have Article 3 injury here,
10 yes. The Agency wants to --

11 JUDGE PAN: I'm not talking about Article 3
12 standing.

13 MR. WALL: I know. I, I just --

14 JUDGE PAN: I'm, I'm just talking about zone of
15 interests.

16 MR. WALL: Yes.

17 JUDGE PAN: Would any manufacturer, producer,
18 anybody who manufactures a part for a combustion engine
19 have statutory standing in your view?

20 MR. WALL: I, I just want to say as long as
21 they're independently harmed, yes, they would because what
22 the Agency is --

23 JUDGE PAN: How are their interests aligned with
24 the zone of interest of the Clean Air Act?

25 MR. WALL: Because the Clean Air Act draws a

1 balance. As the Supreme Court said, no statute pursues its
2 end at all costs; and it says we do want to improve
3 emissions, there's no question about that; but we want to do
4 it in a way that's technologically feasible and that the
5 industry is able to comply with.

6 JUDGE PAN: Feasible for the automakers. Are they
7 thinking about all the manufacturers of parts for combustion
8 engines?

9 MR. WALL: I don't know if Congress specifically
10 had that in mind; but the point of the zone of interest test
11 is, do you have an interest that's arguably protected by the
12 statute? The Agency wants to transition from one kind of
13 vehicle to another. That may or may not hurt auto
14 manufacturers. I think it will hurt some of them more than
15 others. It clearly hurts the fuel manufacturers.

16 JUDGE PAN: I understand --

17 MR. WALL: And they --

18 JUDGE PAN: -- but the auto manufacturers are
19 definitely in. I'm just trying to understand what is the
20 scope in your view of the zone of interests? Does it extend
21 to any manufacturer, anybody who has any kind of an interest
22 in a combustion engine or fuel, or, you know, gas fuel?

23 MR. WALL: I think it extends to the entities that
24 have an interest in the productive economic activity that
25 this Court has squarely said is one-half of the balance that

1 the Clean Air Act achieves.

2 JUDGE PAN: So, you think the Clean Air Act, the
3 zone of interest includes any kind of economic activity that
4 is addressed by this Act, or is affected by this Act?

5 MR. WALL: It has any, anyone who has an interest
6 in the productive economic activity, that the Act balances
7 against improvements in air quality.

8 JUDGE PAN: So, so, that would be, though, anybody
9 who has any kind of an economic harm or interest as a result
10 of this Act?

11 MR. WALL: Well, I want to be careful, Judge Pan.
12 Your earlier questions asked about anybody who is
13 manufacturing components in cars. Yes, I think those
14 manufacturers likely would be included. I think fuel
15 producers are included. I don't want to say how far beyond
16 that the zone of interest would go because I don't want to
17 sort of speculate in the absence of knowing what the
18 industry is; but those industries clearly police and, the,
19 the balance between productive economic activity and air
20 quality that this Court squarely said in Energy Future the
21 Act protects.

22 JUDGE PAN: You say it's clear. I don't know if
23 that's so clear because the Clean Air Act, they, it wants to
24 clean the air; but they want to make sure that automakers
25 can still be in business and be able to economically

1 function. I don't think it's clear that they were thinking
2 about all the other potentially affected industries that
3 might go along with this; and Delta Construction suggests
4 that they were not.

5 MR. WALL: Judge Pan, that's not the way the Court
6 read it in Energy Coalition. The court there didn't
7 perceive any conflict with Delta. I don't perceive any
8 conflict on the reasoning of Delta; and I think more
9 generally in terms of methodology, the Court has been clear
10 that when it runs the zone of interest test, it doesn't take
11 sort of, you know, too stingy a view of what the zone of
12 interest is.

13 JUDGE PAN: Well --

14 MR. WALL: The Supreme Court has said --

15 JUDGE PAN: -- I do wonder about that because
16 that's the APA standard versus the other type, which is --

17 MR. WALL: But, Judge Pan --

18 JUDGE PAN: -- we're not in the APA here.

19 MR. WALL: I think the Supreme Court has been
20 clear when you look at the zone of interest, you have to
21 look at all of the provisions in a given statute, how they
22 interact, and you have to take a fairly broad birds' eye
23 view to what the zone of interest is; and then you've just
24 got to ask, are you arguably protected by it, keeping in
25 mind this is not a demanding standard; it is not difficult

1 to meet; it is rarely satisfied. I think it would be, given
2 that this Court has already said that a biofuel and a
3 traditional fuel manufacturer, all within the zone of
4 interest, to challenge emission standards in this same
5 statute, Title II of the Clean Air Act, I, I think it would
6 be, I think it would be a really marked departure if this
7 Court kept this case on sort of prudential standing or zone
8 of interest grounds.

9 JUDGE PAN: It wouldn't be a marked departure from
10 Delta Construction.

11 MR. WALL: But, again, I think I just read Delta
12 Construction differently. Delta Construction said, not if
13 you're trying to increase the burden on somebody else. What
14 it did not say was, oh, you're here challenging the burden
15 on you? That still doesn't fall within the zone of
16 interest. Now if it had said that, I agree, we'd have a
17 conflict within Energy Future; but Delta doesn't say that.

18 JUDGE SRINIVASAN: So, you haven't mentioned
19 consumers in the exchanges you've had; and I just, do you
20 think that the consumers rise and fall with the, with the
21 manufacturers?

22 MR. WALL: I think it's just as easy under the zone
23 of interest. I mean when you, when you start looking at
24 compliance costs, that's obviously manufacturers; but it's
25 also consumers, right? And so, if, if the consumers think

1 that the standard that the Agency has set will drive the
2 price up on cars too high, here they say it will be \$1,000 a
3 car, right? That's a pretty significant amount more for an
4 average American to pay for an automobile. It seems to me
5 they're arguably protected by the way that the statute says
6 you got to balance what's possible with what's sort of
7 economically, or in terms of compliance costs, a good idea.
8 The consumers can police that balance; so can the fuel
9 manufacturers.

10 JUDGE PAN: What about the Ruckelshaus case that
11 we decided? It's, we said there that the Clean Air Act is
12 not concerned with regular regulations pose costs that
13 consumers should rightly bear if ecological damage is to be
14 minimized.

15 MR. WALL: So --

16 JUDGE PAN: We're not concerned with costs to the
17 consumer. It's not in the zone of interest of the Clean Air
18 Act.

19 MR. WALL: So, Judge Pan, it's been a long time
20 since I looked at Ruckelshaus. If memory serves, I think it
21 was quite some time ago before the more modern zone of
22 interest cases before Energy Future, before the Court's
23 decision in Lexmark. So, I under, I'll have to go back and
24 look at it. I, I, maybe it does have language that suggests
25 that the Clean Air Act pursues only environmental quality

1 and isn't concerned with anything else; but that's not right
2 on the fact of the --

3 JUDGE PAN: It's just that, it's just I think
4 within the economical impacts that are addressed by the
5 Clean Air Act. It's not any economic impact; it's very
6 targeted to things that are aligned with the interests of
7 the statute; and consumer protection is not part of the
8 Clean Air Act.

9 MR. WALL: Judge Pan, I, I, I guess I, I read it
10 very differently then. I think that would be a sort of
11 remarkable holding. If the Agency said we're going to, like
12 here they say it's \$1,000; but imagine if it were five, six
13 or 7,000; and we're going to make a price of an automobile
14 out of reach of the average American, it would seem to be
15 fairly remarkable to say that consumers couldn't walk in and
16 say that the Agency had acted arbitrarily and capriciously
17 in where they had set the standard because they simply fall
18 outside the protection of the Act. The Act says compliance
19 costs and it has to have -

20 JUDGE PAN: With a different cause of action,
21 arbitrary and capricious under the APA is different from
22 what we're doing here.

23 MR. WALL: Or walk in and say they lacked
24 statutory authority to set the number that high, whatever
25 the claim is. For zone of interest purposes, it seems to me

1 if the Act says you have to balance improving air quality
2 with how much it's going to cost in order to do that, and
3 that cost is borne by manufacturers and consumers, I don't
4 understand why only the automaker manufacturers and not the
5 consumers who will bear at least most, if not all of that
6 ultimate cost, wouldn't also fall within the zone of
7 interest. That turns into almost like an Illinois brick,
8 sort of the first injured party cuts off the standing and
9 zone of interest has gone exactly the opposite way over the
10 last 20 years.

11 JUDGE PAN: Well, I just hear you saying that the
12 magnitude of the cost is going to determine whether it's in
13 the zone of interests; and I think the analysis is
14 different. Look at the statute. What was the statute
15 trying to do; and is this within the zone of interest? Even
16 if the cost is really high, that doesn't put something into
17 the zone of interest if a statute doesn't address that.

18 MR. WALL: So, I was just, I was just using the
19 hypothetical to say I think there are circumstances where it
20 would get clearer and clearer that they would be within the
21 zone of interest that Congress was trying to protect; and if
22 I'm right about that as one goes to the hypotheticals, then
23 I think, I'm right here. Once you're in the zone, you're
24 not in the zone for only some purposes.

25 JUDGE SRINIVASAN: Let me make sure my colleagues

1 don't have additional questions at this time. We have a
2 little bit of time for rebuttal. Thank you, Mr. Wall. Ms.
3 Petti.

4 ORAL ARGUMENT OF LANORA C. PETTI, ESQ.

5 ON BEHALF OF THE STATE PETITIONERS

6 MS. PETTIT: Thank you, Chief Judge Srinivasan,
7 and may it please the Court. I've heard a lot of questions
8 today about whether the EPA was merely predicting whether
9 this would increase electric vehicles or actually mandating
10 it. To use the words of the EPA itself on page 60 of the
11 Joint Appendix --

12 JUDGE KATSAS: Sorry, which, which page?

13 MS. PETTIT: Page 60 on the --

14 JUDGE KATSAS: 6-0?

15 MS. PETTIT: 6-0, right-hand column, halfway down.
16 Compliance with the final standards will necessitate greater
17 implementation and pace of technology penetration,
18 including, skipping down, further deployment of the EV and
19 PHEV technologies.

20 JUDGE SRINIVASAN: Right, but it says including;
21 and so, I, does that -- I don't read that necessarily to
22 mean we cannot certainly ask EPA about that. I don't, I
23 don't read that to mean that one of the things that has to
24 happen is be EV and PHEV. It could mean that there has to
25 be changes and one of the potential changes would be the

1 PHEV and --

2 MS. PETTIT: This would --

3 JUDGE SRINIVASAN: -- be EV and PHEV, sorry, I'm
4 getting the letters wrong.

5 MS. PETTIT: Yes, Your Honor. If this were the
6 only sentence that was that, to that effect, I would agree;
7 but I would point to look for a prediction about what is
8 going to happen is on page 5; and I'm afraid I didn't bring
9 that page up with me, so I can't point you exactly on where
10 the page is; but it's talking about how it's anticipating
11 and that point the increase and to be electric vehicles.
12 And it's driving electric vehicles on page 51.

13 So, the, the EPA has said on a number of occasions
14 this rule will lead to, or will necessitate again this
15 transition.

16 JUDGE SRINIVASAN: So, then do you read those to
17 mean that they will, yes, they made the prediction, there's
18 no doubt because I think the gap between 17 and seven is
19 proof-positive that the prediction is there. There's no
20 doubt about that.

21 MS. PETTIT: Yes, Your Honor.

22 JUDGE SRINIVASAN: And do, do, do your statements
23 mean that the only way, what the Agency is saying is the
24 only way that manufacturers can come into compliance with
25 the new standards is by shifting to EVs?

1 MS. PETTIT: Read in context, yes, Your Honor;
2 and, and it, the EPA really can't deny that either. It
3 cannot deny that it's part of the Administration's larger
4 policy to force the electrification of the fleet because not
5 only was it announced on the same day as Executive Order
6 14037, that order is referenced on JA-4 of the Joint
7 Appendix. So, read in context, this is a mandate.

8 Now whether, whatever the merits of that policy,
9 it is not a permissible policy end under Section 202 of the
10 Clean Air Act; and the EPA has proceeded through
11 impermissible means for, for, among the reasons and it, I'm
12 sorry, in addition to the reasons you were just discussing
13 with my colleague that they relied on a cost and benefit
14 analysis that picked and choosed between the facts and
15 assumptions that maximized the putative benefits while
16 ignoring the very real costs. So --

17 JUDGE PAN: Under, under your argument, does it
18 have to be the policy end? What if it's just incidental to
19 what they're doing? What if incidentally like it, it
20 requires some electrification? They're just setting the
21 standard which is what they have to do under the Clean Air
22 Act.

23 MS. PETTIT: Under our argument, it doesn't matter
24 because whether they did it by accident or on purpose, they
25 have mandated the transition and the fundamental rewrite of

1 major industry which since Brown and Williamson, and
2 reasserts, reaffirms a couple of years ago in West Virginia
3 against EPA is a major question reserved for Congress.

4 JUDGE PAN: But what if, what if it requires 1
5 percent electrification? Does it matter the degree of
6 electrification to make it a major question?

7 MS. PETTIT: So, if it's just 1 percent
8 electrification, it would be difficult to assert that that
9 is the, a true mandate.

10 JUDGE PAN: Okay. So, for 5 percent, would that
11 be?

12 MS. PETTIT: So, it's hard to say the, if there
13 were a, perhaps to clarify my prior answer, if the EPA were
14 to say you are required --

15 JUDGE PAN: No, no, I'm, I'm, I'm working within
16 the framework that we have --

17 MS. PETTIT: Uh-huh.

18 JUDGE PAN: -- under the Clean Air Act. They're
19 setting emission standards. It incidentally requires
20 electrification because that's a real-world factor; and it
21 just requires 1 or 2 percent electrification. Would that be
22 a major question in your view?

23 MS. PETTIT: If there were no other functional way
24 to do it, then probably because, again, the Congress has
25 considered --

1 JUDGE PAN: I'm sorry, no functional way to do
2 what?

3 MS. PETTIT: If there were no functional way to --
4 that is a hypothetical that's difficult to imagine the way
5 you would write that regulation; but if it were possible --

6 JUDGE PAN: The regulation is I'm setting this
7 standard. It's a standard that to comply with it,
8 incidentally, we contemplate that there will be some
9 electrification, 1 or 2 percent, is that a major question?

10 MS. PETTIT: At the, at the present time, it's not
11 a major question because that already exists in the
12 marketplace; and if what, what is, what is driving it is --

13 JUDGE PAN: Okay. So, so, you --

14 MS. PETTIT: -- the past market.

15 JUDGE PAN: -- agree that setting a standard that
16 requires some electrification as it has in the past would
17 not be a major question?

18 MS. PETTIT: So --

19 JUDGE PAN: It's only if there's a lot of
20 electrification?

21 MS. PETTIT: Setting the standard in a way that
22 can be complied with with existing technologies is not a
23 major question. What makes it a --

24 JUDGE PAN: That's not what I was asking you.

25 MS. PETTIT: So, I'm not sure I understand. If

1 you could, if you could rephrase the question?

2 JUDGE PAN: Sure. My question is, all the EPA
3 does under this provision of the Clean Air Act has set a
4 standard and we're talking about the stringency of the
5 standard. And I understand your argument to be, if you set
6 it at a very stringent level which requires automakers to
7 electrify, that would be a major question because you don't
8 have the authority, EPA, to require electrification; but I
9 understood your prior answer to me to be that if I, if I'm
10 the EPA and I set the standard and it happens to contemplate
11 a little bit of electrification, 1 or 2 percent, that
12 wouldn't necessarily be a major question. So --

13 MS. PETTIT: If it, if it happens to contemplate
14 that? No, it's taking into account reality. If it is
15 forcing that, that's when it becomes a problem because
16 Congress has considered an electrification mandate at a
17 below 100 percent level four times in the last --

18 JUDGE PAN: Wait, at what percentage does it
19 become a major question, if at 1 or 2 percent it does not;
20 and at 17 percent, it does, where is the line for a major
21 question?

22 MS. PETTIT: It is, the line is where it becomes a
23 mandate because Congress has considered a mandate four times
24 in the last five years. So, the question --

25 JUDGE PAN: But what, if, if the, if it mandates 1

1 or 2 percent, you said that wouldn't be a major question?

2 MS. PETTIT: I believe I clarified my answer to be
3 if it mandates, if, if the standard -- so, you've asked the
4 question a couple of different ways. If the standard
5 contemplates, it's not a mandate, it's not a major question.
6 If the, if the --

7 JUDGE PAN: Okay. If, if, let me clarify, I'm
8 sorry.

9 MS. PETTIT: Yes.

10 JUDGE PAN: So, if the standard set requires 1 to
11 2 percent electrification, is that a major question?

12 MS. PETTIT: Under the way that the Court has, has
13 interpreted that question, yes, because the way --

14 JUDGE PAN: It would be? That, that's huge and
15 extraordinary power by the Agency?

16 MS. PETTIT: Yes --

17 JUDGE PAN: That's in our current --

18 MS. PETTIT: -- because --

19 JUDGE PAN: -- world, or there's electrification
20 happening anyway?

21 MS. PETTIT: Yes, Your Honor, because the frame of
22 the doctrine is not how the power is, and this is going to,
23 the Nebraska case is probably the best, the best example of
24 this. It is not the way that power is wielded. The
25 doctrine is a guard for fundamental constitutional concerns

1 about the separation of powers that is the nature of the
2 power claimed; and whether they are claiming an ability to
3 mandate 1 percent or 100 percent, that is a power that is a
4 fundamental legislative choice reserved to Congress.

5 JUDGE PAN: So, I asked your friend the same
6 question. So, what do you think the Agency should do? They
7 should decide what the standard is that would protect public
8 health and they should ratchet it down to make sure that
9 they're not relying on electric vehicles? What are they
10 supposed to do?

11 MS. PETTIT: I would point Your Honor to Section
12 202(a)(3)(A)(i) where the EPA considers, is given a variety
13 of different factors that it has to balance in the Energy
14 Coalition, the term of that phrase. And so, they, this is
15 not an instance or a public health law entirely. They are
16 not entitled to set, well, we think it would be ideal to
17 have X number of carbon, of tons of carbon dioxide. They
18 can set the standard based on technological feasibility and
19 upon other considerations set out by the standard.

20 JUDGE PAN: But, but it's all feasible. This,
21 this is not one of the factors that's --

22 MS. PETTIT: So --

23 JUDGE PAN: -- in the statute avoiding
24 electrification because it's a major question. So, I'm just
25 wondering like how in practical effect you think the Agency

1 is supposed to do its job while taking into account this
2 issue?

3 MS. PETTIT: So, the Agency is supposed to do its
4 job by taking into account those statutory factors; and I
5 think the, perhaps the better way to answer Your Honor's
6 question is to point you to pages 2, 2609 and 2610 of the,
7 of the West Virginia case in which the court said that
8 federal agencies are not entitled to short-circuit the
9 political process by using broadly-worded, I apologize,
10 broadly-worded general delegations of power even where there
11 is a plausible, textual basis. So, I don't dispute, Your
12 Honor, that they could, that under the strict construction
13 of the statute they technically could do this; but that is
14 not the common sense understanding of how Congress is
15 understood to delegate matters of significant economic and
16 political concerns in the words of Justice Barrett's
17 separate opinion in the Nebraska case. So, they are to set
18 the standard based on the overall context of the statute
19 which was written at a time and written, frankly, in terms
20 that contemplate an internal combustion engine.

21 JUDGE PAN: It also contemplates electrification,
22 though.

23 MS. PETTIT: The statute does not contemplate the,
24 I'm speaking to Section 202(a), doesn't say --

25 JUDGE PAN: It doesn't, it doesn't require you to

1 ignore electrification.

2 MS. PETTIT: It does not speak to electrification
3 one way or the other; but that is the problem with the major
4 questions doctrine or for the EPA because the, this is a
5 very complicated issue that requires balancing a lot of
6 different issues, interests; which is why in the
7 infrastructure and the Infrastructure Act that my colleague
8 referenced, the Congress commissioned a report about 16
9 different topics because Congress recognized that this
10 impacts not just cars; it also impacts the grid and it
11 impacts oil companies, as well as many other factors; and
12 balancing that is a fundamentally legislative task that
13 Congress hasn't done yet. And so, as a major, from a major
14 questions perspective, the EPA cannot short-circuit that
15 process using this old, broadly-worded provision.

16 JUDGE SRINIVASAN: Can I, can I just ask one
17 clarification? For the 1 percent hypo, I take it that your
18 argument is not that 1 percent every time, a mandate of 1
19 percent, just to be clear --

20 MS. PETTIT: Uh-huh.

21 JUDGE SRINIVASAN: -- a standard that's going to
22 require a 1 percent shift in favor of electrification, your
23 argument isn't necessarily that any time there's any iota of
24 a mandatory shift, that's enough. I assume your argument is
25 that any time there's a mandatory shift of any iota, if

1 there's no distinction, there's no stopping point to that?
2 In other words, the Agency is saying, yeah, this time we're
3 doing a half percent; but the logic of what we're saying
4 would take us all the way up to 99?

5 MS. PETTIT: Precisely, Your Honor.

6 JUDGE SRINIVASAN: That would be? But if there
7 were, if there were another world in which there was some
8 other consideration that would cap it at 1 percent, then it
9 might not be a major question, even under your view, I take
10 it?

11 MS. PETTIT: Yes, Your Honor.

12 JUDGE SRINIVASAN: But the --

13 MS. PETTIT: But it's the nature of their power;
14 and the power that they are claiming here is the power to
15 force 100 percent transfer and Congress has not given it to
16 them.

17 JUDGE KATSAS: Which, which, which is why I think
18 your case depends on this question of can, can you include
19 electric vehicles in the class; because, otherwise, if we're
20 just talking about 1 percent versus 17 percent, versus 7
21 percent, it just feels like the question of degree and how,
22 you know, how many notches can they turn up the knob. That
23 doesn't feel major. That feels like arbitrary and
24 capricious review. So, I --

25 MS. PETTIT: But --

1 JUDGE KATSAS: -- it just has to be that there's
2 this, it's just a conceptual difference in kind when you put
3 into the class this non-emitting --

4 MS. PETTIT: I --

5 JUDGE KATSAS: -- different kind of thing, which
6 is the --

7 MS. PETTIT: Certainly, Your Honor.

8 JUDGE KATSAS: -- electric car?

9 MS. PETTIT: And what I would point Your Honor
10 that might help with that question is I believe it is
11 Subsection C.

12 JUDGE KATSAS: You, you agree? I mean I wasn't
13 entirely --

14 MS. PETTIT: Because --

15 JUDGE KATSAS: -- a friendly question, right?
16 It's, you need, you need the piece about --

17 MS. PETTIT: I think that --

18 JUDGE KATSAS: -- the cars being in the class.

19 MS. PETTIT: I think that it has, the electric
20 cars have to not be, have been contemplated by 202 is how I
21 understood Your Honor's --

22 JUDGE KATSAS: Right.

23 MS. PETTIT: -- question --

24 JUDGE KATSAS: Right.

25 MS. PETTIT: -- to be. And if, and we don't think

1 that it is, and we don't think that Congress has clearly
2 spoken to it precisely because as I was discussing with your
3 colleagues, it doesn't mention the electric cars at all; and
4 by contrast, and I would point this Court to the language in
5 Brown and Williamson, where the Food and Drug and Cosmetics
6 Act, or in general terms included it; but Congress spoke
7 about tobacco in a much more specific way; and this is very
8 analogous to that because the Clean Air Act has been
9 interpreted to include electric cars, but it shouldn't be in
10 light of, for example, 26 U.S.C. 30(d), 42 U.S.C. 32 --

11 JUDGE KATSAS: Well, let's, before, before we get
12 to the FDA v. Brown and Williamson point about other
13 statutes, let's just talk about this one for a second. And
14 one feature of this one that may cut against you on this
15 point is a combination of two things. One is this scheme is
16 all about motor vehicles, motor vehicles as a defined term
17 and the definition includes electric no less than combustion
18 engines, right?

19 MS. PETTIT: Yes, Your Honor.

20 JUDGE KATSAS: And then, and then the other is
21 right in the provision we're talking about, EPA gets the
22 authority to define the relevant classes within that
23 definitional category.

24 MS. PETTIT: So, what I would point Your Honor to
25 about that is actually Subsection E, not C as I said

1 earlier, where it's talking about new power or propulsion
2 systems.

3 JUDGE KATSAS: I'm sorry, where are you, E of?

4 MS. PETTIT: Section 202, or 7521 in --

5 JUDGE KATSAS: Right.

6 MS. PETTIT: -- 202 U.S.C. where Congress seems to
7 be contemplating how --

8 JUDGE KATSAS: I'm sorry, this is new power
9 sources?

10 MS. PETTIT: New power sources --

11 JUDGE KATSAS: Okay.

12 MS. PETTIT: -- or propulsion systems.

13 JUDGE KATSAS: Right.

14 MS. PETTIT: So, Congress in this section does not
15 seem to contemplate that the EPA is just going to squish
16 together all forms of motor vehicles. The Congress seems to
17 be saying in this section that the administrator is to
18 consider them separately, and that is how I would respond to
19 Your Honor.

20 JUDGE PAN: How does it say that in this
21 provision? It says any class or classes of new motor
22 vehicles, or new motor vehicle engines, which in his
23 judgment cause or contribute to air pollution which may
24 reasonably be anticipated to endanger public health or
25 welfare.

1 MS. PETTIT: I was looking at Section E, Your
2 Honor, which says that in the event of a new power source or
3 propulsion system for a new motor vehicle or new motor
4 vehicle engines is submitted for certification, skipping
5 some parts. The administrator must postpone certification
6 until he has prescribed standards. So, he seems to, this
7 seems to contemplate different standards for different new
8 propulsion systems; and electric vehicles are a propulsion
9 system that may have been in existency when they, the law
10 was passed; but it is certainly not in the form that they
11 currently --

12 JUDGE PAN: But that was certification. Was that
13 the ability to regulate such vehicles?

14 MS. PETTIT: So, certification is the way to, that
15 the standards are enforced. The standards are set and then
16 new vehicles have to be certified that they meet those
17 standards. So, this, this allows the administrator to
18 postpone that certification process to set standards where
19 there's a new propulsion system which seems to suggest it
20 should be in a different class. But the Court doesn't need
21 to necessarily get to that point because I think that it can
22 resolve on the major questions doctrine, as my colleague
23 suggested. So --

24 JUDGE SRINIVASAN: They could, they could still be
25 in the same class, I guess, right, because it could be that

1 when you have a new propulsion system, there's, is the
2 authority to postpone certification; but that doesn't mean
3 that it's not also part of the equation under A?

4 MS. PETTIT: So, I would ask, I, make sure that
5 Your Honor, I'd ask Your Honor to pose that question to my
6 colleague whose brief covers that topic in much more detail;
7 but the problem that I see with that is the way that we're
8 turning back to (a) (1) that Judge Pan was just asking me
9 about. The way that it's written is in terms of standards
10 applicable to the emission of any air pollutant; and then
11 it's, and then it, dropping down two lines, such standards,
12 referring to the same standards, shall be applicable to such
13 vehicles and engines for their useful life.

14 So, if this vehicle is not, not emitting the
15 relevant pollutant because it, for example, doesn't have a
16 tailpipe, and that's where carbon dioxide comes out, then it
17 couldn't be in the same class because it's not, in his
18 judgment, cause or contribute to air pollution from that
19 standard, from that pollutant because pollutants are not
20 one-size-fit-all.

21 JUDGE KATSAS: You want, I stopped you. You
22 wanted to go to other statutes like in Brown and Williamson,
23 the statutes other than the FDCA. So, is that like the RFS,
24 right, about the scheme which presupposes the availability
25 of liquid fuel? Is that what your --

1 MS. PETTIT: That is certainly one of them; but
2 that actually wasn't what I was referring to.

3 JUDGE KATSAS: Okay. So --

4 MS. PETTIT: So, what I was referring to was
5 Congress, when Congress has dealt with electric vehicles,
6 again, it has rejected a mandate four times in the last five
7 years. Instead, it has, it has picked other options. It
8 has created a tax credit in 26 U.S., in 26 U.S.C. 30(d). It
9 has created demonstration projects in 42 U.S.C. 13281 and it
10 has allowed for the development of infrastructure to permit
11 their growth. It has encouraged; it has not mandated; and
12 as the Supreme Court noted in the MCI case, the court and
13 the EPA is not just bound by Congress' ultimate or, or
14 desired policy choice, but by the methods that it chose to
15 use; and here, the Congress has never chosen to mandate and
16 it has never allowed (unintelligible), so --

17 JUDGE SRINIVASAN: Can I ask you for your view,
18 if, if a shift to electrics is -- no, let me put it the
19 other way. If it's technologically feasible to comply with
20 the new standards without shifting to electrics, but it just
21 costs a lot more to do it that way, would you agree that
22 that doesn't then tee up the major question that it has to
23 be technologically only achievable by going the electric
24 route?

25 MS. PETTIT: As long as it doesn't cross the line

1 of 202(a)(3)(A)(i), because there is a point where it has
2 become so costly that it's not feasible; and it goes back to
3 what I was talking with Judge Pan a few minutes ago where
4 they're just turning it into a public health statute instead
5 of one that balances. So, if it satisfies that, then it
6 wouldn't be a major question just for it to be less
7 expensive. It would be a, as in my friend's terms, the
8 compliance.

9 JUDGE SRINIVASAN: So, prohibitively costly?

10 MS. PETTIT: Prohibitively costly would, I think,
11 run afoul of that other provision because as this Court
12 noted in Energy Coalition, it's a balancing act.

13 JUDGE KATSAS: But if you just look at the statute
14 on its face and put aside major question, put aside
15 electrification, it seems like the focus of the statute is
16 on technical feasibility --

17 MS. PETTIT: Yes, Your Honor --

18 JUDGE KATSAS: -- provision you just read and the
19 one in (a)(1) about allowing time for the new technology to
20 be developed and such?

21 MS. PETTIT: The, the provisions that we were just
22 talking about because I've learned my lesson about trying to
23 interpret Your Honors' questions ahead of time, but, yes,
24 the, the provisions that we were just talking about are
25 talking about technological feasibility in a way very

1 similar to what the statute at issue in West Virginia
2 against EPA; and technological feasibility in that case was
3 not moving between major types of, between major sources of
4 electricity; and technological feasibility here isn't moving
5 to be major propulsion systems. We have a, I have a number
6 of arguments about the arbitrary and capricious issue, but I
7 am way over time. So, unless you have, unless you have
8 questions?

9 JUDGE SRINIVASAN: Okay. Thank you very much for
10 your argument. We'll hear from EPA now, Ms. Chen.

11 ORAL ARGUMENT OF SUE CHEN (DOJ), ESQ.

12 ON BEHALF OF THE RESPONDENT EPA

13 MS. CHEN: Good morning and may it please the
14 Court, Sue Chen for the United States. With me today are
15 Daniel Gurke (phonetic sp.) from the Justice Department and
16 David Orland (phonetic sp.) and Seth Nubaum (phonetic sp.).

17 To protect the public from harmful motor vehicle
18 emissions, Congress directed EPA to reduce emissions through
19 technology in 7521(a); and that's exactly what EPA did here.
20 Before, but before we can get to the statutory arguments,
21 I'd like to first address the threshold question. First,
22 looking at exhaustion of the time bar and then I'll speak
23 briefly as to zone of interest.

24 Petitioners waive all their statutory arguments
25 for three reasons. First, they failed to raise these issues

1 with reasonable specificity as required by 7607(e). Second,
2 the regulatory elements that Petitioners object to were in
3 established in a 2010 rule; and so, the challenge is time-
4 barred; and, finally, EPA expressly said that it was not
5 reopening these elements.

6 The Court should strictly enforce 7607(d)'s
7 mandatory exhaustion rule and hold that Petitioners waive
8 their statutory arguments for failure to exhaust. In
9 response to our exhaustion argument, the Fuel reply brief at
10 page 9 offers three snippets from the record where they
11 supposedly raise these issues; but those three snippets are
12 just vague references to EPA's authority in the context of
13 other, discussions about other issues. So, the best example
14 they offer, and it's not very good, is JA-642, which is a
15 discussion about the Energy Independence and Security Act
16 and the renewable fuel standards; and the commenter notes
17 EPA's authority to set standards under 7521(a)(1); but then
18 says that EPA's encouragement of zero emission vehicles at
19 the expense of internal combustion vehicles is an overreach
20 of authority inconsistent with statutory design of the Clean
21 Air Act.

22 JUDGE SRINIVASAN: So, I might, I might quibble
23 with you a little bit on which one is the best. It may be
24 that the trading one at least speaks a little more
25 specifically; but if we just for, for present purposes at

1 least, if we put aside reasonable specificity, I think they
2 seem to be placing the principle focus not on the fact that,
3 yeah, we did it by, with reasonable specificity; but that we
4 didn't need to do it at all because this is a
5 presupposition. This is the kind of presupposition that the
6 Agency just has to address every time.

7 MS. CHEN: So, they're relying on --

8 JUDGE SRINIVASAN: The key assumption.

9 MS. CHEN: Yeah, they're relying on key
10 assumptions doctrine.

11 JUDGE SRINIVASAN: Uh-huh.

12 MS. CHEN: And that doctrine has been displaced
13 here by the Supreme Court's 2016 decision in Ross v. Blake,
14 which held that mandatory exhaustion statutes are mandatory
15 and there's no room for judicial discretion. This Court
16 then applied Ross in funding the USDA and held that when a
17 statute imposes a mandatory exhaustion rule, courts can
18 excuse the failure to exhaust no matter the reason. And so,
19 we ask that you follow Ross and Fleming, and apply 7607(d)'s
20 exhaustion rule as written, which recognizes no exception
21 for key assumptions. But it --

22 JUDGE SRINIVASAN: So, suppose there is, suppose
23 there is, I know, I know, I'm familiar with that line of
24 cases, but suppose, yes, for obvious reasons; but suppose
25 that the key assumption doctrine subsists, it persists,

1 what's your answer to their argument? I'm not saying it
2 necessarily does; but just for purposes --

3 MS. CHEN: Sure.

4 JUDGE SRINIVASAN: -- of fleshing out the
5 principle focus of their submission as I understand it.

6 MS. CHEN: So, the statutory issues that they're
7 raising are not the assumptions in the context of this rule.
8 This is a well-established regulatory framework that EPA has
9 used in every single vehicle greenhouse gas rule; and EPA
10 specifically said it was not reopening those structural
11 elements. So, it can't be that every time the Agency
12 tightens its standards, that somehow reopens the, the, the
13 fundamental structure to, to challenge. That would deny
14 automakers the predictability they need to be able to run
15 their businesses.

16 JUDGE SRINIVASAN: Why, so your argument is that
17 you're, you're, then you're melding together the fact that
18 it's happened before with key assumptions?

19 MS. CHEN: Many times, many times.

20 JUDGE SRINIVASAN: Yeah, with, with once, or a
21 million times, I'm just saying that there's, that, that
22 you're making that into key assumptions; and where I, I
23 haven't seen that done before. I mean they're, I'm not
24 saying that there's not a reason to do that, or that doesn't
25 make sense. I'm just saying that that seems like something

1 -- I don't recall a key assumption case, there's not that
2 many of them --

3 MS. CHEN: Right.

4 JUDGE SRINIVASAN: -- and I don't really recall a
5 key assumption case that specifically treats this question
6 of what happens in a situation in which the rules actually
7 come up a few times already with the same features baked
8 into it, does --

9 MS. CHEN: So --

10 JUDGE SRINIVASAN: -- you need to still have to
11 redo the key assumption every single time; and your answer
12 is --

13 MS. CHEN: So --

14 JUDGE SRINIVASAN: -- no?

15 MS. CHEN: Right, especially when EPA specifically
16 said it was not reopening these elements. And I think a
17 helpful case might be Hispanic Affairs Project v. Acosta.
18 This is 901 F.3d 378, which was decided in 2018; and there
19 the, the key assumption, there was a key assumption, but the
20 court was stressing that this was the first time that the
21 Agency had made that assumption in this -- well, it was the
22 first time that EPA, or Agency was regulating in that area;
23 and so, there was no prior regulatory source to be found for
24 that authority. And so, I think it is, it is important that
25 this is not the first time that the Agency (unintelligible).

1 JUDGE SRINIVASAN: But what if it was the first
2 time? I take that point. I think I understand that
3 submission that key assumption works differently. It,
4 essentially, gets turned off when this is a repeated
5 exercise, but do you have --

6 MS. CHEN: I think we would have a weaker
7 argument.

8 JUDGE SRINIVASAN: Uh-huh.

9 JUDGE KATSAS: Can I ask you to focus on the, just
10 the major question piece?

11 MS. CHEN: Sure.

12 JUDGE KATSAS: So, for preservation. So, suppose
13 they say, the argument they make is lack of statutory
14 authority for this rule to force electrification. Without
15 the major question overlay, the question would be whether
16 the statute contains authority with the major question
17 overlay, the question is whether the statute contains clear
18 authority. They don't specifically mention major question.
19 Is that a forfeiture of the major question point?

20 MS. CHEN: We don't think --

21 JUDGE KATSAS: Or is it just, is that just kind of
22 like a standard of review that's encompassed in the
23 statutory question?

24 MS. CHEN: So, I think the major questions
25 doctrine is a principle of statutory interpretation; and

1 they don't need to say the word major questions doctrine in
2 their comments. What they do need to do is to present the
3 underlying interpretative issues that they're now raising in
4 court and they haven't done that.

5 JUDGE KATSAS: And you think that they, I get the
6 point about averaging and trading, and stuff. You don't
7 think it was fairly preserved in this record, the argument
8 that EPA lacks statutory authority to force electrification?

9 MS. CHEN: No, they didn't say anything about
10 forcing electrification at all. There's nothing about
11 averaging in EVs is somehow, somehow means that this was now
12 an effective EV mandate. We don't have any of that.

13 JUDGE SRINIVASAN: But you, you do make the
14 argument, I thought, in your brief, and maybe you can point
15 me to it or disabuse me of this, this impression, but I
16 thought you do make the argument that there was an
17 independent requirement to preserve, whether you call it
18 major questions or not, there was an independent requirement
19 to preserve the argument that we're now calling major
20 questions in the rulemaking process and that wasn't abided
21 by?

22 MS. CHEN: The, they needed to raise these
23 particular interpretative questions.

24 JUDGE SRINIVASAN: Right, but not, not just that
25 they needed to, not just that they needed to address

1 averaging and electrification, but that they needed to
2 address major questions; in other words, the need, that
3 because of the degree to which it's been done here or
4 whether you call it a difference in degree or difference in
5 kind, what's happening here is something that's so
6 significant that it kicks into play, it brings into play
7 this doctrine to the effect that there has to be a specially
8 clear authorization to do it.

9 MS. CHEN: I, I don't think they needed to say
10 this is major questions because of X, Y, Z. They do need to
11 preserve the underlying legal and factual predicates of the
12 arguments that they're now making, including that the
13 statute doesn't allow EPA to do averaging; and the statute
14 doesn't allow EPA to include EVs; and that this, EV
15 standards are so strict that they basically force the use of
16 EVs. Those are the things that they should have raised in
17 comments.

18 JUDGE PAN: I'm sorry, you're --

19 JUDGE SRINIVASAN: But I thought that --

20 JUDGE PAN: -- conceding, I'm sorry. You're
21 conceding that they didn't have to exhaust the major
22 questions issue?

23 MS. CHEN: They didn't have to say major questions
24 doctrine.

25 JUDGE SRINIVASAN: Well, they don't have to use

1 the words --

2 MS. CHEN: Right.

3 JUDGE SRINIVASAN: -- but is that all you're
4 saying because I'm just reading from your brief. This is
5 page 39 of your brief. Let me make sure I got the brief in
6 the right case. Yeah, okay. So, I, I think it's, that
7 there's two cases here that can run together at one time.
8 Petitioners also failed to articulate their view that the
9 level of projected electrification and indirect effects on
10 the economy triggers the major questions doctrine.

11 MS. CHEN: So, I think we meant to say that they
12 didn't say that the, because their argument is the major
13 question argument they're making is that it's a major
14 question because this is (unintelligible) and they didn't
15 say in comments that the level of, or the stringency of the
16 standards means this is an (unintelligible), not that this
17 triggers a major questions doctrine.

18 JUDGE PAN: So, why do you think they don't need
19 to raise major questions specifically because that would put
20 the Agency on notice, but they need to address that?

21 MS. CHEN: Because major questions doctrine is a
22 principle of statutory interpretation. I don't think they
23 needed to raise that in comments; and, certainly, when they
24 raise interpretative issues, that is an issue of statutory
25 interpretation that the Agency would (unintelligible); and

1 so, we're focused on giving the Agency the opportunity to
2 deal with these particular interpretative issues at the
3 comments stage rather than, you know, what this means on, on
4 the major questions.

5 JUDGE SRINIVASAN: So, you, you're, you're, you're
6 just saying you're fine that you may not have known that you
7 needed to point to particularly clear statutory authority,
8 that doesn't matter?

9 MS. CHEN: We don't think they needed to raise the
10 major questions issue, right.

11 JUDGE SRINIVASAN: Okay. All right. And can I
12 ask you on, although I don't want to shift precipitously
13 away from the threshold questions, on, on the, on the
14 ultimate, the substantive questions that are before us, do
15 you agree that the EPA rule practically mandates use of,
16 practically mandates electrification --

17 MS. CHEN: No.

18 JUDGE SRINIVASAN: -- do you agree with that?

19 MS. CHEN: No, because there are, in fact,
20 internal combustion vehicles that can meet the standard
21 about EV. As Judge Pan points out, there's Subaru. So,
22 there is no, so the standards do not, in effect, mandate
23 anyone. Now automakers who want to use EVs because they
24 provide a cheaper compliance pack, but that's not the same
25 thing as a mandate.

1 JUDGE KATSAS: The, the, the rule doesn't mandate
2 on its face --

3 MS. CHEN: Right.

4 JUDGE KATSAS: -- but is it technologically
5 feasible to meet these standards without electrifying?

6 MS. CHEN: Yes. And Subaru is the evidence of
7 that.

8 JUDGE SRINIVASAN: And you don't think that, you
9 think anybody can be a Subaru?

10 MS. CHEN: We think that, we think this just, this
11 shows that there are internal combustion vehicles that can
12 meet the standard. Whether people want to do that, whether
13 people want to be Subaru is a whole separate issue.

14 JUDGE SRINIVASAN: Okay. So, I mean it seems to
15 me that you heard all, both arguments on the other side. It
16 seems to me there's a fundamental disagreement on whether
17 the rule as a matter of technological feasibility requires
18 electrification?

19 MS. CHEN: And this is why it was important for
20 Petitioners to have raised this issue before the Agency.
21 The Agency could have looked at its' modeling and crunched
22 the numbers, and given us a definitive answer one way or
23 another, but they haven't; and so, the Court shouldn't draw
24 any, a favorable inference based on the absence of this
25 clear analysis in their favor.

1 JUDGE SRINIVASAN: Do, do you think that the case
2 would look different if the only technologically feasible
3 way to comply with the standards were to go down the
4 electrification route? You can see that that would be a
5 major question; that that, it would pose --

6 MS. CHEN: No.

7 JUDGE SRINIVASAN: -- a major question? You
8 don't?

9 MS. CHEN: No. So, let me answer, so, so, in
10 answer to your question, the case could look different in
11 that if this, if you agree with us that this rule were not
12 an effective EV mandate, then I think you have an easier
13 path at saying Petitioner's whole argument is predicated on
14 this being an EV mandate; it's not, so we don't need to
15 resolve other issues.

16 If you think that this were an EV mandate, it's
17 still not a major question because the major questions
18 doctrine, as I said, is a principle of statutory
19 interpretation. So, the major, the, the major question
20 inquiry here is not whether EPA can set standards to enforce
21 EVs. That's not a question of statutory interpretation.
22 The relevant interpretative questions here are whether EPA
23 can consider all feasible technologies when setting
24 standards; whether it can set standards using averaging;
25 whether it can define classes to include EVs; and none of

1 these questions qualifies as major because these are things
2 that EPA has been doing for years. So, there's no transform
3 to claim of new authority.

4 JUDGE SRINIVASAN: But once -- go ahead.

5 JUDGE KATSAS: Suppose EPA did set a standard
6 under which the only technologically, technologically
7 feasible means of compliance is a hundred percent
8 electrification, do you assert that power?

9 MS. CHEN: You mean right --

10 JUDGE KATSAS: Would that be consistent with the
11 statute on your view?

12 MS. CHEN: Yes, because I think we need to draw a
13 distinction between having authority to do something versus
14 using the authority in a reasonable way.

15 JUDGE KATSAS: I understand.

16 MS. CHEN: And the statute --

17 JUDGE KATSAS: There might be arbitrary and
18 capricious challenges, but your, your theory would support a
19 hundred percent electrification rule, mandatory in the sense
20 that that's the only technologically feasible means of
21 compliance?

22 MS. CHEN: So, I think that would come about if
23 EPA were to set its standards at zero; and that's assuming -
24 -

25 JUDGE KATSAS: A standard, sorry?

1 MS. CHEN: At zero. And that's assuming that
2 there are no technologies like carbon capture that could be
3 installed on internal combustion vehicles. And in that, so
4 then the question is, does EPA have authority to set
5 standards at zero; and the answer is, yes, because 7521(a) -
6 -

7 JUDGE KATSAS: If, if the --

8 MS. CHEN: -- authorizes --

9 JUDGE KATSAS: -- if they did set it at zero,
10 would that trigger the major question doctrine?

11 MS. CHEN: No, because, I mean, let me just go
12 back and, and, and clarify.

13 JUDGE KATSAS: Okay.

14 MS. CHEN: The answer is still no, but when it
15 comes to a zero-emission standard, of course, EPA has to
16 have the record to support that standard. Now I think your
17 hypothetical posit is whether EPA could, in theory, reset a
18 standard that we might see right now as extreme on this
19 record; but that's not enough to trigger the major questions
20 doctrine because you can always imagine some extreme use of
21 any regulatory reporting. So, for example, the Clean Air
22 Act authorizes EPA to set national ambient air quality
23 standards; and with the right hypothetical record, those
24 standards could be zero; but no one --

25 JUDGE KATSAS: I mean why is it extreme on, on

1 your theory? Your, your theory is that electricity is just
2 another kind of technology. It's like thinking about a
3 catalytic --

4 MS. CHEN: Right.

5 JUDGE KATSAS: -- converter or something.

6 MS. CHEN: I'm not saying it's extreme in general;
7 I'm saying it might look extreme at this point. In other
8 words, this is why I assume we're talking about a
9 hypothetical; but if EPA, when, whatever standards EPA sets,
10 it has to be supported by the record at that point. So --

11 JUDGE KATSAS: I mean it's going to be easy to
12 support, the electric vehicles are so much more efficient
13 you say; electric vehicles are technologically feasible. If
14 you electrify to a hundred percent, you can get, I don't
15 know what the number is, a hundred miles per gallon
16 standard, whatever it is. You set the, you, you say the
17 scheme, the only standard on the face of the statute is
18 technological feasibility, and there you go.

19 MS. CHEN: That would still not trigger the major
20 questions doctrine because, again, the question is not about
21 whether EPA can set zero standard. You have to frame it in
22 statutory requirements. And the, the question, so, the
23 question is, can EPA set a standard that considers all
24 feasible technologies, which it would have to be, which it
25 would have to do no matter what standard.

1 JUDGE SRINIVASAN: Can you just make sure you
2 point the mike so you --

3 MS. CHEN: All right.

4 JUDGE SRINIVASAN: Yeah. Yeah.

5 MS. CHEN: Is this better?

6 JUDGE SRINIVASAN: I think, I think it will be.
7 Let me just make sure I'm understanding where we are in the
8 argument. So, as a matter of the argument's architecture,
9 this exchange is assuming that we're past an off-ramp that's
10 a different one, which is that we're not even talking about
11 mandating, as a practical matter, electrification at all in
12 this rule because this rule just doesn't do that.

13 MS. CHEN: Right.

14 JUDGE SRINIVASAN: And so, we're going to have to
15 engage with the question of whether we would, in theory,
16 have the capacity to mandate at 200 percent?

17 MS. CHEN: Uh-huh.

18 JUDGE SRINIVASAN: But if you go down that road,
19 then I guess I have the same question --

20 JUDGE KATSAS: Was --

21 JUDGE SRINIVASAN: Well, go ahead.

22 JUDGE KATSAS: -- meaning just put aside the
23 question --

24 JUDGE SRINIVASAN: Yeah.

25 JUDGE KATSAS: -- what this rule does and ask

1 about the logic of the --

2 JUDGE SRINIVASAN: Assertion of power.

3 JUDGE KATSAS: -- position, right.

4 MS. CHEN: Of potentially setting a zero-emission
5 standard.

6 JUDGE PAN: So, wouldn't --

7 MS. CHEN: But --

8 JUDGE PAN: -- 42 U.S.C. 7521(a)(2) come into play
9 because that says that the standard shall take effect after
10 such period as the administrator finds necessary to permit
11 the development and application of the records of
12 technology, giving appropriate consideration to the cost of
13 compliance within such period?

14 MS. CHEN: Right. These are built-in guardrails
15 for EPA's authority in (a)(1) to set standards at the level
16 --

17 JUDGE PAN: So, if the EPA followed all of the
18 statutory directives and guardrails, it could theoretically
19 set a standard that meets these requirements?

20 MS. CHEN: Exactly, and the fact that it could set
21 the standard to zero doesn't trigger the major questions
22 doctrine because, again, there are lots of standards that
23 agencies can set and it, and they, in theory, could all be
24 set to zero. It doesn't mean that all those issues are
25 major questions because major questions doctrine is limited

1 to extraordinary caselaw, not every time an agency sets its
2 standard.

3 JUDGE SRINIVASAN: Right. It depends on what the
4 standard does and I, and I'm just, if EPA just announces
5 there shall be no more gas-powered vehicles, all vehicles
6 from year 2026 on have to be electric vehicles?

7 MS. CHEN: That would not, that --

8 JUDGE SRINIVASAN: That sounds kind of major just
9 as a --

10 JUDGE KATSAS: Yeah, you think that might not be a
11 big deal --

12 JUDGE SRINIVASAN: -- restrictive matter --

13 MS. CHEN: Right, but again, the major questions
14 inquiry is not about particular outcomes. It's about
15 statutory questions; and so, the statutory question is, can
16 EPA when it's setting standards consider all feasible
17 technologies? And as Judge Pan points out, if it's
18 feasible, then that is the authority that Congress gave EPA
19 to act.

20 JUDGE KATSAS: You, you do need, I'll, I'll give
21 you, you do need some element of novelty; but I mean a big
22 part of the major questions doctrine is the economic and
23 political significance of the power asserted; and that seems
24 easily satisfied.

25 MS. CHEN: But, again, the major questions

1 doctrine does not revolve around particular outcomes. You
2 have to look at the statutory questions.

3 JUDGE KATSAS: If you look at the scope of the
4 power asserted, and I mean it --

5 MS. CHEN: Those are the powers --

6 JUDGE KATSAS: -- may be that you have that power,
7 but that's an application of the doctrine, not a reason for
8 treating --

9 MS. CHEN: And the scope --

10 JUDGE KATSAS: -- of a hundred percent
11 electrification mandate is just another standard.

12 MS. CHEN: And the scope of the power asserted is
13 the ability to set standards. And I think especially in
14 this case when you're looking at potential collateral
15 consequences, and Congress intended for and designed these
16 standards to have collateral consequences on things like
17 fleet make-up and supply chains; and so, that's just the
18 nature of standards that push for technological innovation
19 and adoption in something as ubiquitous as motor vehicles.
20 So, you know, the fact that EPA's standards and have effects
21 on other things is not a reason to think that EPA acted
22 beyond what Congress could reasonably be expected to have --

23 JUDGE SRINIVASAN: And, and, and the, the other
24 side has invoked West Virginia.

25 MS. CHEN: Yeah.

1 JUDGE SRINIVASAN: And so, in the hypothetical
2 situation after you've gotten past the fact that under your
3 view this case does not involve a mandate at all, but if
4 we're in mandate land, then in a hypothetical situation in
5 which the mandate is a hundred percent, that it's just,
6 we're not doing gas vehicles anymore, gas-powered vehicles
7 anymore, we're only going to do EVs; and the argument from
8 the other side, of course, is going to be, well, that's West
9 Virginia (unintelligible) because that wasn't a complete
10 shift, it was just saying you shift from 36, 27 to 36, or
11 something. I can't remember the exact numbers, but you
12 shift in some measure. We're talking about a complete
13 shift. And I guess the difference at that point is just
14 what you define as the relevant denominator. Is it motor
15 vehicles or is it motor vehicles that are gas-powered?

16 MS. CHEN: And it's motor vehicles. I mean the
17 big difference between this case and West Virginia is that
18 Congress set a completely different regulatory scheme here.
19 So, the problem in West Virginia was that EPA had no
20 authority to regulate renewable (unintelligible); and so,
21 when the Clean Power Plan was shifting electricity
22 production from coal plants, which is a regulated source, to
23 renewable plants, that completely changed the regulatory
24 scheme which was to reduce emissions at regulated sources
25 and not to shift away from it.

1 Here, 7521(a) authorizes EPA to regulate motor
2 vehicles, and they're defined functionally without regard to
3 their propulsion source. And motor vehicles are the only
4 sources that we're talking about here. So, in other words,
5 we start off with motor vehicles. Thanks to the rule, we
6 end up with motor vehicles that have emission controls on
7 it. And that is EPA acting within the heart of the
8 regulatory scheme that Congress set up whereas to reduce
9 harmful emissions by putting emission controls on motor
10 vehicles.

11 JUDGE SRINIVASAN: So, you think the analog to, I
12 think the baseline in West Virginia was power plants, right,
13 and the idea was, well, if you're shifting from coal to a
14 different kind of source, then that's a shift that is major.
15 And you would say the relevant baseline here is modes of
16 transportation. So, it would be shifting from cars to
17 bikes?

18 MS. CHEN: Yes. That would be, that would be the

19 --

20 JUDGE SRINIVASAN: But as long as you're within
21 the, the scheme of cars --

22 MS. CHEN: Right.

23 JUDGE SRINIVASAN: -- or not just cars --

24 MS. CHEN: Right, because --

25 JUDGE SRINIVASAN: -- it's motor vehicles, yeah,

1 right, because --

2 MS. CHEN: Right, because --

3 JUDGE SRINIVASAN: -- now we're past vehicles.

4 MS. CHEN: -- so, this idea of shifting from gas
5 cars to electric cars, I think that draws a false
6 distinction between these two types of vehicles; and it's
7 one that 7521(a) does not recognize because, remember, it
8 talks about motor vehicles. So, the shift from electric to
9 gas is not relevant as a legal matter under 7521.

10 JUDGE SRINIVASAN: Okay. Can I, can I just, if
11 that, can I, can I bring us back to non-mandate land because
12 the first fork in the road is between mandate and non-
13 mandate. And, and then, then you think this is a non-
14 mandate case; and, and in the non-mandate world, is there a
15 difference between a situation in which the Agency thinks
16 it's technologically feasible to comply without shifting to
17 electricals, without electrification? It's still
18 technologically feasible to do it through traditional
19 engines, do that; but the Agency is actually not agnostic as
20 between those two possibilities. It actually wants to bring
21 about a shift towards electrification? Do you see a
22 difference between, though, what the Agency wants to do
23 because some of the statements that have been pointed to
24 that are outside of the role itself, but that are officials,
25 various officials commenting on the result of the rule point

1 to a desire, a hope, an aspiration act by the rule that this
2 is going to, this is going to engender a shift? And that
3 seems different to me, I mean conceptually, there's a
4 distinction between that and, yeah, it could, and it could
5 be a shift; but the Agency quiet, just easier, is agnostic
6 as to, as between those?

7 MS. CHEN: Is agnostic as between specific
8 technologies; but when tightening standards, of course, EPA
9 is pushing for automakers to use more emission control
10 technologies, period; and, of course, that includes
11 electrification. Now if the shift means that automakers are
12 going to use better and more efficient emission controls,
13 that's great; but at the end of the day what EPA is worried
14 about is automakers meeting their fleet average standards
15 and however they could.

16 JUDGE SRINIVASAN: So, then how do you, the, I, we
17 were looking for the various statements in the rule itself.
18 If we disregard statements outside the rule, we look at the
19 rule itself. So, there, there was a statement on page 60 of
20 the Joint Appendix, the third column, 74493 of Volume 86 of
21 the Federal Register. Compliance with the final standards
22 will necessitate greater implementation of pace of
23 technology, penetration through FY 2026, using
24 (unintelligible) reduction technologies, including further
25 deployment of EV and PHEV technologies.

1 MS. CHEN: Right. And that, that's just saying
2 the standards have gotten tighter; more technologies will be
3 used; those technologies include electrical. It's not a
4 mandate to specifically use more electrification.

5 JUDGE SRINIVASAN: And it's not a recognition, you
6 don't think, that the only way to comply is through at least
7 some use of electrification?

8 MS. CHEN: Right. It, it just notes that there
9 are, that electrification is an option.

10 JUDGE SRINIVASAN: People might make that choice -
11 -

12 MS. CHEN: Automakers may --

13 JUDGE SRINIVASAN: -- and then, and actually you,
14 you're predicting -- I mean you don't deny that the
15 prediction definitely is that more, more manufacturers will
16 make that choice under the rule than without it?

17 MS. CHEN: That is the penetration analysis, yes;
18 but that might not --

19 JUDGE KATSAS: Now I'm not sure we should be
20 reading statements in the preamble as if they were statutory
21 text, but let me do that for a minute. I read it very
22 differently and I, I was surprised by your answer that this
23 is not a mandate because it says, "Compliance will
24 necessitate technology penetration, including further
25 deployment of electrification."

1 MS. CHEN: Right. So, there are other kinds of
2 emission control technologies that are on the table.

3 JUDGE KATSAS: Electrification is included in the
4 technology penetration that will be necessitated --

5 MS. CHEN: Right.

6 JUDGE KATSAS: -- by compliance?

7 MS. CHEN: Well, it's --

8 JUDGE KATSAS: It seems like the, the most natural
9 reading of this by far is the standards will force
10 technological change and that part of it is unexceptional;
11 but one part of that change will be electrification.

12 MS. CHEN: Right, because electrification is one
13 of the emission control technologies that can be used for
14 automakers to comply with the standard. It's not the only
15 one that can be used. What EPA is mandating with this rule,
16 in effect, is more emission control technologies. It's
17 agnostic as to what kind it is.

18 JUDGE SRINIVASAN: In other words, when it says
19 including electrification, in your view what it's saying is,
20 that's likely going to happen. Well, our tables are
21 predicting that it's going to happen.

22 MS. CHEN: Sure, because that's --

23 JUDGE SRINIVASAN: But it's not the only way that
24 it can happen?

25 MS. CHEN: That's right. That's exactly right.

1 JUDGE PAN: Is there anything that precludes the
2 EPA from contemplating penetration that includes
3 electrification because it seems that it would be very
4 artificial to try to set a standard to avoid electrification
5 in order to not spark a major questions challenge, which I
6 think is the bottom line of what your friend on the other
7 side is suggesting, that the EPA --

8 MS. CHEN: Right.

9 JUDGE PAN: -- must avoid electrification because
10 any kind of requirement of electrification would spark a
11 major question?

12 MS. CHEN: Right.

13 JUDGE PAN: I, I don't see any support for the
14 idea that the EPA cannot consider, or even require, some
15 amount of electrification. It could be on an extreme level
16 we might be getting into a major question land; but in just
17 setting a run of the mind emission standard and expecting
18 that to mandate some electrification, that doesn't seem to
19 fall outside of what the statute requires, or does it?

20 MS. CHEN: Right. Right. And, in fact, (a)(2)
21 directs EPA to consider feasibility, basically, of the
22 requisite technology; and there's no carveout for
23 electrification. I must want to just step back for a
24 second. The whole point of 7521(a) is for EPA to protect
25 the public by reducing motor vehicle emissions by using

1 technology. So, it would be really perverse to require EPA
2 to ignore electrification which is not only a very effective
3 technology, but also one that's embraced by automakers.

4 I do want to address the question about the
5 standards applying to these because I agree that is
6 important to the outcome. So, the regulatory scheme
7 revolves around motor vehicles; and 7550 defines motor
8 vehicles functionally, not based on emission level. It says
9 any self-propelled vehicle designed for transport on public
10 roads, and that includes EVs.

11 So, then you look at 7521(a), which applies the
12 standards to emissions from any class or classes of new
13 motor vehicles; and by using the words class and classes,
14 Congress is identifying the harmful emission as a problem
15 that occurs at the class level rather than the individual
16 vehicle level; and so, the standards apply to the class.
17 And if you keep reading (a)(1), the last sentence actually
18 says that. It says, such standards shall be applicable to
19 such vehicles, meaning motor vehicles, whether these
20 vehicles are designed as complete systems or incorporate
21 devices to prevent or control such pollution. So this, this
22 last sentence is saying that the standards apply to motor
23 vehicles with devices that prevent pollutant which perfectly
24 describes EVs.

25 JUDGE PAN: Could you indicate which statute that

1 was?

2 MS. CHEN: I'm sorry. This is 7521(a)(1), the
3 last sentence. So, this is sort of the language about
4 emission, standards applying to emissions from any
5 pollutant, from any class or classes, it's just the last
6 sentence of that provision. And our reading is in line with
7 the regulatory scheme which is to reduce emissions by
8 putting control on these (unintelligible), right, because
9 both EVs and internal combustion vehicles are motor vehicles
10 with emission controls on them. Electrification is a lot
11 more effective, but that's not a reason to disqualify them
12 or motor vehicles with that technology from the effort to
13 reduce motor vehicle emissions. And, in fact, to exclude
14 EVs from the standards would deprive automakers of a really
15 effective and a cheaper way to comply; but it would also
16 create this absurd outcome where automakers would be able to
17 us emission controls that are 99 percent effective, but not
18 100 percent effective, which is, again, contrary to
19 Congress' goal with 7521(a). And, of course, automakers who
20 produce the EVs are not here complaining about their product
21 being regulated.

22 And I do want to note that the Auto Alliance
23 Intervenors, they actually represent automakers who produce
24 something like 95 percent of new motor vehicles in the
25 United States and not just a few (unintelligible)

1 suggesting.

2 JUDGE SRINIVASAN: Let me make sure my colleagues
3 don't have additional questions for you at this time.

4 JUDGE PAN: I'm interested in the zone of
5 interests issue.

6 MS. CHEN: Sure. And if I could also get a word
7 in about the time bar? So, the zone of interest excludes
8 parties more likely to frustrate than further the statutory
9 objective; and here, 7521(a)'s objective is to use
10 technology to reduce emissions while giving due regard to
11 the burden on automakers. Petitioners want EPA to ignore
12 electrification and that would impede EPA's effort to
13 regulate emissions and automakers' ability to comply with
14 emission, with the emission standards.

15 As for Energy Future Coalition, that is a fuel
16 case, not a case dealing with (unintelligible) as such. And
17 as Delta Construction explained, the breadth of the zone of
18 interest varies by the provision at issue.

19 JUDGE SRINIVASAN: Do you want to make a word
20 about timeliness?

21 MS. CHEN: Sure. Yes. The time bar, as we said,
22 the disputed parts of EPA's program for greenhouse gas
23 standards were established in 2010. Petitioners missed
24 their jurisdictional 6-day deadline and because their
25 opening briefs don't argue that EPA reopened the 2010 rule

1 either actually or constructively, they have forfeited that
2 argument; and then on top of that, they have, in effect,
3 conceded our forfeiture argument by not disputing it in the
4 reply.

5 JUDGE SRINIVASAN: Okay. All right. Thank you,
6 counsel.

7 MS. CHEN: Thank you.

8 JUDGE SRINIVASAN: We'll hear from Respondent-
9 Intervenors counsel now, Mr. Donahue.

10 ORAL ARGUMENT OF SEAN DONAHUE, ESQ.

11 ON BEHALF OF THE RESPONDENT-INTERVENORS

12 MR. DONAHUE: Chief Judge Srinivasan, and may it
13 please the Court.

14 JUDGE SRINIVASAN: You might, you might need to
15 put the mike up, or the podium.

16 MR. DONAHUE: If you want to hear me.

17 JUDGE SRINIVASAN: Yeah.

18 MR. DONAHUE: How is that?

19 JUDGE SRINIVASAN: Better.

20 MR. DONAHUE: Better? So, on exhaustion, I mean
21 we submit there's just a complete failure to exhaust any of
22 the arguments, statutory, factual arguments about the grid.
23 The Clean Air Act, 7607(d)(7)(B) is quite explicit. As this
24 Court has said, it enforces it strictly for good reason and
25 these arguments are just, were not raised. The, the

1 reply brief does its best to point to comments and none of
2 them comes close. There's no mention of averaging, for
3 example; and I would cite a case on key assumptions, the
4 Utility Air Regulatory Group case, 744 F.3d 748, n. 4, where
5 the court kind of said there's been a more basic failure to
6 identify like the key assumption of what. There's no, there
7 was no comment that said you can't do averaging in the
8 context of greenhouses gases, but then failed to elaborate.
9 There's nothing. There's a total void.

10 My clients have to comply with this provision.
11 It's, it's, it's important. It's not just a kind of empty
12 formality and this argument shows why it's important because
13 there's been a lot of argument about what is the actual
14 impact of this rule, how far does it go in creating
15 incentives or going further with electrification, and all
16 kinds of arguments. It's been treated that somehow
17 established that there's some kind of statutory bar against
18 some kind of electrification which I think is totally wrong;
19 but, but one reason that we're less sort of up-to-speed than
20 we would be is that, none of this stuff was raised before
21 the Agency. The next time EPA set standards, as Mr. Wallace
22 suggested, I am sure that people raised these arguments with
23 great detail; but it's, it's really not, not proper, not
24 fair to other parties, to the Agency, or to the Court itself
25 to go ahead and grapple with things this important that were

1 not raised at all.

2 JUDGE SRINIVASAN: Can I just stop you for a
3 second? I think I heard you say statutory bar against
4 electrification. I just want to make sure --

5 MR. DONAHUE: I --

6 JUDGE SRINIVASAN: -- you mean statutory mandate
7 for electrification?

8 MR. DONAHUE: No, I'm saying they say there's
9 something in the statute that says EPA --

10 JUDGE SRINIVASAN: Oh, I see.

11 MR. DONAHUE: -- has to somehow exclude one
12 technology that is sub silentio, even though it's the most
13 effective; and that leads to the next point I'd like to
14 make. We've used the term electrification a lot and, of
15 course, that's like a spectrum from power steering which
16 does reduce pollution, and things like stop/start
17 technology, those little batteries that turn off the car at
18 a stoplight and then, and then start it back up again; to
19 hybrids, various kinds of hybrids, including plug-in hybrids
20 that can operate on the battery all the time if you're, if
21 you plug them in enough; and then to battery electric
22 vehicles.

23 And so, just one point I'd make about that is,
24 first of all, it's important to try to figure out what the
25 petitioners are saying about where the line is. I don't

1 take them to say EPA can't rely on power steering or
2 hybrids, or even perhaps plug-in hybrids. It's got to use
3 gas, apparently. That's their, that's their rule. But it
4 is, it's a sort of an odd rule that has no basis, we think,
5 in the statute.

6 JUDGE SRINIVASAN: But I thought part of what
7 they're saying is that one group that you can consider
8 together is every group that the Agency itself says we
9 should treat as zero emitters; and that would include
10 hybrids --

11 MR. DONAHUE: Right, but --

12 JUDGE SRINIVASAN: -- even though in theory the
13 Agency could have done something different with hybrids, but
14 they didn't.

15 MR. DONAHUE: Well, this is the, this is the class
16 argument. I think there's, if I'm understanding the Court's
17 question, the statute says any class or classes, so it's
18 language that suggests some discretion for the Agency. The
19 Agency has never created a special class for any particular
20 sort of subcategory of emission-producing technologies,
21 including electric vehicles; and so, and we think that
22 automatically and, again, this is all unexhausted statutory
23 speculation that, that the Agency hasn't had a chance to
24 fully elaborate on; but the, the far better reading is that
25 EPA has it right, that you can include non-emitting

1 vehicles. And I think the text of, of Section 7521(a), that
2 second sentence of (a)(1) that talks about prevent,
3 preventing and controlling pollution, preventing pollution,
4 we think the natural reading is, and this is a Clean Air Act
5 theme, prevention. The Clean Air Act says where you can
6 actually prevent pollution instead of having to struggle
7 with capturing it and then storing it, that's better; that's
8 in the very first section of the Clean Air Act. 7401(c)
9 talks about that as, as directing the Federal Government to
10 focus on prevention where it can so that the idea that EPA
11 has to exclude these clean cars from the, the categories is
12 just a stretch. And then, of course, there's the fact that
13 Congress did define motor vehicle in a way that is agnostic
14 as between what powers the vehicle, which seems quite
15 significant.

16 JUDGE PAN: And is there another statutory
17 provision that allows the EPA to include EVs in the class?
18 I'm looking at 42 U.S.C. 7521(a)(3)(A)(ii), which says that
19 the EPA may designate classes based on gross vehicle weight,
20 horsepower, type of fuel used or other appropriate factors.

21 MR. DONAHUE: Yeah, I mean I think that attests to
22 the fact that Congress was okay with the EPA using these
23 functional categories. That's what the definition of motor
24 vehicle itself is. I note, as EPA's brief points out,
25 there's another provision that talks about, I think it's a

1 heavy-duty vehicles provision that does identify, does talk
2 about internal combustion engines. So, it's like a, stands
3 in contrast to, to this one. So, so, I think that when that
4 issue is properly preserved, that EPA should and will win
5 it; but it, it really precisely, because it's important, it
6 seems like a total failure to raise it before the Agency is
7 not excusable here. I mean it seems like at a commonsense
8 level, if it's really a major question, somebody would have
9 pointed it out, right? If, if major questions as it seems
10 to involve some certain amount of we know it when we see it,
11 the fact that nobody raised this in the very extensive
12 comment, public comment period was, is significant.

13 JUDGE SRINIVASAN: But I think part of their
14 argument is that it's, it's so major and it's such a
15 fundamental presupposition, that actually the exhaustion
16 principles don't matter because it becomes the key as to key
17 assumptions.

18 MR. DONAHUE: Right. And I, and I think, first of
19 all, I, I think I would point to that you are like, it might
20 not matter that nobody cited, you know, major questions and
21 terms, or cited Brown or Williamson, or any of the
22 particular cases; but there was must no, no one said,
23 apparently, no one has been able to identify anyone who said
24 you can't, you can consider electric vehicles, and you can
25 consider hybrids. Presumably, they, they don't seem to say

1 that hybrids are statutorily forbidden; but once you go from
2 a plug-in hybrid that's like mostly battery in practice to a
3 fully battery electric vehicle, all of a sudden it becomes
4 illegal. Nobody said that and, and it doesn't require sort
5 of parsing and a, and a bad faith reading of anyone's
6 comments to get there, just there's a void.

7 So, I'd also just like to certainly agree with Ms.
8 Chen about West Virginia. This is not like West Virginia.
9 This about making the regulated sources cleaner, which is
10 what West Virginia says EPA can do; and this is EPA using
11 the exact same methodology that it has used since the Clean
12 Air Act was, was enacted 50-plus years ago of us saying the,
13 the technologies that are out there, determining which ones
14 are feasible, cost-effective and then basing standards on a
15 realistic assumption of what -- and note that this isn't
16 even pushing to the limit of EPA's power as this Court has
17 recognized in a lot of the early cases under Clean Air Act,
18 Title II, which is technology enforcing, which is where EPA
19 says the technology isn't really quiet ready right now, but
20 we really need the public health benefits; and we think that
21 we can get there, the sort of direction of, of study is such
22 that these are all off-the-shelf, these are all on the road
23 now, the technologies that this rule is based on. And, and
24 that's doubtless why, coupled with the fact that they think
25 that this is where their business is going, the alliance,

1 with represents basically all auto manufacturers that sell
2 in the United States is supporting this rule and saying
3 things like on page 3 of their brief, the auto industry is
4 already rapidly deploying electric vehicles in their U.S.
5 sales fleet. Even apart from the final rule, there's
6 nothing, this is page 6, there's nothing unprecedented about
7 EPA's use of fleet-wide averaging banking and trading under
8 Section 202, not in setting standards that require greater
9 deployment of emission-reducing technologies such as
10 electric vehicles.

11 I think it's, it's, the idea that the, that the
12 Agency is, you know, overstepping is, is in significant
13 tension with the fact that the industry itself is saying
14 it's going to go faster than the Agency's given
15 requirements. Thank you very much.

16 JUDGE SRINIVASAN: If my colleagues don't have
17 questions for you, thank you, counsel. Mr. Wall, we'll give
18 you, start with five minutes for rebuttal.

19 REBUTTAL ARGUMENT OF JEFFREY B. WALL, ESQ.

20 ON BEHALF OF THE FUEL PETITIONERS

21 MR. WALL: Your Honors, I have to say I'm fairly
22 floored. I've been litigating this case for a year on the
23 belief that we were in mandate and I got that from the rule
24 because it says at page 5 of the JA, their standards are
25 achievable, I'm reading at the bottom of the second, the

1 middle column on JA-5. It says, they're achievable
2 primarily, not only, primarily through the application of
3 advanced gasoline vehicle technologies because, of course,
4 they'll still be 83 percent potentially gas vehicles
5 (unintelligible); but with a growing percentage of electric
6 vehicles. We project that the standards can be met with
7 gradually increasing sales from seven percent to 17 percent
8 of EV. In their brief, they had every opportunity to come
9 back and say, this is not about forced electrification; we
10 are not mandating a transition; you can do this only by
11 improving the efficiency of gasoline-powered vehicles.
12 There's not one word in their brief about that. The
13 automaker's brief --

14 JUDGE SRINIVASAN: Now, go, go ahead --

15 MR. WALL: I was going to say if Mr. Donahue had
16 read just the next sentence in the automaker's brief, it is
17 true that EPA's new standards will require greater
18 deployment of electric vehicles by full line vehicle
19 manufacturers. And I understand the Government to now turn
20 to Subaru. Judge Pan, there's not a word in their brief
21 about it. The Subaru comment letter is not even in the JA
22 in this case. They have never tried to say no, no one on
23 that side of the V in all the briefs in this case has tried
24 to say, no, no, no, this is still an option; it's just a
25 matter of cost; you can improve your gas-powered vehicles

1 and you can still manage to meet the standard. The rule
2 says, you can achieve it primarily through improving gas
3 engines; but it can be met, it says, by ramping up sales of
4 EVs. That is always been, if the Government now --

5 JUDGE SRINIVASAN: You know, I don't even
6 understand that statement, though, to do the work that
7 you're reading into it.

8 MR. WALL: Well, I --

9 JUDGE SRINIVASAN: Because it doesn't say can
10 only. It says it can be met; and, of course, it can be met.
11 I mean nobody denies that the projected percentage is going
12 to go up. The question is whether the percentage goes from
13 seven to 17 because that's the only way practically to
14 comply.

15 MR. WALL: Judge, Chief Judge Srinivasan, that is,
16 the way I understand this, and the way I have always
17 understood the other side not to, to fight, is that they put
18 so many zeroes in the standards for EVs that the only way to
19 comply with the standards they've set is to either make more
20 EVs or to buy credits from companies like Tesla that manage,
21 manufacturer EVs. If the Government's position is now that
22 the primarily should be an only, that it's achievable
23 through the application of advanced gasoline vehicle
24 technologies alone, that you can also choose to sell more
25 EVs, but you don't have to, that would be, that would be the

1 first time the Government has ever said that; and, frankly,
2 I'd like to see it in writing. I don't think the evidence
3 in the record could support that proposition.

4 JUDGE PAN: I, I hear their position to be that
5 they're allowed to require some electrification because it's
6 technologically feasible. They're just setting an emission
7 standard and is it technologically feasible; and one of the
8 aspects of that is electrification. And it seems that
9 there's nothing in the statute, and you can correct me if
10 I'm wrong, that says you can't consider electrification; and
11 even some mandatory electrification. We'd be maybe in a
12 different world if we had Judge Katsas' hypothetical where,
13 where, you know, zero emissions, everybody, a hundred
14 percent electrification is required; but if we're just
15 requiring, I guess my hypothetical to the State's Attorney,
16 you know, maybe it requires 1 percent or 2 percent
17 electrification, what's wrong with that?

18 MR. WALL: Judge Pan, I think the Government is
19 also making that argument, I just, I understood the
20 Government to be making both arguments this morning; and the
21 first argument is not supported by the record and does not
22 appear in their briefs. Now the second argument, I
23 absolutely grant they are saying we can require some
24 electrification if it's technologically feasible. Now,
25 first, I think that's clearly a major question and the

1 Government is quite candid about saying --

2 JUDGE PAN: But even 1 percent electrification
3 would be a major question in your case?

4 MR. WALL: If you force electrification, it
5 doesn't matter what the percentage was in West Virginia, if
6 you force electrification, that's a major question.

7 JUDGE PAN: So, you think they have to avoid
8 mandatory electrification; they have to set a standard that
9 is not going to rely in any way, shape or form on mandatory
10 electrification?

11 MR. WALL: Well, I don't think that I, that's what
12 the fact says. So, in 202(a)(1), it says, the administrator
13 can set standards applicable to the emission of any air
14 pollutant from any class or classes of new motor vehicles or
15 new motor vehicle engines which in his judgment cause or
16 contribute to air pollution; and the debate here between the
17 parties is do only some vehicles in the class have to cause
18 or contribute to air pollution in EPA's view; or is the
19 class defined by that in all of them do? And I take even
20 the Government to acknowledge that if we're right about our
21 statutory interpretation, they cannot feed EVs into the
22 standard and set the standard by considering EVs; and that's
23 what's so odd about this case.

24 JUDGE PAN: So, so, your position, I just want to
25 make sure I'm understanding you, is that the EPA in setting

1 emission standards to protect public health cannot consider
2 electric vehicles in the mix of classes of automobiles that
3 are being regulated?

4 MR. WALL: If it's --

5 JUDGE PAN: Cannot?

6 MR. WALL: If it says that those vehicles do not
7 emit the relevant pollutant, so it didn't say that for
8 hybrids; it said for strong and mild hybrids, those are
9 burning gas, so they do, and it put them in the class, and
10 we even challenge that here; but for the vehicles --

11 JUDGE PAN: I'm just trying to get the big picture
12 of your argument. You're saying EPA cannot consider
13 electric vehicles in regulating classes of vehicles; they
14 can't regulate electric vehicles; they can only regulate
15 combustion engine vehicles?

16 MR. WALL: If they say that the EVs do not emit
17 the relevant pollutant, they are not eligible to be included
18 in the class for which the administrator sets a standard.

19 JUDGE PAN: But what about the definition of --

20 MR. WALL: That's absolutely right.

21 JUDGE PAN: -- motor vehicle, which doesn't
22 exclude EVs, and these other statutory provisions that say
23 the classes can be defined by things like weight of the
24 vehicle?

25 MR. WALL: Well, I, I, look, the definition of

1 motor vehicle, like I agree, that's not doing any work here.
2 That's broad enough to cover any vehicle. What's doing the
3 work is that it tells you you have to have a class of be it
4 cars, or engines, that emits the relevant pollutant. You
5 get that class and you can set a standard for the class, and
6 then --

7 JUDGE PAN: So, does your argument then reduce to
8 interpretation of class or classes of vehicle, and an
9 insistence that it must invariably be read to exclude
10 electric vehicles?

11 MR. WALL: On our second argument on whether you
12 can force electrification, I take it both parties, that's
13 the argument, 202(a)(1), and how to read that class'
14 language. They, they say it's clear in their favor. We say
15 not clear enough to be a major question; and even if you
16 don't buy that overlay, we're right about the most natural
17 meaning. I think everybody agrees that's the question, the
18 second question; and then the first one is, can they average
19 it all? And, no, that doesn't depend on 202, that, 202(a).
20 That depends on other provisions in 202 and in Title II,
21 more generally, that indicate that what Congress had in mind
22 was you set these standards and then you determine whether
23 individual vehicles comply, nothing about --

24 JUDGE PAN: Does that really hamstring --

25 MR. WALL: -- averaging.

1 JUDGE PAN: -- the Agency? It's been given a task
2 by Congress to set emissions levels to protect public
3 health; and you're telling them they have to ignore the most
4 effective technology to, to set these standards at a level
5 that's, they do have to be technologically feasible and have
6 economic considerations; but you're hamstringing them,
7 aren't you, by saying that they cannot consider electric
8 vehicles?

9 MR. WALL: Judge Pan, I'm not; Congress is. And
10 the last time it looked at this most closely with respect to
11 the second case you'll hear this morning, it says to NHTSA,
12 unlike here, you can fleet-wide average, but you can't
13 consider electric vehicles.

14 JUDGE PAN: So, every time --

15 MR. WALL: And the same argument --

16 JUDGE PAN: -- I'm sorry, but every time they've
17 applied this exact same statute before, they have not read
18 it this way, and it hasn't been challenged.

19 MR. WALL: They have averaged and they have
20 allowed electrification as a compliance flexibility.

21 JUDGE PAN: And the classes of vehicles included
22 electric vehicles.

23 MR. WALL: They have folded them in, that's right;
24 but only in a way that was a compliance flexibility. You
25 could meet it other ways. And what's new about this, and

1 what squarely tees up the major question doctrine is they've
2 now asserted --

3 JUDGE SRINIVASAN: In fact, but apart from major
4 questions, I mean you can shift to major questions, but in
5 terms of the underlying statutory authority, you'd have the
6 same problem with what happened before?

7 MR. WALL: I, I, yes, I have run both with
8 averaging and with folding in EVs, but the reason it's, I
9 think it's sort of different for all of the threshold
10 purposes we've talked about earlier in major questions is,
11 before it was meant to be a shield for the industry; and now
12 they've, they've gone to a sword. It is now something that
13 forces the kind of transition that you saw in West Virginia
14 and --

15 JUDGE SRINIVASAN: So, that, that, there's
16 obviously a disagreement on that; and on that, you, you
17 read, you say that you're stunned because you've always
18 understood the case to be different. I'm just looking for
19 something in the, in the written record that tells me that
20 they viewed the case as you thought they viewed the case.

21 MR. WALL: So --

22 JUDGE SRINIVASAN: And is that the statement that
23 you identified?

24 MR. WALL: I mean --

25 JUDGE SRINIVASAN: Is that the best one? Even in

1 their brief, I mean I don't think they ever, as far as I
2 know in the brief, they don't actually agree with your
3 characterization.

4 MR. WALL: I think it's, it's a little bit like
5 the dog that didn't bark, I guess, Your Honor, which is in
6 the rule I take all this language, and I'll grant that like
7 it's very carefully phrased; but I take all of this
8 language, the most natural meaning to be my understanding
9 from my clients; and it, the automakers say at page 6 of
10 their brief, they are required to meet more, to make more
11 EVs or buy credits. That's the only way they can satisfy
12 the standard. And I wrote the rule that way; I didn't take
13 the other side to dispute it; and the first time I've heard
14 anybody say, no, no, you don't have to make more EVs or buy
15 credits in order to meet our standard was here in court this
16 morning; and it seems to me --

17 JUDGE SRINIVASAN: But I, I think even the word
18 require, it depends on, it could mean that we're required to
19 do it because that's by far the most cost-effective way to
20 do it, in respect, we're essentially required to do. It
21 just means, it just begs the question of what are we baking
22 into the context of being required, just like the \$1 less in
23 costs that we had a debate about that. And so --

24 MR. WALL: I --

25 JUDGE SRINIVASAN: -- I don't think that question

1 has ever been actually joined and addressed in any of the
2 materials.

3 MR. WALL: I mean we joined it in our opening
4 brief by saying you're forcing electrification. The time
5 for them to say that it wasn't true was in the
6 (unintelligible); but I look at the rule. I don't think
7 that's the right reading that you're giving to it, Judge
8 Srinivasan. When it says primarily achievable, but with a
9 growing percentage, we predict the standards can be, we, we
10 project that the standards can be met with gradually
11 increasing sale. The most natural meaning of that is that's
12 the only way you can satisfy the standard, not -- I mean if
13 they wanted to say it's achievable, not primarily, just
14 achievable with gasoline technologies, they could have said
15 it in the rule. I mean this rule was more aggressive
16 because of all the options they were considering, right, the
17 President issues the EO; and then they come out with a more
18 aggressive rule than anything the EPA had been considering
19 before. They say in the rule, I think this is at page 51,
20 that it drives electrification. They say at page 60 that it
21 necessitates greater deployment of technologies, including
22 EVs. I mean at every point the most natural reading of the
23 language is the one we've given it and I would have thought
24 that if anyone ever disagreed with that, they would have put
25 in the brief.

1 JUDGE SRINIVASAN: So, the, the, the table that
2 has Subaru at zero is also in the rule, right?

3 MR. WALL: Right.

4 JUDGE SRINIVASAN: It's in the -- so, I mean I
5 think the, the statements you, they would, can be judged
6 against the empirical stuff that's laid out in the rule, one
7 of which is a zero. I mean those, at least you would agree
8 that if your interpretation of the bottom of the middle
9 column of JA-5 to the top of the right column of JA-5 is
10 right, that's incompatible with what the rule itself says
11 about Subaru in the table?

12 MR. WALL: Well, I, so, I haven't studied Subaru
13 enough in the table to note -- and, obviously, the
14 Government never pointed --

15 JUDGE SRINIVASAN: Yeah.

16 MR. WALL: -- no one, so I, I, I can't stand here
17 and tell you that I know anything about Subaru, which is not
18 --

19 JUDGE SRINIVASAN: But in terms of the
20 representation that it's going to be at zero, that just
21 couldn't be possible. No manufacturer can be at zero.

22 MR. WALL: I, I, I'm not sure exactly what the
23 Agency meant by that, and I don't know how they ran the
24 numbers for Subaru. All I can tell you is if, if I have
25 always understood that to be their position; and I didn't

1 understand them to dispute it until today.

2 JUDGE SRINIVASAN: Uh-huh.

3 MR. WALL: I think as the case comes to the Court,
4 it should take it that way. If the Court thinks that
5 there's now some open question about that, then I think the
6 parties ought to have a chance to address it because I'd
7 like to see the evidence in the rule, not outside the rule,
8 but in the rule for (unintelligible) purposes, that the
9 Agency can point to to say, no, no, you don't need to
10 electrify in order to meet this. I, I, I have read, you
11 know, I've been over the rule multiple times; I don't see
12 anything like that in there; but at the end of the day, for
13 major questions purposes, the Government quite candidly says
14 we can move to 100 percent and it's not a major question.
15 With all respect, I disagree. You turn to the text.

16 I think it clearly says you can't include EVs in
17 the class and you can't average; but again, I don't need to
18 be right about that. All the Court has to say is 202(a)(1)
19 is not clear that you can set standards with respect to EVs.
20 If you want to do what you were doing with averaging and
21 compliance flexibilities, fair enough; but when you move to
22 a mandate, you've gone further than Congress would allow.
23 That's a decision for Congress unless it clearly vested in
24 the Agency. That's the way that we think the Court should
25 resolve the case.

1 JUDGE KATSAS: What do you do with the clause at
2 the end of (a)(1) which says that the vehicles or engines
3 that are subject to regulation include systems that
4 incorporate devices designed to prevent or control
5 pollution.

6 MR. WALL: I --

7 JUDGE KATSAS: If you, if, if you contrast prevent
8 with control, it seems like that's saying prevent, control
9 means drive down, prevent means to drive down to zero, that
10 tends to suggest that zero emitters can be in the relevant
11 class.

12 MR. WALL: So, I, I'm, I, I should have addressed
13 that, Judge Katsas. I appreciate the question. The first
14 thing to note is that the second sentence is a different
15 word from the first. The first tells you the class for the
16 --

17 JUDGE KATSAS: The second in (a)(1)?

18 MR. WALL: In (a)(1), exactly. So, it says, it
19 tells you how long the standards apply. It says the
20 standards apply for the useful life of the vehicle and
21 subsection D defines the useful life.

22 JUDGE KATSAS: Uh-huh.

23 MR. WALL: And so, it says the standards that are
24 set under the first sentence, they're in effect for the
25 useful life of the vehicle regardless of how the vehicle is

1 designed or, or manufactured. So, the second sentence isn't
2 expanding the class in the first sentence; it's just telling
3 you how long the regulations last. And then the second
4 thing I would say is when we say, Judge Katsas, vehicles and
5 engines designed as complete systems or incorporate devices
6 to prevent or control such pollution, that is a perfectly
7 natural way to talk about traditional vehicles that turn
8 liquid fuel and produce emissions. It is not at all a
9 natural way to talk about EVs. If I said that my iPod is
10 designed as a complete system to prevent or control record
11 skips, you'd say like, no, it's just a different kind of
12 technology. And it feels like we're having the West
13 Virginia debate all over again, you know? It's not that you
14 can't come up with some literal hyper-technical reading of
15 best system of emission reduction; it just says, ah, that's
16 a renewable fuel-powered plant; but it is not the most
17 natural reading of system or preventor control pollution in
18 the context of this provision.

19 JUDGE PAN: I'm sorry, you're saying this language
20 doesn't include electric vehicles' engines that are designed
21 or incorporate devices to prevent or control pollution?
22 That doesn't apply to electric vehicles?

23 MR. WALL: That's exactly what we're saying, Judge
24 Pan, as we said in our brief. That's dealing with
25 traditional vehicles and trying to design them to run

1 cleaner and emit less. And they want to say --

2 JUDGE PAN: I'm sorry, but why doesn't that apply
3 to electric vehicles? It just seems on its face that it
4 would.

5 MR. WALL: I, I, I just don't think that's
6 naturally the way we talk about something that doesn't emit
7 the pollutant in the first place. This is really natural
8 language for Congress to use when it wants to talk about
9 vehicles that emit the relevant pollutant, but are designed
10 in some way to try to prevent or control, or capture it; and
11 we know because it's following the first sentence and the
12 first sentence is talking about classes that emit the
13 relevant pollutant. So, what Congress has in mind are
14 polluting vehicles. When they come in and say --

15 JUDGE PAN: I'm sorry, but you don't think an EV
16 was designed to prevent pollution?

17 MR. WALL: I don't think within, no, that's, that
18 is what I mean. The text of this provision in context, if
19 you set aside my first argument to Judge Katsas, which is
20 this doesn't expand the relevant class at all; but if you
21 set that aside, no, in context it follows a sentence that
22 talks about setting standards for vehicles that emit
23 pollutants; and then it says, standards apply for the useful
24 life regardless of how they are designed to prevent or
25 control that pollution. It is not meant to capture vehicles

1 that in the EPA's view don't trigger the first sentence at
2 all, don't emit the relevant pollutant.

3 I'm not denying that just as in West Virginia you
4 can look at the words and try to give them some literal
5 reading; but that is not the most natural meaning in
6 context.

7 JUDGE SRINIVASAN: So, do you read prevent not to
8 mean prevent altogether?

9 MR. WALL: I, I, well, I read it to mean the
10 devices or the systems that are incorporated into the
11 vehicle are preventing the pollution, which is to say it's a
12 vehicle that would otherwise be producing the pollutant
13 absent that system; and here, what they have, which is
14 vehicles that they say don't emit the relevant pollutant in
15 the first place.

16 JUDGE KATSAS: So, I guess it would be odd to
17 speak of a bicycle as a vehicle that prevents or controls
18 pollution?

19 MR. WALL: I, I --

20 JUDGE KATSAS: Is that --

21 MR. WALL: -- I find it very weird; but I think on
22 their view, they would have to say that they could put
23 bicycles in the class because they can put things in that
24 don't emit pollutants.

25 JUDGE KATSAS: Well, I mean they're not, they're

1 not motor vehicles; so, this is just a --

2 MR. WALL: Yeah, but --

3 JUDGE KATSAS: -- linguistic point, not a
4 (unintelligible)?

5 MR. WALL: If you had a, if you had a motorized
6 bike, right, I think they would say that could fall within
7 both sentences. And now at that point, they might be
8 willing to say, ah, that's a major question because now
9 you've gotten into modes of transportation as opposed to
10 motor vehicles; and I would say, look, that's not a
11 distinction from West Virginia. West Virginia was
12 factories. Here it's motor vehicles. You can make the
13 factories run cleaner; you can't make them switch power
14 sources. I can put in cars for factories and the sentence,
15 as I just said, are equally true.

16 JUDGE SRINIVASAN: Okay. Thank you, counsel.
17 Thank you to all counsel. We'll take this case under
18 submission and well take a brief recess before we switch to
19 the next case.

20 (Whereupon, the proceedings were concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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