ARGUED SEPTEMBER 14, 2023
No. 22-1031 (and consolidated cases)

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF TEXAS, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

ADVANCED ENERGY UNITED, ET AL.,
Intervenors.

On Petition for Review from the United States Environmental Protection Agency
(No. EPA-HQ-OAR-2021-0208)

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Federal Rule of Appellate Procedure 27, private petitioners respectfully move this Court for leave to file a supplemental brief. EPA advanced the position for the first time at oral argument that the challenged emission standards do not operate as a de facto electric-vehicle mandate, and that the example of Subaru shows as much. Supplemental briefing is warranted to address those new arguments. *See, e.g.*, *Pharmaceutical Care Mgmt. Ass'n* v. *District of Columbia*, 613 F.3d 179, 187 (D.C. Cir. 2010) (addressing supplemental briefing requested after a party "took [a] position for the first time" "[a]t oral argument"). Private petitioners therefore request this Court's permission to submit a short brief addressing both the propriety and the merits of EPA's late-breaking argument. Private petitioners respectfully submit that a supplemental brief might assist the Court in deciding this case.

Counsel for private petitioners conferred with counsel for EPA, which does not consent to this motion and reserves taking a position until it has reviewed the proposed supplemental brief.

Private petitioners' proposed supplemental brief is attached.

SEPTEMBER 19, 2023

Respectfully submitted,

s/ Jeffrey B. Wall

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CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it is 173 words long.

The motion also complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it was prepared in 14-point font using a proportionally spaced typeface.

s/ Jeffrey B. Wall
JEFFREY B. WALL

SEPTEMBER 19, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of September, 2023, I electronically filed the foregoing motion with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

s/ Jeffrey B. Wall
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INTRODUCTION AND SUMMARY OF ARGUMENT

At oral argument, counsel for the Environmental Protection Agency (EPA) represented for the first time that the challenged standards do not operate as a de facto electrification mandate. Citing the example of Subaru raised earlier by the Court, counsel asserted that in practice the standards can be satisfied without any shift from conventional vehicles to electric vehicles. Oral Arg. 1:30:45-1:32:16. This Court should reject EPA's late-breaking assertion, if the Court considers it at all. First, EPA never found in its rulemaking or argued in its briefing that automakers in practice could comply without greater electrification, so the argument is both *Chenery*-barred and forfeited. Second, the Subaru example actually proves petitioners' point because, based on EPA's own projections, Subaru will not comply with the standards without relying on electrification. The government has not pointed to *any* record evidence that any automakers can or will comply with these standards absent greater electrification. Third, EPA was clear at oral argument that its interpretation of Section 202(a) would authorize it to mandate electrification—even up to 100% electrification. The rule thus presents a major question regardless, and the Court can and should resolve the case on that basis.

ARGUMENT

I. EPA's New Argument Is *Chenery*-Barred And Forfeited.

Under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), agencies may not defend a rule in court on new grounds not set out in the rule itself. *Id.* at 94-95. Here, there is no basis in the rule for EPA's new argument that the standards are not a de facto mandate. EPA was well aware of concerns that the standards would effectively mandate electrification. *See* J.A. 1076 (EPA's response to "comments suggesting that the rule will mandate electric vehicles" or force a "shift of our transportation infrastructure to EVs"). In response to those comments, EPA asserted only that the rule is not *formally* a mandate because it does not require any particular technology and leaves compliance decisions with manufacturers. *Id.* EPA made no attempt to demonstrate that *in practice* the standards afford manufacturers such a choice.

As the Court knows, the Clean Air Act requires EPA to find that any emission standard is technologically feasible, accounting for the cost of compliance. *See* 42 U.S.C. § 7521(a)(2); EPA Br. 5. EPA never found that it would be technologically feasible and cost-effective to comply with the rule without producing electric vehicles. To the contrary, EPA made its feasibility finding only while including electric vehicles in its projections. *See* J.A. 916,

917. At most, EPA pointed to some existing combustion-engine vehicles that comply with the standards for Model Year 2023, and noted that those credit generators could "help [automakers] comply" with later standards. J.A. 62. But the agency did not even say that, let alone explain how, automakers could comply for the full span of the standards solely through improvements to internal-combustion vehicles, even if they might choose increased electrification for financial or other reasons.

In fact, EPA determined exactly the opposite. It found that "[c]ompliance with the final standards *will necessitate* greater implementation and pace of technology penetration through MY 2026 using existing GHG reduction technologies, *including further deployment of BEV and PHEV technologies*." J.A. 60 (emphases added). Specifically, EPA projected that automakers would meet the new standards if they achieved a market share of 17 percent electric vehicles in Model Year 2026. *Id.* In other words, EPA determined that its standards were feasible under Section 7521(a)(2) because automakers could improve internal-combustion vehicles *and* manufacture a certain number of electric vehicles.

To be sure, EPA said that "the growth in the projected rate of [electric-vehicle] penetration is consistent with current trends and market forces,"

J.A. 52, by which it meant that automakers were already moving toward increased electrification, J.A. 52-53. But that does not disprove that the standards operate as a de facto mandate. EPA never denied that its standards require automakers to manufacture electric vehicles or purchase credits from those who do. And again, all of the agency's technological feasibility and compliance-cost analysis assumed a fleet with increased electric-vehicle penetration. *See* J.A. 916, 917.

Over and over again, EPA recognized in the rule's preamble that the new standards in practice require greater electrification. In addition to the language quoted above, EPA explained that "*together with moderate levels of electrification*, the continued adoption of advanced gasoline GHG-reducing technologies already existing in the market will be sufficient to meet the final standards." J.A. 59 (emphasis added). The preamble repeatedly states that the standards are achievable "*primarily*," "*largely*," or "*predominantly*"—not solely or exclusively—through advancements to conventional vehicles. *See, e.g.*, J.A. 5, 51, 52, 64 (emphases added). Especially in the face of comments asserting that the rule was a de facto electric-vehicle mandate, and in the absence of any finding or analysis by EPA to the contrary, the agency's

statements can only reasonably be read as acknowledging that the rule will force electrification.

EPA offered nothing more in its briefing to this Court. In response to petitioners' argument that the standards unlawfully operate as a de facto electrification mandate, EPA contended that "the rule does not mandate any particular emission-control technology." Br. 54; *see id.* at 55 ("EPA did not mandate which technology, let alone how much of it, to use. That decision is up to automakers."). But EPA's point again was that the rule does not operate as a *legal* mandate. EPA did not deny that the rule is a *practical* mandate. *See* AAI Br. 6 ("[I]t is true that EPA's new standards will require greater deployment of electric vehicles by full-line vehicle manufacturers to meet them."). EPA did not point to anything in the record, much less the example of Subaru—a word that never appears in EPA's brief—to show that in practice the standards afford manufacturers a technologically feasible choice, accounting for compliance costs, that would satisfy Section 202(a)(2). The argument is thus forfeited. *See United States ex rel. Davis* v. *District of Columbia*, 793 F.3d 120, 127 (D.C. Cir. 2015) ("Generally, arguments raised for the first time at oral argument are forfeited."). Beyond forfeiture, in a case about whether EPA can force a shift to electric vehicles, this would be the

ultimate dog that didn't bark: EPA has never before claimed that it is not in effect requiring greater electrification.

II. EPA's New Argument Fails On The Merits.

Even if EPA's argument were properly presented, the Court should reject it on the merits. The government's primary support for this point at oral argument was Subaru's projected compliance with the challenged standards. But Subaru does not show that compliance is possible without electrification. Critically, EPA projects that in Model Year 2026 Subaru *will* electrify some of its fleet, including by shifting 3% of its car fleet to electric vehicles. *Compare* J.A. 51-52 (Tables 31, 33), *with* J.A. 908 (Table 4-27) (tables reproduced below). EPA thus projected that even Subaru would adopt greater electrification in order to comply with the new standards by the end of the relevant period.

TABLE 31—CAR BEV+PHEV PENETRATION RATES UNDER THE FINAL STANDARDS

	2023 (%)	2024 (%)	2025 (%)	2026 (%)
BMW	4	9	22	29
Daimler	15	18	18	19
FCA	20	22	22	22
Ford	13	13	16	21
General Motors	11	11	11	13
Honda	2	5	8	12
Hyundai Kia-H	10	10	18	18
Hyundai Kia-K	3	3	8	8
JLR	0	3	3	3
Mazda	7	13	13	13
Mitsubishi	3	3	3	3
Nissan	3	3	17	17
Subaru	0	0	0	3
Tesla	100	100	100	100
Toyota	2	6	9	9
Volvo	3	3	4	11
VWA	16	17	17	25
Total	10	12	16	17

TABLE 33—FLEET BEV+PHEV PENETRATION RATES UNDER THE FINAL STANDARDS

	2023 (%)	2024 (%)	2025 (%)	2026 (%)
BMW	6	10	18	22
Daimler	12	14	20	36
FCA	14	15	15	18
Ford	5	9	10	18
General Motors	6	9	13	16
Honda	1	8	12	14
Hyundai Kia-H	9	9	17	19
Hyundai Kia-K	6	6	9	9
JLR	15	15	26	34
Mazda	3	7	7	17
Mitsubishi	2	2	10	10
Nissan	3	4	14	15
Subaru	0	0	0	1
Tesla	100	100	100	100
Toyota	2	9	10	12
Volvo	17	17	18	20
VWA	13	14	14	21
Total	7	10	14	17

Table 4-27 BEV+PHEV Penetration Rates under the No Action Scenario

	Car				Light Truck				Fleet			
Manufacturer	2023	2024	2025	2026	2023	2024	2025	2026	2023	2024	2025	2026
BMW	4%	8%	10%	17%	10%	10%	10%	10%	6%	9%	10%	14%
Daimler	12%	12%	13%	13%	8%	8%	8%	8%	10%	10%	10%	11%
FCA	17%	18%	19%	19%	1%	1%	1%	1%	3%	4%	4%	4%
Ford	13%	13%	14%	19%	1%	1%	3%	6%	5%	5%	6%	10%
General Motors	5%	5%	5%	6%	0%	1%	1%	1%	2%	2%	3%	3%
Honda	1%	1%	3%	7%	0%	6%	8%	8%	1%	3%	6%	8%
Hyundai Kia-H	8%	7%	7%	7%	0%	0%	0%	0%	7%	7%	7%	7%
Hyundai Kia-K	2%	1%	1%	2%	0%	0%	0%	0%	1%	1%	1%	1%
JLR	0%	0%	0%	0%	16%	16%	16%	16%	15%	15%	15%	15%
Mazda	7%	7%	7%	7%	0%	0%	0%	0%	3%	4%	4%	4%
Mitsubishi	3%	3%	3%	3%	0%	0%	0%	0%	2%	2%	2%	2%
Nissan	2%	2%	2%	2%	0%	0%	0%	0%	1%	1%	1%	1%
Subaru	0%	0%	0%	0%	1%	1%	1%	1%	0%	0%	0%	0%
Tesla	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Toyota	2%	2%	3%	3%	0%	0%	0%	0%	1%	1%	2%	2%
Volvo	3%	3%	4%	11%	13%	13%	14%	14%	10%	10%	12%	14%
VWA	16%	17%	17%	17%	11%	11%	11%	11%	13%	13%	13%	14%
TOTAL	9%	9%	9%	10%	2%	2%	3%	3%	5%	5%	6%	7%

EPA also projected that in Model Years 2023-2025, Subaru's electric-vehicle penetration will round down to 0%. *See* J.A. 51-52. But that is not because Subaru's combustion-engine vehicles will be able to comply with the standards in all those years. On the contrary, EPA projects that Subaru's combined fleet will fail the standards in Model Years 2025 and 2026, *compare*

J.A. 47 (Table 23, Combined Fleet Targets), *with* J.A. 49 (Combined Fleet Achieved Levels), and that Subaru's cars will never actually meet the standards in any model year, *compare* J.A. 47 (Table 21, Car Targets), *with* J.A. 48 (Table 24, Car Achieved Levels).

The apparent explanation for why Subaru nevertheless has a projected compliance path with approximately 0% electrification in Model Years 2023-2025 is that the automaker has banked extensive compliance credits and the model that EPA uses applies those credits to determine compliance. *See* 2021 EPA Automotive Trends Report, EPA-HQ-OAR-2021-0208-0771, Figure 5.13, Tables 5.11, 5.13, 5.15, 5.19 (excerpt of record document not included in joint appendix); J.A. 48. Many manufacturers do not have similar banked credits. *Id.* Nor is reliance on those credits even a long-term solution for Subaru itself, because Subaru's light-duty trucks, which previously generated credits, are projected to fail to comply with the standards starting in Model Year 2026. *Compare* J.A. 47 (Table 22), *with* J.A. 48 (Table 25). The Subaru example thus does not show that manufacturers generally would be able to comply with the standards without electrification.

III. In Any Event, The Major-Questions Doctrine Applies.

Even if EPA's new points about Subaru were correct, that would not save its argument. *West Virginia* v. *EPA* counsels that what makes a question major is the "history and the breadth of the authority that the agency has asserted." 142 S. Ct. 2587, 2608 (2022) (alterations and internal quotation marks omitted). Here, EPA invoked its authority under Section 202(a) to set emission standards for a fleet of vehicles that includes both conventional and electric vehicles. EPA candidly acknowledged at oral argument that its interpretation of Section 202(a) would authorize it to mandate electrification—even up to 100% electrification. *See* Oral Arg. 1:35:43-1:35:50 (EPA's counsel explaining, "so then the question is, does EPA have authority to set standards at zero, and the answer is yes."). Nor has the agency made any secret that that is where it is headed. *See* 88 Fed. Reg. 29,184 (May 5, 2023) (proposing standards that would lead to 67% electric-vehicle penetration by 2032). Regardless of whether EPA has mandated electrification in this rule, its interpretation of Section 202(a) asserts that power. This rule therefore presents a major question, and the Court can and should decide the case on that basis.

CONCLUSION

For the foregoing reasons, the Court should decline to consider or otherwise reject EPA's new argument.

SEPTEMBER 19, 2023

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