Transportation is now the source of 28% of U.S. greenhouse gas emissions, more than the electric power sector. The transportation sector is also a substantial source of nitrogen oxides and particulates, both of which are dangerous to human health. The Biden Administration has taken important regulatory actions bearing on these problems, with others in the pipeline. The fate of these measures depends on three cases argued before the D.C. Circuit in mid-September. To get a better sense of where the court may be heading, I spoke with Sean Donahue, an environmental lawyer who argued one of the cases and was there for the other two oral arguments.

Before starting, here's a little more background about the three cases:

- *Texas v. EPA* is an effort by conservative states and fuel suppliers to block EPA regulations of greenhouse gas emissions from motor vehicles under the Clean Air Act. Notably, the car industry itself is affirmatively supporting EPA in the case.
- *NRDC v. National Highway Traffic Safety Administration (NHTSA)* challenges fuel efficiency standards. The big issue in this case is whether the agency violated a statutory prohibition against "considering" electric vehicles in setting the standard.
- *Ohio v. EPA*, which was heard by another panel of judges, challenges the EPA waiver that allows California to set its own greenhouse gas standards for vehicles. Ohio and some other states argue that the waiver unconstitutionally gives California more power to regulate than it gives them.

In all three cases, challengers invoked the major questions doctrine. This doctrine limits the power of agencies to issue regulations of "extraordinary" importance and was used by the Supreme Court in *West Virginia v. EPA* to overturn Obama's Clean Power Plan.

With that background, let's find out more about how the oral arguments went.

Q: Hi, Sean. Maybe we could start by having you say a bit about yourself and your role in the *Texas* case.

Hi, Dan. I'm an appellate litigator with a focus on climate and Clean Air Act cases. For about 15 years I've been practicing in a very small firm. Previously, I taught law school, practiced solo, worked in the Appellate Section of the Justice Department's Environmental and Natural Resources Division – and way back, I, like you, had the great honor of clerking for Justice Stevens.

In *Texas v. EPA*, I'm on a team representing the Environmental Defense Fund, as part of a broad coalition supporting the challenged federal rules. The coalition includes NGOs

including the American Lung Association, NRDC, Public Citizen, Sierra Club, and many others; California and 19 other states (including Michigan); clean technology firms and power companies; and the Alliance for Automotive Innovation, whose members include all the major motor vehicle manufacturerss. On September 14, I presented oral argument for the NGO intervenors, following the DOJ attorney representing EPA. I represented EDF in the other two cases but I didn't argue.

Q: Could you give us a general sense of how the arguments in the three cases went? What issues did the judges seem to focus on?

Yes, with a couple caveats. First, the three arguments took seven and a half hours over two days. Readers interested in the full picture should grab some snacks and listen to the audio (*Texas* and *NHTSA* are here, and Ohio here – and the many party and amicus briefs can be found here). Second, I'm going to refrain from making predictions, which are always perilous based on oral arguments, even from observers more neutral than I could be here.

That said, I feel good about how the oral arguments unfolded. The D.C. Circuit panels were well-prepared; and although the judges asked tough questions, they were consistently courteous to counsel and to each other throughout the two long mornings of argument.

Q: Let's start with the *Texas* case then.

Petitioners opened by asserting that this case is just like *West Virginia v. EPA*: a sweeping, transformative, and not-clearly-authorized exercise of agency power that fails scrutiny under the major questions doctrine. (I'll discuss that comparison more in a bit). Petitioners urged that EPA is trying to compel adoption of electric vehicles—whereas, petitioners say, prior EPA rules had relied on EVs merely as a "compliance flexibility."

EPA countered that what the agency did here is just what it has traditionally done under this core provision of the Clean Air Act (Section 202), including in three previous GHG rules for the same source categories: EPA examined available emissions-reduction technologies, costs, and lead time and then set technology-neutral performance standards. EPA has considered electrification technologies in many past rulemakings and has used fleet average standards for decades. Respondents also noted that EPA's actions are in line with the plans of automakers, who have already pledged extensive EV deployment beyond anything required by EPA's rule, in response to improving EV technology, declining battery costs, and growing consumer demand.

At argument, the parties jousted over whether the rule's reliance on increased

electrification was something novel and different "in kind," or merely another step in an iterative regulatory process, dating back at least to EPA's 2010 GHG standards. That back-and-forth mostly tracked the briefing. But a good deal of the oral argument addressed a different, largely *factual* question: whether EPA's emissions standards effectively *compel* manufacturers to sell more EVs than they otherwise would have. There was parsing of EPA's preamble in which the agency forecast an increase in EV deployment from 7% to 17% over the course of the rule's implementation (Model Years 2023-2026)—and whether that projection revealed an EV "mandate," or merely reflected that, for most companies, EVs are part of the most cost-effective or market-friendly paths of achieving compliance. There were questions about the difference between incentives and compulsion, between "more cost-effective" and "mandatory."

Q: What's your take on the "compelled electrification" issue?

A few observations about this issue: First, no party raised this during the rulemaking. Because the Clean Air Act restricts litigants to objections presented in the rulemaking, this is a (in our view, fatal) legal problem for the challengers. But it also helps explain why EPA's analysis in the rule itself did not comprehensively address the "de facto EV mandate" issue.

Second, although petitioners accused EPA of an about-face at oral argument, EPA's preamble explained that the scenario of increased EV penetration was merely one possible, non-binding projection of automakers' cost-effective pathways to compliance. Petitioners identified no statement from EPA that the rule would require—whether "de facto" or otherwise—that companies comply via Battery-powered Electric Vehicles (BEVs) or any other technology. The International Council on Clean Transportation (ICCT), an independent nonprofit with technical expertise on carbon dioxide control from major transportation modes, submitted an amicus brief highlighting the technical feasibility and flexibility of EPA's standards; using EPA's model ICCT had found that *all* automakers could comply with the standards without selling any additional BEVs.

The term "electrification" covers a wide range of technologies—power steering, "stop-start" technology, regenerative braking, "mild" to "strong" hybrids, plug-in hybrids, and BEVs. At argument the term was often used without specifying which of these technologies were being referenced – confusingly, since petitioners' *legal* attacks seem trained only on BEVs.

Q: How did "compelled electrification" come into the argument, then?

The "compelled-electrification" discussion felt a little like a detour; there is nothing unlawful (or new) about EPA setting emissions standards that may require use of some emission-

reduction technology, provided EPA takes account of statutory factors like technical feasibility and cost. Section 202, after all, is designed to remedy serious health and environmental dangers, and for decades EPA emissions standards have reflected expected improvements from catalytic converters, to fuel injection, to computerized emissions monitoring, and many more. EPA is not allowed to ignore emissions-control technologies on the basis that they are too effective at reducing pollution; EPA could not, for example, ignore a "perfect" catalytic converter that could, at modest cost, reduce nitrogen oxides from the current 90+ percent control to 100%. The industry's rapid move toward BEVs confirms that EV technologies are not just effective at reducing pollution; they are also eminently marketable, and have a range of important benefits for consumers, including saving thousands on avoided fuel costs.

Q: So why, at argument, were there so many questions on whether the 2021 rule "compels" electrification?

One possible explanation is that the court wants to determine whether petitioners' arguments regarding a de facto BEV "mandate" are in fact presented on this record. If not, that would be another reason the petitioners' legal arguments may be put off for another day.

There was some discussion of petitioners' contention that "compelled electrification" is a statutory red line. Petitioners argue (despite, again, not having presented the objection to EPA) that because EPA's obligation to regulate is triggered by an "endangerment" finding, vehicles that don't emit the dangerous pollutant can't be part of the regulated "class" of vehicles. But the statute explicitly allows EPA to regulate "any class or classes" of motor vehicles; defines "motor vehicle" in a manner that does not depend upon how vehicles are propelled; and requires EPA to consider technologies that are effective, feasible, and cost-reasonable (no one challenges EV technologies on any such grounds). EPA noted at argument that petitioners' theory would allow EPA to require elimination of *almost* all emissions of a pollutant but deny it power to prevent pollution entirely – an inplausible outcome, and one counter to statutory language specifying that standards apply to technologies that "control or prevent" pollution.

Q: Let's turn to the *NHTSA* Case and the challenge to the Fuel Economy standards.

Unlike EPA when setting Clean Air Act emissions standards, NHTSA is forbidden by the Energy Policy and Conservation Act, or EPCA, from relying on the fuel economy of electric vehicles in carrying out specified subsections of the statute. The central dispute here is whether that precludes NHTSA from considering electric vehicles' fuel economy values in

establishing the regulatory "baseline"—the pre-regulation vehicle fleet used for measuring the impact of proposed standards. NHTSA concluded the EV-consideration prohibition doesn't apply in setting the baseline, for only when NHTSA considers the technologies that can improve fuel economy.

At oral argument, petitioners urged that the statutory prohibition on considering EVs is clear and categorical. NHTSA and California countered that petitioners' reading goes beyond the statute, and would make fuel economy standards meaningless as EVs make up a larger share of the fleet. (Under petitioners' reading, respondents point out, NHTSA must assume an unrealistic scenario that excludes EVs, so the final standards would soon be far less stringent than the levels the industry is already achieving). The oral argument centered on these arguments.

A biofuel trade association challenged NHTSA's consideration of California's Zero Emissions Vehicles (ZEV) program in identifying the baseline as preempted by EPCA's provision targeting state laws "related to fuel economy standards." Two federal courts (a district court in Vermont and another in California) rejected similar EPCA preemption arguments more than a decade ago, and the CAA/EPCA relationship and recent acts of Congress endorsing California's GHG and ZEV programs cut against it. There was no showing the alleged error affected the final standard and no questions from the panel about the merits of the EPCA preemption argument.

Q: And finally, the third case, *Ohio v. EPA* and the challenge to California's EV waiver.

A bit of background: Since 1967, the Clean Air Act has preempted (forbidden) states from adopting their own emissions standards for new vehicles, but, in Section 209(b), allowed California to enforce its own emission standards if it obtains preemption waivers from EPA. EPA must grant such a waiver if it finds that California's standards are, in the aggregate, at least as protective as EPA's; needed to meet compelling and extraordinary circumstances; and technologically feasible. Section 209(b) reflected a legislative compromise that allowed California to continue operating its pioneering, already-successful emissions-control program and operate as a "laboratory" for innovating measures that might later be adopted nationwide, while shielding carmakers from having to comply with many state standards. California has received scores of preemption waivers over the years, and the program has led to many of the most important advances in emissions control. Under the Clean Air Act, other states with air quality problems may adopt California's standards; many have. The preemption waiver at issue here applies to two sets of California regulations: GHG emission standards and a requirement that increasing percentages of vehicle sales in California be

ZEVs (the "ZEV mandate").

Much of the three-hour oral argument in the *Ohio* case consisted of detailed discussion of the Clean Air Act text. I won't spoil the fun of listening, but briefly: Petitioners' central statutory argument is that the waiver provision is limited to "local" problems uniquely severe in California, not a "global" problem like climate change. Petitioners link this argument to statutory language providing for waiver denial if the Administrator finds California "does not need" its standards to meet "compelling and extraordinary" conditions. EPA and California responded that the statutory test is (and for decades has been) whether California "needs" its whole program (including standards for smog-forming pollutants), which it undisputedly does, and that, in any event, California faces such serious climate hazards that even petitioners' narrower test is satisfied. They noted that California's ZEV mandate directly reduces emissions of all tailpipe pollutants, and long predated California's regulation of GHGs.

Q: Besides the statutory claim, the states raise a novel constitutional challenge to the California waiver. How did that part of the argument go?

Yes, Ohio, joined by a number of other states, asserts the 56-year-old waiver provision violates the principle of "equal sovereignty" of states, as recognized in *Shelby County v. Holder*, in which the Supreme Court struck down the preclearance provisions of the Voting Rights Act. In addition to tough questioning on Ohio's standing to strip from California powers that Ohio does not want for itself, Ohio's counsel faced lots of questions on whether this claim has a sound basis in constitutional text, history, or precedent. Respondents pointed out that Congress had good reasons for establishing the waiver regime, including deference to California's already successful program and the interest in testing innovative emissions-control programs.

Q: Any other issues in *Ohio* that got attention?

A couple other issues came up: The preemption waiver challenged in *Ohio* is a reinstatement of a waiver initially granted in 2013, but rescinded in 2019 by the Trump Administration's rollback of air pollution protections. The court asked questions about EPA's conclusion in the 2021 that the 2019 waiver rescission had failed to consider states' and manufacturers' reliance interests.

Petitioners in *Ohio* also argue that EPA's reinstatement of California's waiver is unlawful because California's standards are preempted by EPCA (similar to the argument raised in *NHTSA*). EPA counters that the Clean Air Act prescribes three specific criteria for

preemption waivers and does not contemplate that EPA will rule on alleged violations of other federal laws—matters that can be raised in federal district court, as in the prior Vermont and California cases. If the court were to address it, petitioners' preemption argument would face challenges: Since ZEVs don't even have fuel economy and can't be considered in setting fuel-economy standards, it's hard to argue California's ZEV mandate is preempted by EPCA. In addition. the statutory text and history make clear that Congress expected California laws protected by a Clean Air Act waiver to operate alongside NHTSA's fuel economy standards. There was limited questioning on the petitioners' preemption theory, and some discussion of how the preemption issue's fact-intensiveness may make it unsuitable for adjudication in the court of appeals.

Q: The federal government raised some threshold argument about standing and other issues. Did those get any traction with the judges in the *Texas* case?

In *Texas*, the panel probed whether the fuel petitioners have "prudential standing"—whether they are within the "zone of interests" Congress sought to protect or regulate in the Clean Air Act. (No party challenged the fuel petitioners' Article III standing).

In *Texas*, EPA challenged the state petitioners' Article III standing: The case for state standing seems much more difficult here than in *West Virginia*, because, unlike the Section 111(d) regime in *West Virginia v. EPA*, Section 202 does not operate through state plans. Instead, EPA sets vehicle emissions standards directly applicable to automakers.

A pair of additional threshold issues got attention. One, mentioned already, is administrative exhaustion. While petitioners' briefs accuse EPA of overstepping various statutory limits, no one raised these arguments in the EPA rulemaking. Because the Act says that only objections raised with "reasonable specificity" in rulemaking comments may be raised in court, such omissions are normally fatal. At oral argument, petitioners maintained that exceptions should apply. We'll see.

EPA and its supporters also noted that petitioners are challenging features of EPA's regulations (including averaging) that were introduced in previous rulemakings, so that it is too late to challenge those issues now unless EPA "reopened" them, which it had expressly declined to do. This threshold issue too came up at oral argument, though less than exhaustion.

Q: What about the Ohio case?

In the *Ohio* case, the fuel petitioners were questioned closely on standing, including on

whether, since the period covered by the waiver will soon end, even if the court invalidated the waiver, any injury to fuel companies would be "redressable" (judicially curable), given the long lead times required for automobile production and marketing.

The court also quizzed Ohio's counsel on whether the state suffered harm from the federal government allowing California to have its own standards, given that *Ohio* itself does not wish to regulate more stringently nor complain that federal law preempts Ohio from regulation. There was also discussion of claims that California's program raises vehicle prices in Ohio—a point California disputes with factual proffers on industry pricing practices and evidence that BEV sales are exceeding the sales targets set in California's regulations and that manufacturers are not cross-subsidizing EVs by raising prices on internal-combustion vehicles.

Q: The major questions doctrine loomed large in the briefing. How did the judges seem to be thinking about that issue?

As noted above, in *Texas* the petitioners argued that EPA's rule presents a major question, because they say it (unlike prior GHG rules) "forces electrification" and electrification of the U.S. vehicle fleet has broad social and economic ramifications.

The panel did not seem to buy the claim that this case is simply *West Virginia* redux. That's not surprising: First, in contrast to the *West Virginia* case, EPA's rule requires that the sources themselves—"motor vehicles," a defined Clean Air Act term—produce less pollution. The *West Virginia* Court pointedly contrasted that sort of conventional pollution regulation to the Clean Power Plan, which (as the Court saw it) imposed a new regulatory approach starkly different from all EPA's prior efforts. Here, EPA has used basically the same technology-based approach in multiple vehicle emissions standard rulemakings stretching back decades.

Other differences are pretty stark too: EPA's motor vehicles rule regulates only new sources, so it gives companies time to adjust. The Clean Air Act specifically requires that EPA give manufacturers lead time adequate to meet the standards, and no one has suggested that there are lead time problems with this rule. That again contrasts with the Clean Power Plan, which governed existing sources, requiring them to reduce or cease operations or retrofit their plants. The *Texas* panel did not ask many questions about the major questions doctrine, but did inquire whether a hypothetical rule requiring 100 percent BEVs would present a major question.

No "major questions" argument is seriously advanced in the *NHTSA* case.

In *Ohio*, petitioners claim that EPA's approval of California's application for a waiver for its GHG standards and ZEV mandate triggers the major questions doctrine because California's regulation of GHGs is highly consequential and involves a global pollutant. This would be a strikingly novel application of the doctrine; the authority regulating private activity is a state, and an EPA waiver actually *limits* federal power. Other doctrinal prerequisites seem to be missing here, including novelty: California has had GHG waivers for more than a decade, and ZEV program goes back even further, to the 1990s, as means to reduce criteria pollutants. Petitioners' major questions argument in *Ohio* seems like an uphill battle. It received little attention at oral argument.

Q: Any final thoughts to share with our readers?

Three final thoughts:

First, major questions as a distinct doctrine is still new; as the Supreme Court decisions show, even the six sitting justices who have relied on it do not necessarily agree on how it should work. Zealous counsel challenging regulations can be expected to press the doctrine hard until the courts more clearly demarcate its limits. But it's still striking to see it invoked in cases like *Texas*, where the agency is following a longstanding regulatory approach with the support of the regulated industry, where no one thought to raise the various objections during the rulemaking, etc. The same might be said about *Ohio*, a case involving state law and a limit on federal power. If major questions applies in cases like these, it could apply in almost any significant rulemaking.

Second, in the 2021 Bipartisan Infrastructure Law and the 2022 Inflation Reduction Act ,Congress made massive investments to encourage diffusion of zero-emitting vehicles and expand EV infrastructure. Congress left no doubt about its support for a shift to clean transportation and BEVs. Whether and how much courts will rely on these statutes when considering major questions challenges to rules like EPA's emissions standards remains to be seen.

Finally, given some of the threshold problems in these cases, it's possible key issues will be left undecided. But new matters presenting those questions will soon return to the DC Circuit, which has exclusive jurisdiction to review national Clean Air Act rules: A case involving a waiver for California heavy-duty vehicle standards awaits briefing; EPA will finalize the next round of light duty standards (for model year 2027 and after); and the agency will be ruling on a waiver application for an updated California clean vehicles program.

Thanks again, Dan.