[ORAL ARGUMENT HELD SEPTEMBER 14, 2023]

Nos. 22-1080, 22-1144, 22-1145

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

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

On Petition for Review of a Final Rule
Issued by the Department of Transportation,
National Highway Traffic Safety Administration

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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INTRODUCTION AND SUMMARY

This case involves petitions for review of the National Highway Traffic Safety Administration's (NHTSA) 2022 rule revising the corporate average fuel-economy standards for model years 2024 to 2026. As required by statute, NHTSA established those standards at "the maximum feasible average fuel economy level" that the agency determined automobile manufacturers can achieve in those model years. 49 U.S.C. § 32902(a). In making that determination, NHTSA properly excluded the possibility that manufacturers would comply with revised standards by producing new dedicated alternative-fuel vehicles, such as battery-electric vehicles, or using compliance credits.

The government files this supplemental brief in response to the Court's order of July 29, 2024, directing the parties to address the relevance of *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024) (per curiam), to petitioners' standing to bring their petitions for review in this case, and the relevance of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), to issues of statutory interpretation presented in the case.

With respect to *Ohio*, we note that respondents have not contested petitioners' standing. With regard to issues of statutory interpretation,

respondents' principal brief explains that the government's construction of 49 U.S.C. § 32902 is the best reading of the statute. We also noted that, even assuming some ambiguity, the government's reasonable interpretation would be entitled to deference. That argument does not survive *Loper Bright*, which overruled *Chevron*. As we urged in our principal brief, however, NHTSA's fuel-economy standards are fully consistent with the governing statute, and the petitions for review should be denied.

ARGUMENT

A. The Government Has Not Argued In This Case That Petitioners Lack Standing.

In *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024) (per curiam), groups of States and fuel manufacturers petitioned for review of a decision by the Environmental Protection Agency to waive federal preemption of two California regulations regarding automobile emissions under the Clean Air Act. *Id.* at 293. The fuel manufacturers argued that California's regulations depress the demand for liquid fuels and thereby injure fuel manufacturers financially. *Id.* at 300-301. The state petitioners argued that they were injured because the Environmental Protection Agency's waiver would allegedly increase the cost of gasoline-

powered vehicles, reduce fuel-tax revenue, and adversely affect the States' electrical grids. *Id.* at 301. Applying the established principle that a petitioner bears the "burden of establishing each of the elements of standing" "in its opening brief," *id.* at 300 (quotation marks omitted), this Court held, *inter alia*, that the petitioners lacked standing because they failed to explain how their claimed injuries would be redressed by a favorable decision. *Id.* at 301. The Court noted, in particular, that California's regulations applied only to model years 2017 through 2025 and that the petitioners "fail[ed] to point to any evidence affirmatively demonstrating that vacatur of the waiver would be substantially likely to result in any change to automobile manufacturers' vehicle fleets by Model Year 2025." *Id.* at 302.

We have not argued in this case that petitioners do not have standing.

B. *Loper Bright* Does Not Affect The Decision In This Case Because NHTSA's Construction Is The Best Reading Of The Statute

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and held that courts "must exercise their

independent judgment in deciding whether an agency has acted within its statutory authority." 144 S. Ct. 2244, 2273 (2024). The Court reaffirmed, however, that "[i]n exercising such judgment," courts may "seek aid from the interpretations of those responsible for implementing particular statutes." *Id.* at 2262. "Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the [Administrative Procedure Act]." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The Court also recognized in *Loper Bright* that a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion," such as where the statute "empower[s] an agency … to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility.'" 144 S. Ct. at 2263. The Energy Policy and Conservation Act of 1975 grants the Secretary of Transportation such discretion. The Secretary is directed to "prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in [each] model year." 49 U.S.C. § 32902(a). Those standards must be established at "the maximum feasible average fuel

economy level that the Secretary decides the manufacturers can achieve in that model year." *Id.* The statute further requires that the Secretary consider certain factors in making that decision and prohibits the Secretary from considering certain other enumerated factors. *Id.* § 32902(f), (h). Within those boundaries, the Secretary is vested with discretion to determine the maximum feasible average fuel-economy level as well as to decide on the process through which to make that determination.

As we explained in our principal brief (Br. 30-33), NHTSA, as the Secretary's delegee, determines the maximum feasible fuel-economy level that manufacturers can achieve in a future model year by first ascertaining the fuel-economy level that manufacturers have already achieved in previous model years, and then determining what gains in fuel economy are feasible and practicable (without considering new dedicated automobiles, the electric-only operation of dual-fueled automobiles, or the use of compliance credits). NHTSA has employed this methodology since the earliest fuel-economy standards, *see* 42 Fed. Reg. 33,534, 33,535 (June 30, 1977). And that longstanding choice of methodology is one that draws on NHTSA's particular technical

expertise. NHTSA's approach thus has all the hallmarks of one with the "power to persuade." *See Loper Bright,* 144 S. Ct. at 2259 (quoting *Skidmore*, 323 U.S. at 140); s*ee also id.* ("'[I]nterpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon … specialized experience,' 'constitute[] a body of experience and informed judgment to which courts and litigants [can] properly resort for guidance,' even on legal questions." (quoting *Skidmore*, 323 U.S. at 139-140) (second alteration in original)).

NHTSA's exercise of discretion is cabined by the restrictions imposed by § 32902(h). Our principal brief explained (Br. 29-70) that these restrictions are unambiguous. Section 32902(h)(1), in particular, constrains NHTSA from considering the extent to which manufacturers can achieve compliance by producing new dedicated automobiles in the model years being regulated. It does not constrain NHTSA's determination of the pre-existing fuel-economy level or otherwise require NHTSA to proceed from a deliberately incorrect account of a manufacturer's preexisting fleet. It similarly does not bar NHTSA from accounting for dedicated vehicles that would be produced even in the

absence of further fuel-economy standards. NHTSA's methodology fully accounts for and complies with the restrictions of § 32902(h).

The government's brief cited (Br. 48) *Chevron* in a single paragraph as an alternative basis for ruling in respondents' favor "even assuming that the relevant statutory provisions were ambiguous." That argument does not survive *Loper Bright*. As we argued, however, the Court should deny the petitions for review because, using the traditional tools of statutory construction and considering the text, structure, and purpose of the various provisions of 49 U.S.C. § 32902, NHTSA's construction of § 32902(h) provides the best reading of that provision.

CONCLUSION

For the foregoing reasons and the reasons set out in our principal brief, the petitions for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Court's July 29, 2024 order because it contains 1,223 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

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