ARGUED SEPTEMBER 14, 2023

No. 22-1080 and consolidated cases

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

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

On Petition for Review of a Rule of the
National Highway Traffic Safety Administration

SUPPLEMENTAL BRIEF FOR RESPONDENT-INTERVENOR PUBLIC INTEREST ORGANIZATIONS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

GLOSSARY iii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 1

I. *Ohio* Should Not Change the Standing Analysis Here 1

II. *Loper Bright* Should Not Affect Disposition of the Statutory Issues ... 3

CONCLUSION 4

CERTIFICATE OF COMPLIANCE 7

TABLE OF AUTHORITIES

Cases

Chevron v. NRDC,
467 U.S. 837 (1984)..... 1, 3, 4

Ctr. for Auto Safety v. NHTSA,
793 F.2d 1322 (D.C. Cir. 1986).....4

**Loper Bright Enterprises v. Raimondo*,
144 S.Ct. 2244 (2024)..... 1, 3, 4

**Ohio v. EPA*,
98 F.4th 288 (D.C. Cir. 2024).....1, 2

Smith v. Spizzirri,
601 U.S. 472 (2024).....3

Statutes

49 U.S.C. § 32902(a) 3

49 U.S.C. § 32902(h) 4

* Authorities on which Respondent-Intervenor Public Interest Organizations chiefly rely are marked with asterisks.

GLOSSARY

EPA	Environmental Protection Agency
NHTSA	National Highway Traffic Safety Administration
NHTSA Br.	Brief for Respondents
State Intv. Suppl. Br.	Supplemental Brief of State Respondent Intervenors

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent-Intervenor Public Interest Organizations submit this supplemental brief in response to the Court's Order of July 29, 2024. ECF No. 2067052. For the reasons explained below, neither *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), nor *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), should alter the Court's disposition of these cases. The Court's decision in *Ohio* applied well-established standing principles to the unique facts of that case and should not change the Court's analysis of Petitioners' standing here. Meanwhile, the Supreme Court's *Loper Bright* decision does not undermine NHTSA's interpretation of the relevant statutory provisions at issue in this case; it negates only NHTSA's fallback argument that had relied on *Chevron* deference.

ARGUMENT

I. *Ohio* Should Not Change the Standing Analysis Here

This Court's decision in *Ohio* applied established, preexisting precedent to conclude—based on the facts of that case—that the petitioners there had not satisfied their burden to establish standing to press their statutory claims. 98 F.4th at 299-306.[1] In particular, the decision held that petitioners had not demonstrated a "substantial probability" that a favorable decision would redress their alleged

[1] The *Ohio* decision held that the state petitioners did have standing to raise their constitutional claim based on an alleged dignitary injury of unequal treatment. 98 F.4th at 307-08. No similar claim is present in this case.

economic injuries. *Id.* at 301. The Court explained that neither the record evidence, nor any other evidence identified by petitioners, provided a basis to conclude that automobile manufacturers would change course in the remaining model years if the Court were to vacate the challenged waiver reinstatement. *Id.* at 302-05.

Key to the *Ohio* decision were facts unique to that case that are distinct from the facts at issue here. For example, *Ohio* involved a Clean Air Act preemption waiver that EPA initially granted in 2013, which covered California standards for model years 2017-2025. *Id.* at 297. By the time petitioners challenged EPA's reinstatement of that waiver in 2022, automobile manufacturers—who themselves never challenged the waiver—had already spent years adjusting their fleets to comply with the California standards. *Id.* at 297-98. Moreover, the administrative record at that time addressed the overall effect of the California standards during the entire regulatory period, rather than the effect of the standards in only the remaining model years. *Id.* at 302-03. And other evidence before the Court, including an expert declaration submitted by California, showed that manufacturers were "already selling *more* qualifying vehicles in California than the State's standards require." *Id.* at 304-05.

Here, by contrast, NHTSA finalized the challenged standards in 2022, covering only future model years (2024-2026), and Petitioners challenged them within a matter of weeks. Manufacturers had thus not spent years adjusting their

fleets to comply with the standards at issue, the administrative record addressed the standards' effect on the remaining model years at the time the petitions were filed, and no party filed a countering expert declaration contesting redressability.

Public-Interest Intervenors previously took no position on whether Petitioners here had established standing to bring their petitions for review, and we take no such position now. But because the Court's decision in *Ohio* did not make new law, and merely applied existing precedent to the particular facts of that case, it should not change the Court's analysis of Petitioners' standing here.

II. *Loper Bright* Should Not Affect Disposition of the Statutory Issues

The Supreme Court's *Loper Bright* decision—unlike this Court's *Ohio* decision—did change the law by overruling the prior deference framework under *Chevron v. NRDC*, 467 U.S. 837 (1984). But other than that, *Loper Bright* did not change the rules of statutory interpretation. Here, the interpretative considerations of "text, structure, and purpose," *Smith v. Spizzirri*, 601 U.S. 472, 475 (2024), support NHTSA's construction of the relevant statutory provisions.

The Energy Policy and Conservation Act requires NHTSA to set fuel economy standards at the "maximum feasible average fuel economy level that the [agency] decides the manufacturers can achieve." 49 U.S.C. § 32902(a). As NHTSA previously explained, it meets this obligation by, first, calculating the average fuel economy that automobile manufacturers already achieved in their

existing vehicle fleets, and then determining how much automakers "can achieve" by deploying additional efficiency technology to *increase* their fuel economy over those baseline levels. NHTSA Br. 29-31.

Consistent with 49 U.S.C. § 32902(h), NHTSA here considered only technologies other than electric vehicles to be available to improve average fuel economy. NHTSA Br. 32-33, 41-43. Petitioners' demand—that NHTSA further ignore the electric vehicles that automakers have *already* produced when the agency calculates the existing fuel economy baseline—finds no support in the Act. NHTSA Br. 38-40; State Intv. Suppl. Br. 8-18.

The only effect *Loper Bright* has on this case is to render obsolete NHTSA's alternative, fallback argument that relied on *Chevron* deference. NHTSA Br. 48. In a single paragraph, NHTSA argued, based on the then-current caselaw, that its longstanding interpretation of the statute was at minimum "reasonable," entitling it to deference. *Id.* While the Court should now disregard that fallback argument, NHTSA's main argument still holds. It offers the best reading of the statutory text, consistent with the statute's structure and "overarching goal of fuel conservation." *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1340 (D.C. Cir. 1986).

CONCLUSION

The Court should deny the petitions for review in Nos. 22-1144 and 22-1145.

Dated: August 19, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Court's Order of July 29, 2024. According to Microsoft Word, the portions of this document not excluded by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1) contain 860 words.

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: August 19, 2024

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