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 Final Rule of the
National Highway Traffic Safety Administration

SUPPLEMENTAL BRIEF OF PETITIONER AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS AND STATE PETITIONERS

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GLOSSARY

EPA	Environmental Protection Agency
NHTSA	National Highway Traffic Safety Administration

INTRODUCTION

Neither *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), nor *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), changes the bottom line in this case. As before, petitioners have standing, NHTSA's rule exceeds its statutory authority under both the plain language of Section 32902(h) and the major questions doctrine, and the only proper remedy is vacatur. If anything, this outcome is even clearer now.

With or without *Ohio*, the standing question is straightforward. Petitioners plainly have Article III standing because, as NHTSA's own findings in the administrative record establish, the agency's amended 2024–2026 fuel-economy standards will, by design, reduce gasoline consumption by billions of gallons compared to a world in which the amended standards were not in place. In contrast, in *Ohio*, there were no contemporaneous agency findings regarding the "no action" scenario. While such findings are not necessary to establish standing, they readily distinguish this case from *Ohio* and are more than sufficient to show that the financial injuries to petitioners will be redressed by vacating the rule.

The *Loper Bright* question is even simpler. While NHTSA's statutory interpretation was never entitled to *Chevron* deference in the first

place, *Loper Bright* slams that door shut. It holds that the Court must adopt the interpretation that the Court, in its independent judgment, concludes is the best interpretation of the statute—not merely any "reasonable" agency interpretation, as NHTSA has previously argued. As petitioners have shown, the best interpretation—the only one consistent with the statute's text, structure, history, and purpose—is that NHTSA may not consider the fuel economy of *any* electric vehicles in setting fuel-economy standards, as it unlawfully did here.

ARGUMENT

I. *Ohio* Does Not Affect Petitioners' Standing.

In the briefing and oral argument in this case, no party questioned petitioners' standing to challenge the more stringent fuel-economy standards that NHTSA adopted for model years 2024–2026. And for good reason. NHTSA adopted these standards to further "the need of the United States to conserve energy" and reduce oil consumption—policy objectives that "more stringent fuel economy standards can [achieve]." JA884. It is self-evident that parties who profit from the sale of transportation fuel have standing to challenge a rule whose entire purpose is to reduce consumption of transportation fuel. *See Energy Future Coal. v. EPA*, 793

F.3d 141, 144–45 (D.C. Cir. 2015) (Kavanaugh, J.) (explaining that companies that produce a product targeted by the challenged rule, even if not directly regulated by the rule, "are 'an object of the action … at issue,' so 'there is ordinarily little question' that they have standing" (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992))).

Petitioners' standing is also clear from the record. The administrative record and the declarations submitted by petitioners in this Court demonstrate that the amended fuel-economy standards will reduce consumption of petroleum fuels, causing economic injury to petitioners that derive income from the sale of those fuels. *See* Pet. Br. 23–25. That injury is likely to be redressed by vacatur of the rule because NHTSA's own analysis shows that the amended standards "will require some manufacturers to introduce more [fuel-saving] technology into their vehicles than they otherwise would," NHTSA Br. 20, displacing billions of gallons of gasoline that would otherwise be consumed, JA899, 1231. *Ohio*, which involved a challenge to different standards based on a different record without comparable agency findings, is irrelevant here.

A. Petitioner AFPM has standing.

In May 2022, NHTSA issued more stringent fuel-economy standards for passenger cars and light trucks that would be manufactured for model years 2024–2026. The amended standards increase by eight percent per year for model years 2024 and 2025 and by ten percent for model year 2026. JA873. As a result of these increases, the standards will require an estimated average fuel economy of 49 miles per gallon in model year 2026—substantially above the 40 miles per gallon estimated to have been required under the previous standards. JA898.

NHTSA's analyses in the administrative record established that the more stringent fuel-economy standards set in motion a "predictable chain of events" that will injure members of petitioner American Fuel & Petrochemical Manufacturers (AFPM). *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 385 (2024). NHTSA projected that automakers will respond to the amended standards by producing more fuel-efficient vehicles that will "save about 60 billion gallons of gasoline" over "the lives of vehicles produced prior to [model year] 2030," JA899, and "approximately 234 billion gallons of gasoline through 2050," JA1231.

NHTSA also acknowledged that the reduction in gasoline consumption "will lead to lower domestic refining activity," Technical Support Document at 585—the business activity performed by AFPM's members, which own and operate 86% of U.S. domestic refining capacity. *See* Pet. Br. Add-11, Add-13. The reduction in domestic demand forces refineries to reduce production of liquid fuel or incur additional costs in attempting to sell it outside the United States. *Id.* at Add-17–Add-20. Either option reduces refineries' profitability, *id.* at Add-14, causing monetary harm that is "traditionally recognized as providing a basis for a lawsuit in American courts," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021).

Because the refineries' injuries are traceable to the fuel-economy standards that require automakers to manufacture more fuel-efficient vehicles, that injury would be redressed by a decision of this Court vacating the rule and allowing automakers to produce vehicles that consume more fuel. *See, e.g., Energy Future Coal.*, 793 F.3d at 144 (redressability satisfied where a favorable decision would remove a "regulatory hurdle" to consumption of the petitioner's product). There may be unusual situations where "causation does not inevitably imply redressability, because a new status quo may be held in place by forces besides the government

action at issue." *CEI v. FCC*, 970 F.3d 372, 385 (D.C. Cir. 2020) (internal quotation marks omitted). But the record here shows that the "status quo" created by the rule would not remain in place if the rule were set aside. NHTSA's own findings establish that its amended fuel-economy standards will force manufacturers to make a more fuel-efficient fleet in model years 2024–2026 than they would make if the rule were vacated.

NHTSA's analysis showing that the amended fuel-economy standards will lead to a reduction in gasoline consumption was a modeling analysis comparing the levels of gasoline consumption predicted to occur under the amended standards with the levels predicted to occur under "the baseline standards (i.e., the No-Action Alternative)." JA899. This no-action alternative reflects "the state of the world" that would exist if NHTSA had taken no action and had left the 2020 standards in effect. JA885. The modeling of this no-action alternative accounted not only for the effects of the 2020 standards, but also for other market and regulatory forces facing automakers. It included the fuel-saving technology that manufacturers would include in vehicles in response to market forces; the technology the five signatories to Framework Agreements with California would use to meet their contractual commitments; the technology

automakers would use to comply with the emission standards EPA set in 2020; and the technology manufacturers would use to comply with the "zero-emission-vehicle" mandates in California and the "Section 177 States." NHTSA Br. 17–18; Pet. Br. 14–16.[1] The difference between the no-action alternative and NHTSA's amended fuel-economy standards is that the amended standards are "technology-forcing" standards that admittedly "will require some manufacturers to introduce more technology into their vehicles than they otherwise would." NHTSA Br. 20, 30. And it is that additional technology that will result in the reduction in domestic fuel consumption that will hurt AFPM's members.

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[1] The no-action alternative did not include the fuel-saving technology needed to comply with the new greenhouse-gas standards that EPA issued in 2022. But NHTSA admits that its fuel-economy standards may be more stringent than EPA's greenhouse-gas standards for some manufacturers and some vehicles. JA1149. Regardless, petitioners have separately challenged EPA's standards. *See Texas v. EPA*, No. 22-1031 (D.C. Cir. Feb. 28, 2022). When a party "faces two, independent regulatory obstacles that can only be attacked in separate proceedings," the relevant injury is the one caused by the regulation in the case at hand, and "both the causation and redressability prongs are clearly satisfied." *Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 194 (3d Cir. 2004) (Alito, J.). Because, in assessing standing, the Court must assume petitioners will prevail on the merits in both cases, EPA's 2022 standards are irrelevant. *See id.*; *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022).

Thus, the "agency's own factfinding" establishes that if the standards are vacated, automakers likely will produce a fleet of vehicles that consume more gasoline and will not add more fuel-saving technology that is neither cost-effective nor legally mandated. *CEI v. NHTSA*, 901 F.2d 107, 114 (D.C. Cir. 1990) (parties may establish their standing based on the agency's factfinding); *see also CEI*, 970 F.3d at 382 (same). That fact readily distinguishes this case from *Ohio*, where EPA had made no findings about how much fuel consumption would be displaced by its 2022 order reinstating California's preemption waiver from 2013. NHTSA's analysis and the rulemaking record here prove beyond cavil that it is "'likely' as opposed to merely 'speculative,'" *Lujan*, 504 U.S. at 561, that automakers would "change course with respect to the relevant model years if this Court were to vacate" the rule, *Ohio*, 98 F.4th at 302.[2]

[2] In saying that the rulemaking record here proves redressability beyond cavil, petitioners are not conceding that such evidence is necessary to establish that liquid fuel producers have standing to challenge a rule designed to reduce consumption of liquid fuel. AFPM was also a petitioner in *Ohio*, and it joined other *Ohio* petitioners in seeking certiorari because *Ohio* departed from precedents of the Supreme Court and this Court allowing parties to establish causation and redressability based on the coercive and predictable effects of government action on third parties, without the sort of evidence *Ohio* demanded. *See Diamond Alternative Energy, LLC v. EPA*, No. 24-7 (U.S. July 2, 2024).

Nor is there any evidence that automakers had made irrevocable plans to implement the amended standards after they were promulgated but before the petitions for review were filed. Standing is assessed at the time the lawsuit is filed. *Davis v. FEC*, 554 U.S. 724, 734 (2008). Petitioners filed their petitions for review in June 2022, less than 60 days after NHTSA promulgated the rule and more than a year before the first standard (for model year 2024) and more than three years before the last standard (for model year 2026) was scheduled to take effect.[3] There are no declarations describing how the automakers already had plans to comply. *Cf. Ohio*, 98 F.4th at 304–05. The amended standards are an "unprecedented leap in stringency," Kia Comment at 3, that NHTSA admits "may be challenging" for automakers to meet, and that will cause an increase in the average price and a decrease in sales of new vehicles, JA1134, 1137, 1144. There is no basis for concluding that less than two months after the standards were issued, every automaker had irrevocably committed to engage in such a costly endeavor, such that an order vacating the standards would be unable to redress *any*—even a dollar's

[3] The model year begins in October of the prior calendar year, JA893, so the model year 2024 standard took effect in October 2023, and the model year 2026 standard will not take effect until October 2025.

worth—of petitioners' injuries. *See Energy Future Coal.*, 793 F.3d at 145 ("The plaintiff 'need not show that a favorable decision will relieve' his or her '*every* injury.'" (quoting *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007)); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) ("one dollar" of harm is enough to support standing). AFPM clearly has standing.

B. The State petitioners have standing.

The foregoing analysis applies equally to the State petitioners. NHTSA's standards force electrification of the Nation's vehicle fleet resulting in decreased demand for gasoline and increased demand for electricity. JA899, 1231. Such effects harm the States in at least two ways.

First, because the standards decrease the demand for gasoline—and therefore decrease the demand for oil—the standards will lower revenues for States. The taxes and royalties from both oil production and fuel sales provide billions of dollars that fund vital social services in petitioner States. In Texas, for example, a 4.6 percent tax on the market value of oil produced over $16 billion between 2017 and 2021. Pet. Br. 24–25; *see also* Tex. Const. art. III, § 49-g(c), (c-1), (c-2); Tex. Comptroller of Pub. Accounts, *A Field Guide to the Taxes of Texas*, 14 (Jan. 2024), https://bit.ly/3Uh3ApE. Texas also receives $0.20 per gallon of gasoline

and diesel sold. Tex. Tax Code §§ 162.102, 162.202. This amounted to $11,019,320.41 in the fiscal year ending on August 31, 2023. Tex. Comptroller of Pub. Accounts, *Annual Financial Report 2023*, 57 (Nov. 20, 2023), https://bit.ly/3Uh3ApE. Texas relies upon this money to fund its Highway Fund and public education. Tex. Const. art. VIII, § 7-a. This "'pocketbook' injury that is incurred by the state itself" supports standing. *Air All. Hous. v. EPA*, 906 F.3d 1049, 1059–60 (D.C. Cir. 2018); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 448–49 (1992).

Second, the States have standing to protect their quasi-sovereign interest in managing their electric grids. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). The record reflects that increased electrification will demand larger amounts of charging infrastructure, *e.g.*, JA148, 390, 415, 421, which will in turn, place pressure on the power grid managed by the States as "one of the most important of the functions traditionally associated with the[ir] police power." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). As the prior analysis demonstrates, these harms are directly attributable to NHTSA's standards rather than third parties and can be redressed by vacatur from the Court.

Accordingly, the State petitioners have standing.

II. *Loper Bright* Requires The Court To Adopt The Best Interpretation, Without Deference To NHTSA's Views.

Loper Bright confirms what was already clear before: this Court owes no deference to NHTSA's statutory interpretation. *Chevron* deference—and hence *Loper Bright*'s overruling of *Chevron*—makes a difference only when a court would have deferred to an agency at *Chevron* step two. But this was never a *Chevron* step two case, for two reasons.

First, even before *Loper Bright*, courts did not defer to agency views on major questions. As *Loper Bright* recognized, *Chevron* "d[id] not apply" to questions of "deep 'economic and political significance.'" 144 S. Ct. at 2269 (2024) (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)). Instead, the Supreme Court has always expected "extraordinary grants of regulatory authority" to be made "'expressly' if at all." *Id.* (first quoting *West Virginia v. EPA*, 597 U.S. 697, 723 (2022), and then quoting *King*, 576 U.S. at 486). The forced electrification of the Nation's vehicle fleet is a major question if ever there was one. *See* Pet. Br. 42–43. So *Chevron* would not have applied here in the first place.

Second, even before *Chevron* was overruled, no deference was owed to the agency's interpretation when—as here—Congress directly answered the question at issue. For all of the reasons petitioners have previously explained, this was a *Chevron* step one case because, after applying the "traditional tools of statutory construction," the "intent of Congress is clear." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 & n.9 (1984). The statute unambiguously forecloses NHTSA's interpretation, so "that is the end of the matter." *Id.* at 842.

Regardless, *Loper Bright* now squarely forecloses NHTSA's plea for *Chevron* deference. *See* NHTSA Br. 48. Under *Loper Bright*, the Court may not defer to NHTSA's interpretation, but must instead "exercise [its] independent judgment in deciding whether [NHTSA] has acted within its statutory authority." 144 S. Ct. at 2273. Even if the statute is ambiguous, the Court must "use every tool at [its] disposal to determine the best reading"—without deference to NHTSA's views. *Id.* at 2266. After *Loper Bright*, no matter how ambiguous a statute may be, if the agency's interpretation "is not the best, it is not permissible." *Id.* Whether or not NHTSA's interpretation could have been deemed "reasonable" under

Chevron step two—and as petitioners have shown, it could not have been —it is decidedly *not* the best reading of the statute.

To be sure, after *Loper Bright*, courts may still pay "due respect" to agency interpretations that carry the "power to persuade." *Id.* at 2267 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). But NHTSA's interpretation—which is conspicuous for its lack of regard for statutory text—carries no persuasive power. NHTSA's interpretation was not "issued contemporaneously with the statute." *Id.* at 2262. Nor has its interpretation "remained consistent over time." *Id.* In fact, NHTSA's interpretation is completely contrary to its prior views. NHTSA now claims that Section 32902(h) does not "prohibi[t] inclusion" of electric vehicles in the "baseline" it uses to set fuel-economy standards. JA1062. But in 2006, the agency recognized that its "baseline projections *cannot reflect*" the "improve[d] … fuel economy performance" of "alternative fuel vehicles" because Section "32902(h) prohibits us from taking such benefits into consideration." 71 Fed. Reg. 17,566, 17,582 (Apr. 6, 2006) (emphasis added). NHTSA had it right the first time, and its new reading is "bad wine of recent vintage." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019)

(quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in judgment)). That is all the more reason to reject it.

CONCLUSION

The Court should grant the petitions and vacate the rule.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

This brief complies with the type-volume requirements of the Court's July 29, 2024 supplemental-briefing order because it contains 2,956 words, not counting the parts excluded by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

/s/ Eric D. McArthur

CERTIFICATE OF SERVICE

I certify that on August 19, 2024, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF System, which will send notice to all registered CM/ECF users.

/s/ Eric D. McArthur