ARGUED SEPTEMBER 14, 2023

No. 22-1080

Consolidated with Nos. 22-1144 and 1145

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 Action of the
National Highway Traffic Safety Administration

SUPPLEMENTAL BRIEF OF PETITIONER NATURAL RESOURCES DEFENSE COUNCIL

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court ordered supplemental briefing on the effect on this case, if any, of the Court's decision in *Ohio v. EPA*, 98 F.4th 288 (2024), and the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024). ECF No. 2067052.

As explained below, the decision in *Ohio* does not affect NRDC's standing here—standing that neither the government nor any other party has challenged. *Ohio* applied preexisting standing law to the particular facts of that case. *Ohio* did not create new standing law and should not bear on NRDC's standing here.

Loper Bright did change the law of statutory interpretation, but only where an agency's authority is ambiguous. The Energy Policy and Conservation Act is clear that NHTSA must set fuel economy standards at the "maximum feasible" level that automakers "can achieve" each year. 49 U.S.C. § 32902(a). Where NHTSA did otherwise—by limiting its analysis to efficiency improvements that automakers already market rather than what they "can achieve," *compare* NHTSA Br. 110, *with* 49 U.S.C. § 32902(a)—that action was erroneous both before and after *Loper Bright*.

ARGUMENT

I. *Ohio* Does Not Affect NRDC's Standing Here

No party has challenged NRDC's standing to petition for review of the fuel economy standards at issue in this case. It is undisputed that NRDC has members who are injured by increased pollution and decreased availability of fuel-efficient vehicles, *see* NRDC Br. 27–28, injuries this Court and others have long recognized are traceable to NHTSA's alleged under-enforcement of the fuel-economy program, *see, e.g.*, *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1324 (D.C. Cir. 1986); *NRDC v. NHTSA*, 894 F.3d 95, 104–105 (2d Cir. 2018). NRDC cites undisputed record evidence that more stringent standards would lead to increased availability of more fuel-efficient vehicles and decreased pollution compared to the final standards, *e.g.,* 87 Fed. Reg. 25,710, 25,865–25,868 & n.617 (May 2, 2022), JA1028–31; *id.* at 25,974 & tbl. VI-5, JA1137; *id.* at 25,808, JA971; *id.* at 26,010 & tbl. VI-13, JA1173, such that an order remanding the standards to the agency with direction to correct the significant analytic errors that led to less stringent standards will redress NRDC's injuries. *See* NRDC Br. 27–28.

Ohio does not affect NRDC's standing. That case involved a Clean Air Act preemption waiver that the Environmental Protection Agency

had initially granted to California in 2013, which covered standards for model years 2017–2025. *See* 98 F.4th at 297. Thus, by the time petitioners challenged reinstatement of the waiver in 2022, automakers had already spent years adjusting their fleets to comply with those standards. *Id.* at 297–298. And a declaration submitted by California indicated that manufacturers were "already selling *more* qualifying vehicles in California than the State's standards require[d]." *Id.* at 304–305. Based on those unique facts, and applying established precedent, the Court concluded that the petitioners had not demonstrated a "substantial probability" that a decision vacating the waiver reinstatement would redress their alleged economic injuries by changing automakers' production or pricing decisions such that they would "proceed on a different course more favorable to the petitioners." *Id.* at 301–305 (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000); *Chamber of Com. v. EPA*, 642 F.3d 192, 205–206 (D.C. Cir. 2011)).

Here, in contrast, NHTSA promulgated standards applicable only to future model years of vehicles, and NRDC challenged these standards *nine days* after the agency published them in the federal

register. ECF No. 1946518. NRDC cites undisputed record evidence that the final standards would lead to increased pollution and decreased availability of fuel-efficient vehicles compared to more stringent standards. *See* NRDC Br. 27–28. And no declaration was filed otherwise contesting redressability.

In short, NRDC has demonstrated its standing to petition for review of the challenged standards, and nothing in *Ohio* changes that.

II. *Loper Bright* Confirms NHTSA Must Set Standards at the Maximum Feasible Level Automakers Can Achieve

Loper Bright overturned the *Chevron* framework that accorded agencies interpretative deference in certain cases of statutory ambiguity. For purposes of NRDC's challenge, the statute here is unambiguous: NHTSA must determine what maximum feasible level of fuel economy automakers "can achieve" each year and set standards at that level. 49 U.S.C. § 32902(a). NRDC's petition is not about statutory ambiguity, but rather NHTSA's failure to carry out its statutory duty.

Pickup trucks and sport utility vehicles are some of the least efficient vehicles on the road, and NRDC argued that automakers "can achieve" higher levels of fuel economy by upgrading at least some of those vehicles with what are known as high-compression-ratio or

Atkinson-enabled engines. *E.g.*, NRDC Br. 1–2; NRDC Reply Br. 1–3. NHTSA's response—that automakers "can't achieve" *any* gains with this technology—was grounded neither in the statute, nor in the record. Indeed, NHTSA did not once cite the statute as authority in its response to our petition. *See* NHTSA Br. 84–119. Instead, the agency argued these vehicles are "marketed" as having capabilities these engines cannot meet. NHTSA Br. 99–100. But the record flatly contradicts that, as these exact engines are *already in use* in vehicles with capabilities exceeding those NHTSA says precludes the technology. *See* NRDC Reply Br. 9–17.

Thus, the headline holding of *Loper Bright*—that courts "need not … defer to an agency interpretation of the law simply because a statute is ambiguous," 144 S.Ct. at 2273—is inapplicable and should not change the Court's analysis here. *Loper Bright* also reiterated the Court's duty to independently determine "whether an agency has acted within its statutory authority." *Id*. The agency has not done so here, because it set standards that do not reflect what automakers "can achieve." 49 U.S.C. § 32902(a).

CONCLUSION

This Court should remand the Final Rule, without vacatur, for the agency to correct its errors regarding the exclusion of Atkinson-enabled engines and to reconsider the feasibility of more stringent standards.

Dated: August 19, 2024

Respectfully submitted,

/s/ Pete Huffman

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was composed in 14-point Century Schoolbook font and complies with applicable typeface and type-style requirements. The brief contains 993 words and complies with the type-volume limitations of this Court's order of July 29, 2024. ECF No. 2067052.

/s/ *Pete Huffman*
Pete Huffman

Dated: August 19, 2024