ORAL ARGUMENT HELD SEPTEMBER 14, 2023

Case No. 22-1080 (and consolidated cases)

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.

SUPPLEMENTAL REPLY OF STATE RESPONDENT-INTERVENORS

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INTRODUCTION AND SUMMARY OF ARGUMENT

In their supplemental briefs, the parties generally agree the record in *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), is different and that decision does not control the standing analysis here. *E.g.*, Petr. Suppl. Br. 2-11; NHTSA Suppl. Br. 2-3; State Intv. Suppl. Br. 2-5. The parties also generally agree that the overruling of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), does not change the answers to the statutory interpretation questions here. *E.g.*, NHTSA Suppl. Br. 7; State Intv. Suppl. Br. 5-18; Petr. Suppl. Br. 12. The parties disagree, however, about those answers and what *Loper Bright* means about the path to reach them.

Petitioners argue that *Loper Bright* is irrelevant because NHTSA's Rule purportedly implicates the major questions doctrine by "forc[ing] electrification of the Nation's vehicle fleet." Petr. Suppl. Br. 12. Petitioners have not preserved this argument. But the argument fails regardless, particularly as Petitioners have now conceded that this Rule does not, in fact, "force electrification." Petitioners' supplemental brief also highlights that their statutory construction is far from "best" because it would require NHTSA to reject a realistic baseline fleet in favor of a counter-factual one. Finally, Petitioners argue that NHTSA's interpretation of Section 32902(h)(1) is not entitled to *Skidmore* respect because NHTSA may have *once* taken an inconsistent position. But *Skidmore* respect does not rise or fall on

one sentence in a single rule. More importantly, NHTSA's consistent interpretation of Section 32902(f) should be given the heaviest weight under *Skidmore*, and that interpretation is fatal to Petitioners' reading of Section 32092(h).

For their part, Petitioner-Intervenors attempt to transform their improperly presented arbitrary-and-capricious challenge—concerning *how* NHTSA constructed the baseline fleet—into a statutory question. But that attempt fails, as does their challenge.

ARGUMENT

I. THERE IS NO MAJOR QUESTION IN THIS CASE

As Petitioners observe, the Supreme Court declined to apply *Chevron* deference in at least some major-questions cases prior to *Loper Bright*. Petr. Suppl. Br. 12; *Loper Bright*, 144 S Ct. at 2269. But that observation is irrelevant for two reasons. First, NHTSA's interpretation never depended on *Chevron*. State Intv. Suppl. Br. 5-6; NHTSA Suppl. Br. 7. Second, Petitioners' previous briefs made only passing references to a major question. Petr. Br. 3 (pointing to briefing in "other cases"); *id.* at 26 (same). *see also* NHTSA Br. 46-47. That was not enough to preserve the issue.

Underscoring the point, Petitioners' supplemental standing argument entirely belies their major-questions premise: that this Rule results in "forced electrification of the Nation's vehicle fleet." Petr. Suppl. Br. 12. In simple terms, these fuel-

economy standards are the sum of the baseline fleet's average fuel economy plus feasible improvements NHTSA determined could be made. NHTSA Br. 17–20. Thus, for Petitioners' major-questions premise to work, either the baseline or the improvements (or both) would have to "force electrification." But Petitioners now expressly acknowledge that the baseline fleet "reflects 'the state of the world' that would exist if NHTSA had taken no action and had left the [pre-existing] standards in effect." Petr. Suppl. Br. at 6; *see also id.* 6–7 (relying on alleged injuries from "*additional* technology" above baseline) (emphasis added). A baseline fleet that realistically represents what automakers would produce in a no-action scenario does not "force" electrification (or any other technology). And, when it determined the level of improvement to require, NHTSA "did not consider the possibility that automakers could create new battery-electric vehicles" in the covered model years. NHTSA Br. 2; *see also id.* at 18–19.[1] Thus, Petitioners' gestures at a major question never get off the ground because no part of the Rule could "force electrification."

[1] If NHTSA erred in considering the production of new battery-electric vehicles in response to the Rule *outside* the covered model years (2024-2026), that error was harmless. NHTSA Br. 71–73.

II. PETITIONERS' SUPPLEMENTAL BRIEF FURTHER DEMONSTRATES THAT THEIR INTERPRETATION IS NOT THE BEST READING

Petitioners' concession that NHTSA's baseline is a realistic no-action forecast also highlights a fundamental flaw in Petitioners' reading of Section 32902(h): their interpretation requires NHTSA to use a counterfactual baseline fleet with an unrealistically low average fuel economy as the starting point for setting "maximum feasible" standards. That implausible notion underscores that Petitioners' reading is far from the best one.

Specifically, Petitioners contend Congress mandated that NHTSA must reject its realistic baseline and imagine, instead, an inaccurate and unrealistic world—one where the baseline fleet contains no electric vehicles or plug-in hybrids and where manufacturers never had credits to transfer or trade as an alternative to making changes to their fleets. *E.g.*, Petr. Br. 27. Petitioners have never come close to reconciling this supposed congressional command with the express instructions to promulgate standards at the "*maximum feasible* average fuel economy level … manufacturers can achieve," 49 U.S.C. § 32902(a) (emphasis added), and to consider real-world limitations on "economic practicability" and "technological feasibility" when determining how much, if any, fuel-economy improvement to demand, *id.* § 32902(f). *See* NHTSA Br. 36-37.

The best reading here is not the one that requires NHTSA to do the impossible: to determine what manufacturers can realistically achieve in the future

without a realistic sense of what manufacturers have done or would do. Rather, the best reading is the one that respects the express limitations that Congress placed on the requirement to disregard the program's alternative compliance pathways: that NHTSA do so only when "carrying out subsections (c), (f), and (g)." 49 U.S.C. § 32902(h); *see* State Intv. Br. 11-21; State Intv. Suppl. Br. 9-11.

III. *SKIDMORE* APPLIES AND CONFIRMS NHTSA'S INTERPRETATION IS THE BEST ONE

As Petitioners acknowledge, *Loper Bright* affirmed that interpretations from implementing agencies "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Loper Bright*, 144 S. Ct. at 2262 (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)); *see* Petr. Suppl. Br. 14. NHTSA's interpretation provides the Court with precisely this sort of aid. NHTSA Suppl. Br. 5-6; State Intv. Suppl. Br. 16-17.

Arguing otherwise, Petitioners point to *one* rule from 2006, claiming that the interpretation at issue here came too late and has been too inconsistent to warrant *Skidmore* respect. Petr. Suppl. Br. 14-15. But even assuming that Petitioners correctly interpret the language in the 2006 rule, that single example cannot nullify *Skidmore* respect. The weight given to an agency's interpretation depends, *inter alia*, "'upon the thoroughness evident in its consideration.'" *Loper Bright*, 144 S. Ct. at 2259 (quoting *Skidmore*, 323 U.S. at 140). As the "dedicated automobiles" covered by subsection (h)(1), 49 U.S.C. § 32902(h)(1), have grown in market share

and relevance, NHTSA's analysis of that subsection has (not surprisingly) been more thorough, *e.g.*, 85 Fed. Reg. 24,174, 25,150-51 (Apr. 30, 2020), than the three-sentence treatment in the 2006 rule, 71 Fed. Reg. 17,566, 17,582 (Apr. 6, 2006). Moreover, "the validity of [NHTSA's] reasoning" here also warrants *Skidmore* respect, for all the reasons presented in NHTSA's and Respondent-Intervenors' briefs. *See Skidmore*, 323 U.S. at 140.

Even if no *Skidmore* respect were due NHTSA's interpretation of *subsection (h)(1)*, the weighty *Skidmore* respect due to NHTSA's interpretation of *subsection (f)* would still preclude Petitioners' reading of the statute. Although Petitioners would prefer that subsection (h) extended to "carrying out this section," Congress deliberately applied subsection (h) only when NHTSA is "carrying out subsections (c), (f), and (g)." 49 U.S.C. § 32902(h); *see also* State Intv. Br. 12-13; State Intv. Suppl. Br. 9-10. Petitioners must therefore identify some way in which the inclusion of subsections (c), (f), and (g) controls the entire standard-setting process, despite the express exclusion of the standard-setting subsections—(a), (b), and (d). Subsections (c) and (g) cannot provide the mechanism Petitioners need, as those pertain only to the decision to amend standards. 49 U.S.C. § 32902(c), (g); State Intv. Br. 19-21; *accord* Petr. Reply 9. Petitioners' only option, then, is to rely on a reading of subsection (f) that somehow controls every step in the standard-setting process, including the establishment of baseline fleets. Petr. Reply 8-9.

But NHTSA's contemporaneous and consistent interpretation of subsection (f) has been, and is, the opposite. State Intv. Br. 12 (citing multiple prior rules from 1977 on); State Intv. Suppl. Br. 16-17. Consistent with the plain text, NHTSA has always understood subsection (f) to require consideration of the enumerated factors *only when* NHTSA determines how much, if any, *improvement* over baseline is "maximum feasible." 49 U.S.C. § 32902(f). This interpretation of subsection (f) is entitled to the greatest *Skidmore* respect. *Loper Bright*, 144 S.Ct. at 2262. Petitioners have not even attempted to establish otherwise. Petr. Suppl. Br. 14-15. The plain text and NHTSA's interpretation of subsection (f) both unravel Petitioners' argument by depriving them of a mechanism to apply subsection (h) across the entire standard-setting process.[2]

IV. PETITIONER-INTERVENORS' SEPARATE CHALLENGE IS NOT PROPERLY BEFORE THE COURT, AND *LOPER BRIGHT* DOES NOT SUPPORT IT

Petitioner-Intervenors also argue that *Loper Bright* supports their separate challenge to a part of the methodology NHTSA used to construct the baseline fleet—namely, the use of certain state vehicle-emission standards as a proxy for estimating zero-emission-vehicle sales. That challenge was not raised by

[2] Because NHTSA's interpretation of subsection (f) preceded the enactment of what is now subsection (h), that interpretation also informs the Court's understanding of what Congress intended to control when it constrained subsection (f). State Intv. Br. 12-13; State Intv. Suppl. Br. 15.

Petitioners and is not properly before this Court. NHTSA Br. 60-62; State Intv. Br. 27-28. In any event, *Loper Bright* provides no support for Petitioner-Intervenors.

First, *Loper Bright*'s overruling of *Chevron* deference has no relevance to Petitioner-Intervenors' claims because those claims involve no question of statutory construction upon which NHTSA opined in this rulemaking. In fact, Petitioner-Intervenors fault NHTSA for *not interpreting* a preemption provision. Petr.-Intv. Br. 2. There was never a *Chevron* deference question here, as Petitioner-Intervenors well know. Petr.-Intv. Suppl. Br. at 5 ("NHTSA did not invoke *Chevron* deference in defending this specific aspect of its decision.").

Second, *Loper Bright* affirms that deferential judicial review applies to agencies' technical analyses—such as how NHTSA estimated the number of electric-vehicles in the baseline fleet. 144 S. Ct. at 2261. Petitioner-Intervenors identify no reason for this Court to find error with NHTSA's methodology. Indeed, no one has asserted that NHTSA's baseline is wrong, and Petitioner-Intervenors treat NHTSA's baseline as accurate enough to support their standing. Petr.-Intv. Suppl. Br. 3-4 (relying on over-baseline *improvements* to establish injury).

Petitioner-Intervenors' attempts to turn their claim into one of statutory construction fail. They do not and cannot point to any statutory text that invites, much less requires, NHTSA to opine on preemption of state vehicle emission standards when setting federal fuel-economy standards. NHTSA 63-65; State Intv.

Br. 29-30. Therefore, this dispute is not one in which the Court's role is to "police the outer statutory boundaries" of federal agency authority. *Loper Bright*, 144 S. Ct. at 2268. And *Loper Bright* does not in any way support Petitioner-Intervenors' request that this Court police the outer boundaries of *state* authority—by declaring California's laws preempted—in this review of a federal action. State Intv. Br. 30-32.

CONCLUSION

The petitions should be denied.

Dated: August 29, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the Court's July 29, 2024 Order (ECF No. 2067052) because it contains 1,863 words. I further certify that this motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: August 29, 2024

/s/ M. Elaine Meckenstock
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CERTIFICATE OF SERVICE

I certify that on August 29, 2024, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all other participants in this case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: August 29, 2024

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