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,
Petitioners,

CLEAN FUELS DEVELOPMENT COALITION, ET AL.,
Intervenors for Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, ET AL.,
Respondents,

CITY AND COUNTY OF DENVER, COLORADO, ET AL.,
Intervenors for Respondents.

On Petition for Review from the
National Highway Traffic Safety Administration
(No. NHTSA-2021-0053)

SUPPLEMENTAL BRIEF FOR INTERVENORS IN SUPPORT OF PETITIONERS

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GLOSSARY

Biofuel Int. Br.	Final Brief for Intervenors in Support of Petitioners (Doc. 2000125)
Biofuel Int. Reply Br.	Final Reply Brief for Intervenors in Support of Petitioners (Doc. 2000127)
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act of 1975
NHTSA	National Highway Traffic Safety Administration
NHTSA Br.	Final Brief for Respondents (Doc. 2000002)

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court requested supplemental briefing on the relevance to this case of two decisions: (1) this Court's standing decision in *Ohio* v. *EPA*, 98 F.4th 288 (2024); and (2) the Supreme Court's decision in *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024), which overruled *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). As the fuel petitioners explain in their supplemental brief, *Ohio* does not affect the fuel petitioners' standing, while *Loper Bright* strengthens their statutory arguments. The same is true for the biofuel intervenors, for essentially the same reasons.

ARGUMENT

I. *Ohio* v. *EPA* Does Not Affect The Biofuel Intervenors' Standing.

Intervenors in agency rule challenges are required to establish Article III standing. *See Fund for Animals, Inc.* v. *Norton*, 322 F.3d 728, 731-732 (D.C. Cir. 2003). The biofuel intervenors have demonstrated their standing here, and nothing in *Ohio* changes the analysis.

A. The biofuel intervenors and their members produce liquid biofuels like ethanol, biodiesel, and renewable diesel, or the ingredients used to make those fuels. *See* Biofuel Mot. to Intervene 17. The entire purpose of NHTSA's rule, by the agency's own admission, is to reduce consumption of liquid fuels by forcing automakers to sell, and consumers to buy, cars that use less liquid

fuel like gasoline and diesel. *See* J.A. 884. Gasoline must, by law, be blended with ethanol, *see* Biofuel Mot. to Intervene Ex. A at 2-3, and diesel includes biodiesel and renewable diesel. The rule is thus designed to depress demand for the biofuel intervenors' products. As biofuel intervenors explained in their standing declarations, that decrease in demand would be to "the financial detriment of [their] members." Biofuel Mot. to Intervene Ex. B at 4.

A ruling from this Court setting aside NHTSA's unlawful mandate would redress those injuries, as the removal of a "regulatory hurdle" to the consumption of a party's product typically does. *Energy Future Coal.* v. *EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.) (internal quotation marks omitted). When companies produce a product that is targeted in a challenged rule, they are the "object[] of the action at issue," "so there is ordinarily little question that they have standing." *Id.* (internal quotation marks omitted). Moreover, biofuel intervenors are affected by NHTSA's regulation of automakers and may rely on "the predictable effect of Government action on the decisions of third parties" to establish causation and redressability. *Department of Commerce* v. *New York*, 588 U.S. 752, 768 (2019).

B. This Court's decision in *Ohio* v. *EPA* does not affect intervenors' standing here. *Ohio* concerned EPA's decision in March 2022 to reinstate California's Clean Air Act preemption waiver, which permits California to set its own vehicle-emission standards, including, at least according to EPA, standards that mandate "zero-emission vehicles" and limit greenhouse-gas emissions from vehicles. *See Ohio*, 98 F.4th at 293. This Court found that the petitioners in that case, who also produce liquid fuels, had not established the redressability prong of standing because they had not provided record evidence that "automobile manufacturers are likely to respond to a decision by this Court by changing their fleets in a way that alleviates their injuries." *Id.* at 302.

That decision is the subject of a pending petition for certiorari. *See Diamond Alternative Energy, LLC* v. *EPA*, No. 24-7 (U.S. 2024). But whatever the merits of *Ohio*'s view of the record evidence in that case, in this case the record is crystal clear. Here, *NHTSA itself* projected that automakers will respond to its standards by producing vehicles that consume less liquid fuel and accordingly that the standards will "save about 60 billion gallons of gasoline" through 2030 and "approximately 234 billion gallons of gasoline through

2050." J.A. 899, 1231. Lessening the demand for the biofuel intervenors' products on the order of hundreds of billions of gallons will of course cause them to lose at least one dollar in revenue. *See Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 802 (2021). The agency's conclusion that its rule will "save" billions of dollars of gasoline necessarily means that without the rule, more gasoline—and more of the biofuels blended with gasoline—would be consumed. There can thus be no doubt that a favorable ruling here would redress the biofuel intervenors' injuries, at least in part.

II. *Loper Bright* Confirms That NHTSA's Statutory Arguments About Preemption Are Not Entitled To Special Interpretive Weight.

This Court also requested briefing on the relevance of *Loper Bright*. As the fuel petitioners explain in their supplemental brief, *Loper Bright* confirms that NHTSA gets neither *Chevron* deference nor any other special respect for its view that Section 32902(h) allows it to consider electric vehicles in setting fuel-economy standards. For similar reasons, NHTSA's arguments about preemption under the Energy Policy and Conservation Act (EPCA) are not entitled to *Chevron* deference or any other special interpretive weight either.

First, *Loper Bright* confirms that NHTSA is not entitled to *Chevron* deference. As biofuel intervenors explained in their briefs, NHTSA could not incorporate electric vehicles required by state mandates into its fuel-economy-

standard calculations, because those state mandates are preempted under EPCA. *See* Biofuel Int. Br. 14-22; Biofuel Int. Reply Br. 5-10. Although NHTSA did not invoke *Chevron* deference in defending this specific aspect of its decision, it did rely on *Chevron* elsewhere in its brief. *See* NHTSA Br. 48. *Loper Bright* now forecloses that possibility. *See* 144 S. Ct. at 2266.

Second, *Loper Bright* confirms that NHTSA's view of preemption is not entitled to any other special interpretive weight. The Supreme Court in *Loper Bright* explained that a court may give an agency interpretation particular respect under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), based on its "power to persuade." 144 S. Ct. at 2267 (citation omitted). That interpretive respect is at its height when the agency's interpretation was "issued roughly contemporaneously with enactment of the statute and remained consistent over time." *Id.* at 2258. NHTSA's view of preemption, however, is the opposite of the consistent, contemporaneous agency practice that *Loper Bright* contemplates.

NHTSA (along with EPA) has gone back and forth over the past several administrations on whether EPCA preempts state electric-vehicle mandates. In 2013, EPA granted a federal-preemption waiver for a California electric-vehicle mandate, declining to consider the question of EPCA preemption. 78 Fed. Reg. 2112, 2145 (Jan. 9, 2013). In 2019, EPA and NHTSA rescinded

that waiver and concluded that California's laws *were* preempted by EPCA. 84 Fed. Reg. 51310, 51338 (Sept. 27, 2019). Under the current Administration, NHTSA has repealed its previous fuel-economy standards, and now takes the position that it cannot "dictate or proclaim EPCA preemption with the force of law." 86 Fed. Reg. 74236, 74266 (Dec. 29, 2021). NHTSA's current position on EPCA preemption of state electric-vehicle mandates is that it has no position—but that it can nevertheless consider electric vehicles that are on the road because of those mandates. *See* J.A. 1062.

NHTSA's flip-flopping on whether EPCA preempts state mandates—and accordingly, whether the agency may consider them in setting fuel-economy standards—is the height of inconsistency. Under *Loper Bright*, the agency's view of this statutory question is not entitled to any special weight. Moreover, as the biofuel intervenors explained in their briefs, NHTSA's new position is internally incoherent, and thus arbitrary and capricious under the APA. *See* Biofuel Int. Br. 22-26; Biofuel Int. Reply Br. 10-13.

CONCLUSION

For the foregoing reasons, and the reasons in the biofuel intervenors' briefs, this Court should set aside NHTSA's rule.

Respectfully submitted,

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AUGUST 19, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(f) and (g), along with the Court's order of July 29, 2024, because it contains 1,244 words.

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

/s/ Jeffrey B. Wall
JEFFREY B. WALL

AUGUST 19, 2024

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of August, 2024, I electronically filed the foregoing supplemental brief with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

/s/ Jeffrey B. Wall
JEFFREY B. WALL

AUGUST 19, 2024