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 BRIEF OF STATE RESPONDENT-INTERVENORS

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GLOSSARY

EPA	U.S. Environmental Protection Agency
Indus. Intv. Br.	Final Brief of Respondent-Intervenors National Coalition for Advanced Transportation and Zero Emission Transportation Association (ECF No. 1999971)
NHTSA	National Highway Traffic Safety Administration
NHTSA Br.	Final Brief for Respondents (ECF No. 2000002)
Petr. Br.	Final Brief of Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners (ECF No. 2000036)
Petr. Reply	Final Reply Brief Petitioner American Fuel & Petrochemical Manufacturers and State Petitioners (ECF No. 2000037)
State Intv. Br.	Final Brief of State and Local Government Respondent-Intervenors (ECF No. 2000081)

INTRODUCTION AND SUMMARY OF ARGUMENT

On July 29, 2024, this Court ordered the parties to submit supplemental briefs addressing two questions: (1) the extent to which *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), is relevant in this case to petitioners' standing, and (2) the extent to which *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), is relevant to the issues of statutory interpretation presented in these cases. ECF No. 2067052. In response, State Respondent-Intervenors respectfully submit that neither case affects the resolution of the petitions filed by American Fuel and Petrochemical Manufacturers and State Petitioners (collectively, Petitioners).[1] Because *Ohio* applied well-established law to distinct facts, it sheds little to no light on whether any Petitioner has established standing here—a question on which State Respondent-Intervenors continue to take no position. As to *Loper Bright*, Respondents' plain text statutory arguments do not rely on the deference doctrine rejected in that case.

[1] The State Respondent-Intervenors take no position on the petition filed by the Natural Resources Defense Council, consistent with their limited motion to intervene. ECF No. 1957382, at 1.

ARGUMENT

I. THE STANDING PRINCIPLES REITERATED IN *OHIO* APPLY HERE, BUT THE FACTS OF THAT CASE ARE DISTINCT

The *Ohio* decision rests on well-established standing principles that are relevant in this case, as they are in all cases. For example, "'[a] petitioner bears the burden of establishing each'" element of standing. *Ohio*, 98 F.4th at 300 (quoting *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011)). And "absent 'good cause shown,' a petitioner whose standing is not readily apparent must show that it has standing in "its opening brief." *Id.* at 300 (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002)). The *Ohio* panel applied these and other longstanding principles to the particular facts of that case. However, because those facts are distinct from the facts here, that application seems to have little relevance in this case.

In *Ohio*, Petitioners sought review of EPA's 2022 reinstatement of a Clean Air Act preemption waiver that EPA had originally granted to California in 2013. 98 F.4th at 297. That 2013 waiver permitted California to enforce certain vehicle emission standards that the State had adopted in 2012. *Id.* Those standards required automakers to improve the emissions of the vehicles they would sell in California in each model year from 2017 to 2025. *Id.* Automakers began making the necessary "investments to meet

[those] requirements" in 2012. *Id.* at 298. And, by the time the *Ohio* petitions were filed ten years later, automakers were "selling *more* qualifying vehicles in California than the State's standards require." *Id.* at 305 (internal quotation marks omitted).[2] Here, by contrast, the federal standards at issue in this case were challenged within months of their promulgation. Automakers had not therefore spent a decade planning for compliance with these particular standards before Petitioners filed suit.

The peculiar history of the waiver at issue in *Ohio* also had unique implications for Petitioners' standing in that case. When EPA reinstated the 2013 waiver, it did so for all model years (2017 through 2025) covered by that original waiver, thereby reversing a 2019 decision to withdraw the waiver for those same model years. *Ohio*, 98 F.4th at 298. For this reason, the administrative record in *Ohio* addressed the effects of California's

[2] These facts underscore that the Court should disregard the separate claims brought by Petitioner-Intervenors in this case. State Intv. Br. 27-32. Petitioner-Intervenors ask this Court to determine that the state zero-emission-vehicle standards at issue in *Ohio* are preempted by the fuel-economy statute, but they have done nothing to establish standing to seek that relief. *Id.* at 31-32. Moreover, the fact that automakers have been over-complying with California's standards, *Ohio*, 98 F.4th at 305, simply confirms that it was not arbitrary and capricious for NHTSA to assume automakers would at least meet those very same standards, State Intv. Br. 28; NHTSA Br. 62-63.

standards over the entire regulatory period (again, model years 2017 through 2025) in gross. That record thus generally did not speak to current market conditions or distinguish between the past and future effects of the underlying California standards at issue. *See id.* at 302. Consequently, there was a "paucity of evidence in the record regarding … redressability"—*i.e.*, whether and when automakers would change their plans *in the limited model years that remained* if the waiver reinstatement were vacated. *Id.* at 303.

The *Ohio* petitioners nonetheless chose to "treat[] redressability as a foregone conclusion" in their opening brief. 98 F.4th at 303. They cited no record evidence and provided no additional evidence that could establish that element of standing. *Id.* Then, when confronted with evidence about current market conditions in California suggesting that Petitioners' alleged injuries were *not* redressable, "neither State nor Fuel Petitioners meaningfully addressed the redressability of their economic injuries in their reply briefs." *Id.* at 305. The *Ohio* panel thus correctly concluded that "the record evidence, coupled with the filings of the EPA and intervenors, provide this Court with no basis to conclude that Petitioners' claims are redressable—a necessary element of standing that Petitioners bear the burden of establishing." *Id.*

Here, however, NHTSA's record supports the promulgation of fuel-economy standards applicable only to future model years. That record thus addresses current market conditions and examines the likely effects of these standards in those future model years and beyond.[3] And, unlike in *Ohio*, no party provided the Court with evidence of current market conditions that called redressability into doubt.

Given these distinctions between the two cases, the *Ohio* decision appears to have little to no bearing on Petitioners' standing here—beyond providing another illustration of how well-established standing principles apply to particular facts.

II. RESPONDENTS HAVE THE BEST READING OF THE STATUTE UNDER *LOPER BRIGHT*

In *Loper Bright*, the Court overruled the deference doctrine established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That change has no impact on this case's questions of statutory interpretation because State Respondent-Intervenors rely on the plain text of the Energy Policy and Conservation Act (EPCA), not agency deference.

[3] By highlighting the distinctions in the administrative records in *Ohio* and here, State Respondent-Intervenors are not asserting that the record in this case actually establishes Petitioners' standing. As noted, State Respondent-Intervenors continue to take no position on whether any Petitioner here had established standing.

State Intv. Br. 10-25. While *Loper Bright* rejects the *Chevron* "fiction" of implicit delegations from ambiguity, it recognizes the best reading of a statute may be that Congress has delegated discretionary authority to an agency, and it directs courts to respect such delegations. 144 S.Ct. at 2263. Here, the plain text and structure of EPCA's fuel economy provisions show NHTSA stayed within the statutory bounds of its delegated authority to set fuel economy standards—most relevantly, the prohibition on "consider[ing] the fuel economy of dedicated automobiles" when "carrying out subsections (c), (f), and (g) of" Section 32902. 49 U.S.C. § 32902(h).

A. Section 32902 of EPCA Delegates Authority to NHSTA to Determine the Maximum Feasible Average Fuel Economy that Automakers Can Achieve

NHTSA's authority to decide maximum feasible average fuel economy according to its technical judgments derives from an explicit delegation of authority—Section 32902 of EPCA—which *Loper Bright* instructs courts to recognize and respect. 144 S.Ct at 2263, 2268.

In Section 32902, Congress directed NHTSA to "prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year," subject to the requirement that "[e]ach standard shall be the maximum feasible average fuel economy level that *the Secretary decides* the manufacturers can achieve in that model year." 49

U.S.C. § 32902(a) (emphasis added). This text, together with the four factors NHTSA must consider in deciding maximum feasible average fuel economy, 49 U.S.C. § 32902(f), expressly commits the determination of fuel-economy standards to the agency's expert scientific, technical, and policy judgments, always subject to the Court's arbitrary-and-capricious review for "reasoned decisionmaking." *Loper Bright*, 144 S.Ct. at 2263 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)); *see* 5 U.S.C. § 706(2)(A); NHTSA Br. 28-29.

Loper Bright's framework here is clear: Courts are to "police the outer statutory boundaries" of such express delegations and ensure NHTSA rationally exercised its delegated discretion within those boundaries. 144 S.Ct. at 2268; *see also id.* at 2263 (A court fulfills its judicial function by "recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries." (cleaned up)). In "fixing the boundaries" of agency authority, a court must determine the statute's "best meaning," neither enlarging nor diminishing the discretion Congress left to the agency. *Id.* at 2263 ("[O]f course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."); *see also Jama v. ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress

has omitted from its adopted text requirements that it nonetheless intends to apply … .”). Here, that requires the Court to decide the best reading of Section 32902(h)'s statutory limit on when and how NHTSA may consider the impact of three enumerated compliance flexibilities provided to automakers in statute. 49 U.S.C. § 32902(h)(1)-(3).

B. EPCA's Text and Structure Show that NHTSA's Standards Fall within the Statutory Boundaries of its Authority

Following *Loper Bright*'s framework, the best reading of Section 32902(h) is that it constrains NHTSA's technical judgments about fuel economy in precise, enumerated respects—not the whole of its standard-setting analysis, as Petitioners propose. By its plain text, Section 32902(h)(1) applies to NHTSA only (*i*) when it considers the four specific feasibility factors listed in subsection (f), and (*ii*) when it decides whether to amend already-promulgated standards under subsection (c) and (g). 49 U.S.C. § 32902(h)(1); *see id.*, § 32902(c), (f), (g). While Petitioners argue that NHTSA violated Section 32902(h)(1) in constructing a baseline fleet in its "no action" analysis, that analysis implicates neither the four subsection (f) factors nor the decision to amend. NHTSA's rule thus stayed strictly within the bounds of its delegated discretion. State Intv. Br. 11-13, 17. As set out in State Respondent-Intervenors' merits brief, a host of textual and structural

cues confirm that the best reading of Section 32902(h) does not require NHTSA to start from a counterfactual, partial baseline fleet that pretends only gas- and diesel-fueled vehicles exist and will be produced in the future.

1. The plain text of Section 32902(h)[4]

The Court's primary interpretive resource is, as before *Loper Bright*, the statutory text. EPCA's provisions, "no matter how impenetrable, do—in fact, must—have a single, best meaning." *Loper Bright*, 144 S.Ct. at 2266. And the Supreme Court's treatment of a similar cross-reference in *National Association of Manufacturers v. Department of Defense*, 138 S.Ct. 617 (2018) (*NAM*), tells us what that best meaning must be: the one that applies the three 32902(h) constraints only to those provisions it identifies, "subsections (c), (f), and (g)." 49 U.S.C. § 32902(h); *see NAM*, 138 S.Ct. at 630-31. That is, the best reading *cannot* be one that distributes Section 32902(h)'s constraints into each and every subsection that touches NHTSA's

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[4] Section 32902(h) states that, in "carrying out subsections (c), (f), and (g) of this section, the Secretary of Transportation—

> (1) may not consider the fuel economy of dedicated automobiles;
> (2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and
> (3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.

49 U.S.C. § 32902(h).

standard-setting—(a), (b), (c), (d), (f), and (g)—as Petitioners propose. State Intv. Br. 12-13; *compare* Petr. Reply 8-9.

Also as a matter of plain text, "carrying out" subsections (c), (f), and (g) does not mean "set[ting] fuel-economy standards." *See* Petr. Br. 28. In subsection (f), NHTSA's task is to "consider" the four enumerated "maximum feasible" factors. 49 U.S.C. § 32902(f); State Intv. Br. 18-19. While NHTSA's consideration of those four factors is an important part of the standard-setting process, a reading that conflates the part with the whole cannot be the "best reading," because it evades the precision Congress saw fit to use in defining subsection (h)'s applicability. *NAM*, 138 S.Ct. at 631 (courts must "give effect to Congress' express inclusions and exclusions"). "[C]arrying out subsections (c) … and (g)" must also refer to an exercise *distinct* from standard-setting—again, to give effect to the exclusion of subsections (a), (b), and (d) from Section 32902(h)'s constraints—namely, the discretionary decision whether to amend existing fuel-economy standards instead of waiting to promulgate the next round of new standards. State Intv. Br. 19-21; *accord* Petr. Reply 9.

The other two Section 32902(h) constraints—concerning NHTSA's treatment of "dual fueled" vehicles and compliance credits—confirm Respondents' plain text reading that Section 32902(h) cannot apply to every

step of NHTSA's rulemaking. Petitioners contend that subsection (h)(1) requires NHTSA to pretend electric vehicles simply do not exist—even the ones actually manufactured in the model year 2020 fleet—at all stages of its standard-setting rulemaking. Petr. Reply 6, 9-10; *see* NHTSA Br. 30-31, 33-34. If that were correct, then subsection (h)(3) would require the same pretense about "the trading, transferring, or availability of credits under section 32903"—even historical credit-trading reflected in the 2020 fleet's composition, *e.g.*, by one manufacturer's decision to produce less efficient cars offset with credits purchased from another, over-complying manufacturer. Yet Petitioners never demand that NHTSA construct a baseline fleet that erases the effects of past credit trading. 49 U.S.C. § 32902(h)(3).

2. The plain text of surrounding provisions

Petitioners' reading also conflicts with the plain text of Section 32902's other subsections. For example, in subsection (a), which directs NHTSA to set fuel-economy standards at the "maximum feasible average fuel economy level" manufacturers "can achieve" in a given model year, the term "average fuel economy level" refers to a manufacturer's fleet average calculated under Section 32904. 49 U.S.C. §§ 32901(a)(5) (defining "average fuel economy" as calculated under § 32904), 32902(a); *see* State Intv. Br. 15-17.

That calculated fleet average, in turn, must reflect the manufacturer's entire production fleet, including electric vehicles. 49 U.S.C. § 32904(a)(2)(B). Under Petitioners' reading, Section 32902(h) overwrites this plain text, instructing NHTSA to take out what subsection (a) and Section 32904's fleet-average formulas instruct NHTSA to leave in. That disharmony, in turn, produces standards that are dramatically lower than "the maximum feasible average fuel economy level that [NHTSA] decides the manufacturers can achieve in that model year." *Id.* § 32902(a); NHTSA Br. 39-40. That cannot be the "best reading." *Loper Bright*, 144 S.Ct. at 2266.

By contrast, NHTSA's reading gives effect to subsections (a) *and* (h) by setting standards as the maximum feasible *improvement over the baseline* and applying Section 32902(h)(1) to the agency's determination of that improvement. Under this approach, the "maximum feasible average fuel economy level" that manufacturers can achieve is the sum of (*i*) the baseline fuel economy of the entire production fleet, plus (*ii*) maximum feasible improvements. And NHTSA cannot consider plug-in electric vehicle technologies (or the other compliance flexibilities itemized in subsection (h)) when determining those maximum feasible improvements. State Intv. Br. 15-16.

Petitioners' proposed reading would also make a hash out of subsection (d), which uses this same term ("maximum feasible average fuel economy level that the manufacturer can achieve") to define an exemption for small manufacturers. 49 U.S.C. § 32902(d). That is, NHTSA may exempt a small manufacturer from its generally applicable fuel-economy standards when the "maximum feasible average fuel economy level that the manufacturer can achieve" falls below NHTSA's standard. *Id.* § 32902(d)(A). Reading that term to exclude electric vehicles would effectively exempt a small manufacturer with a substantial line of electric vehicles from NHTSA's standards even if that manufacturer is in fact over-complying and generating credits, contrary to the plain operation of the exemption. State Intv. Br. 16. Here again, Petitioners' reading is not the best reading.

3. The absurd results of Petitioners' reading

Reading Section 32902(h) in its statutory context also requires recognizing the absurd results of Petitioners' interpretation. *See, e.g.*, *Landstar Express Amer., Inc. v. Fed. Maritime Comm'n*, 569 F.3d 493, 498-499, 500 (D.C. Cir. 2009) (Kavanaugh, J.) (applying absurdity canon, which disfavors statutory readings that produce "irrational" outcomes, at *Chevron*'s first step, *i.e.*, plain text review); *cf.* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) (the "presumption against

ineffectiveness" "follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness").

Those irrational outcomes include a "minimum standard" for domestic passenger cars that is higher than the "maximum feasible" standards for the whole fleet, State Intv. Br. 14-15,[5] and the perpetual generation of massive numbers of worthless overcompliance credits, *id.* at 22-24, like the magic broomsticks in *Fantasia* forever dumping water. Respondents' reading, which effectuates Section 32902(h) without these absurd results, is the best reading.

4. The history and regulatory backdrop of Section 32902(h)

Finally, statutory context includes the history behind the relevant text. *United States v. Hansen*, 599 U.S. 762, 775 (2023) ("Statutory history is an

[5] At oral argument, Petitioners proposed that the domestic minimum, defined as "92 percent of the average fuel economy projected … for the combined … fleets," 49 U.S.C. § 32902(b)(4)(B), means 92 percent of the average fuel economy *projected to be required for* the combined fleets, *i.e.*, 92 percent of the fleet-average standard. 9/14/23 Oral Arg. 3:59:57-4:00:59. That is not the ordinary meaning of "projected," nor the statutory meaning of "average fuel economy." 49 U.S.C. § 32901(a)(5) ("average fuel economy" means a manufacturer's compliance value). Petitioners' reading posits Congress took a "surprisingly indirect route" to convey a meaning "easily expressed" with the term *standard*. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994).

important part of … context.”). At the time Congress enacted the Section 32902(h) constraint (in the Alternative Motor Fuels Act of 1988), NHTSA’s consistent practice was to employ two steps to set fuel economy standards. First, NHTSA collected automakers’ product plans to understand its starting point, *i.e.*, the baseline fleet. Second, NHTSA used the four factors listed in Section 32902(f) to evaluate which technologies could be feasibly applied to improve that fleet’s average fuel economy. *See, e.g.*, 50 Fed. Reg. 40,528, 40,533-38 (Oct. 4, 1985). Similarly, in determining whether to amend the subsection (a) standards—initially set by statute at 27.5 miles per gallon—NHTSA’s consistent practice was to evaluate “manufacturers’ past efforts to achieve higher levels of fuel economy.” *Id.* at 40,533; 51 Fed. Reg. 35,594, 35,599 (Oct. 6, 1986). Because Congress legislated against the backdrop of this consistent practice, Section 32902(h) should be read to constrain what NHTSA was in fact analyzing when it applied the subsection (f) factors and exercised its amendment discretion: feasible improvements to fuel economy, not baseline fleets. State Intv. Br. 12-13; *see also Loper Bright*, 144 S.Ct. at 2258 (“[T]he longstanding practice of the government—like any other interpretive aid—can inform a court’s determination of what the law is.” (cleaned up) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014))).

NHTSA's consistent practice is also entitled to due respect under *Skidmore*. *See Loper Bright*, 144 S.Ct. at 2262 (courts may "properly resort" to an agency's "body of experience and informed judgment" for guidance (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))); *see Skidmore*, 323 U.S. at 140 (weight given to agency's views "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and [other] factors which give it power to persuade, if lacking power to control"). In its first standard-setting, NHTSA deliberately adopted its approach to maximum feasible fuel economy as the maximum feasible improvement over the baseline, finding that approach more faithful to the statutory language than the alternative methodology, and the agency has consistently deployed that approach in every subsequent rulemaking. 42 Fed. Reg. 33,534, 33,535 (June 30, 1977) ("The adopted methodology looks at present passenger automobiles and projects the impact of applying current and expected future technology to those vehicles."). Indeed, because NHTSA has used this approach from the very first fuel-economy rulemaking, it is entitled to the respect "especially warranted" for agency interpretations "issued roughly contemporaneously with the enactment of the statute" that have "remained consistent over time." *Loper Bright*, 144 S.Ct. at 2258 (citing cases).

Petitioners incorrectly challenge the consistency of the agency's approach by noting that NHTSA has sometimes lowered fuel economy standards. Petr. Reply 7-8 (citing model year 1987-88 standards, 51 Fed. Reg. 35,594). But that is because a baseline fleet's average fuel economy will sometimes be lower than previous rulemakings projected, for example, when the market shifts to favor heavier, less efficient cars. *See, e.g.*, 51 Fed. Reg. at 35,610. NHTSA has still set standards according to the maximum feasible *improvement over the baseline*, even when that baseline adjusts downward. *Id.* at 35,600 ("As part of its consideration of technological feasibility and economic practicability, … the agency has analyzed the manufacturers' current projections and underlying product plans and has considered what, if any, additional economically practicable actions the manufacturers could take to improve fuel economy.").

* * *

Because NHTSA did not consider the fuel-economy equivalencies of electric vehicles when evaluating the four Section 32902(f) factors, or when deciding whether amendment of existing model year 2024-26 fuel-economy standards was appropriate, NHTSA's exercise of its delegated authority

stayed within the statutory boundaries set by Section 32902(h).[6] None of this depends on *Chevron* deference; it follows directly from the statutory text that is the "ordinary diet of the law." *Loper Bright*, 144 S.Ct. at 2267.

CONCLUSION

For the foregoing reasons and those set forth in Respondents' and State Respondent-Intervenors' answering briefs, the Petitioners' challenges should be denied.

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[6] Were the Court to agree with Petitioners that NHTSA "considered the fuel economy of electric vehicles in deciding that it was appropriate to amend the 2024-2026 standards," Petr. Reply 9 n.3, the appropriate remedy would be to remand without vacatur, because NHTSA gave multiple reasons for amending the standards, each of which might independently justify the agency's choice. *See* State Intv. Br. 21; NHTSA Br. 78-84; *see also* Indus. Intv. Br. 11-14 (vacatur would be highly disruptive to auto industry).

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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 3,724 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 19, 2024

/s/ Theodore A. McCombs
Theodore A. McCombs

CERTIFICATE OF SERVICE

I certify that on August 19, 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 19, 2024 *\/s Theodore McCombs*