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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

GLOSSARY

EPA	Environmental Protection Agency
NHTSA	National Highway Traffic Safety Administration

ARGUMENT

NHTSA and its State intervenors concede that petitioners have standing and that *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), has no bearing on this case. They further agree that under *Loper Bright Enterprises v. Raimondo*, this Court "must exercise [its] independent judgment in deciding whether [NHTSA] acted within its statutory authority." 144 S. Ct. 2244, 2273 (2024). Any faithful reading of the statute here permits only one conclusion: NHTSA did not.

A. NHTSA argues it has discretion to determine the "maximum feasible average fuel economy." NHTSA Supp. Br. 5. But this case is not about NHTSA's "expert scientific, technical, and policy judgments." States Supp. Br. 7. It is about the limitation on NHTSA's authority imposed by Section 32902(h)—a provision that NHTSA admits "cabin[s]" its "discretion." NHTSA Supp. Br. 6. That concession is dispositive. Section 32902(h) does not just prohibit "NHTSA from considering the extent to which manufacturers can achieve compliance by producing *new* [electric vehicles] *in the model years being regulated*." *Id.* (emphasis added). It prohibits NHTSA from considering the fuel economy of *any* electric vehicles, regardless of whether they are in the "baseline" fleet or are produced

in years outside those regulated by the rule. Pet. Br. 25–50; Pet. Reply 2–17. NHTSA still cannot explain how "may not consider" can be read to mean "may consider if" or "may not consider unless."

B. The States improperly used their supplemental brief as an excuse to file a sur-reply on the merits, making statutory arguments that were neither altered by *Loper Bright* nor advanced by NHTSA. The Court should disregard their arguments. In any event, they still fail.

1. The States principally argue that Section 32902(h)(1) does not prohibit NHTSA from including electric vehicles in the "baseline" fleet (the fleet NHTSA projects would exist if it took no action) because the baseline does not constitute "carrying out subsections (c), (f), [or] (g)." 49 U.S.C. § 32902(h); *see* States Supp. Br. 8–11. The States are mistaken.

To begin with, NHTSA was indisputably carrying out subsection (g) when it considered electric vehicles' fuel economy in this rule (which included more than just in the baseline, *see* Pet. Br. 36–37; Pet. Reply 16–17). *See* JA893 (invoking subsection (g) as the authority to amend the 2020 standards). Contrary to the States' contention, "carrying out" subsection (g) includes more than just making the discretionary decision

whether to amend an existing standard. States Supp. Br. 10.[1] Subsection (g) also requires NHTSA to determine that "the amended standard meets the requirements of subsection (a)," *i.e.*, that it is "the maximum feasible average fuel economy" that "manufacturers can achieve." 49 U.S.C. § 32902(g)(1), (a). So when NHTSA made that determination here—a determination that was based in part on the fuel economy of the electric vehicles in the compliance fleet that NHTSA modeled—it was "carrying out" subsection (g). *See* JA705 (no-action baseline is "necessarily included" in each alternative NHTSA considered, including the alternative that NHTSA adopted as the standards); JA1087 (Table V-36).

NHTSA also was clearly "carrying out" subsection (f) when it considered the fuel economy of electric vehicles in this rule. Subsection (f) requires NHTSA to consider, among other factors, "technological feasibility" and "economic practicability" "[w]hen deciding maximum feasible average fuel economy." 49 U.S.C. § 32902(f). NHTSA considers those factors by modeling a compliance fleet. *See* JA943. And, as just explained, the

[1] Even on the States' erroneous reading, NHTSA violated Section 32902(h)(1) because it considered the fuel economy of electric vehicles in deciding it was appropriate to amend the standards. JA884.

electric vehicles that NHTSA included in the baseline—along with the electric vehicles that NHTSA projected "could be produced in response to CAFE standards outside the model years for which standards are being set," *id.*—were part of that compliance fleet. NHTSA therefore considered the fuel economy of those electric vehicles in considering the subsection (f) factors, in direct violation of Section 32902(h)(1). Put another way, NHTSA never determined that the amended standards were technologically feasible and economically practicable *without* the high imputed fuel economy of those electric vehicles, and therefore NHTSA necessarily considered their fuel economy in carrying out subsection (f).

The States contend that NHTSA's consideration of the subsection (f) factors is limited to deciding what "*improvement[s] over the baseline*" automakers can make. States Supp. Br. 12. Even if that were true, it wouldn't matter because the baseline—and the fuel economy of the electric vehicles it includes—is still an integral part of that analysis. As the States themselves previously explained, the baseline "fleet 'is foundational' to the determination subsection (f) contemplates because NHTSA cannot consider factors like technological feasibility and economic practicability in a vacuum." States Br. 18. But the States' premise also is

wrong: Subsection (f) does not direct NHTSA to consider the listed factors "when deciding maximum feasible *improvement over the baseline*." It says "when deciding maximum feasible average fuel economy"—which may or may not be higher than the baseline fuel economy. *See* Pet. Reply 7–8. Congress knew how to require "increases." *See* 49 U.S.C. § 32902(b)(2)(C). It did not do so in subsection (f).[2]

NHTSA's views also flunk *Skidmore*. *Contra* States Supp. Br. 16. Even if NHTSA's "first fuel-economy rulemaking," *id.*, could shed light on the later-enacted Section 32902(h), the States' argument still doesn't follow. The question is not whether NHTSA may set fuel-economy standards in two steps; it's whether the agency may include electric vehicles in its standard-setting baseline. On that score, NHTSA has been anything but consistent. *See* 71 Fed. Reg. 17,566, 17,582 (Apr. 6, 2006) ("baseline projections cannot reflect" alternative-vehicle fuel economy).

[2] This doesn't mean NHTSA must remove from the baseline less fuel-efficient vehicles automakers previously produced by purchasing credits. States Supp. Br. 11. Section 32902(h) does not say that NHTSA may not consider "the effects of past credit trading." *Id.* It does say that NHTSA may not consider the fuel economy of electric vehicles.

2. Contrary to the States' contention, petitioners' reading of Section 32902(h) does not conflict with Sections 32902(a) and 32904. *See* States Supp. Br. 11–13. Section 32902(a) requires NHTSA to set standards at the "maximum feasible average fuel economy level" automakers "can achieve." The statute defines "average fuel economy" as the average as "determined under Section 32904," 49 U.S.C. § 32901(a)(5)—the section specifying how EPA calculates the "average fuel economy" of the vehicles manufactured by an individual automaker in a given model year. *Id.* § 32904. Because that average is based on all the vehicles the automaker produced, including electric vehicles, *id.* § 32904(a)(2), the States argue that Section 32902(a) likewise requires NHTSA to consider all vehicles when determining "the maximum feasible average fuel economy level" that all manufactures can achieve. Petitioners' reading of Section 32902(h), they argue, improperly "take[s] out" electric vehicles that Sections 32902(a) and 32904 "instruct NHTSA to leave in." States Supp. Br. 12. That argument is untenable.

Section 32904 does not "instruct NHTSA" to consider the electric vehicles in the nation's fleet when it set standards at the "maximum feasible average fuel economy level" it determines manufacturers can

achieve. It instructs *EPA* to calculate the average fuel economy of the vehicles manufactured by each automaker in the model year—information NHTSA needs to determine whether individual automakers were in compliance with the fuel-economy standards and, if not, the amount of the civil money penalty they must pay. *See* 49 U.S.C. §§ 32911, 32912.

In calculating an automaker's average fuel economy, Section 32904 further instructs EPA to use an imputed fuel economy for electric vehicles, which gives them a higher fuel economy than their conventional counterparts. *See* 49 U.S.C. § 32904(a)(2)(B); NHTSA Br. 10–11. In contrast to those compliance-side determinations where the agencies *must consider* the imputed fuel economy of electric vehicles, Section 32902(h) instructs that when NHTSA amends the standards and determines the "maximum feasible average fuel economy level" that manufacturers can achieve, NHTSA "*may not consider*" the fuel economy of electric vehicles. 49 U.S.C. § 32902(h)(1) (emphasis added). By their plain language and design, these provisions work in tandem to give automakers the flexibility to manufacture electric vehicles, but not a mandate to do so.

The States' contrary interpretation would swallow subsection (h). If NHTSA were required to consider all vehicles, including electric vehicles,

in determining "the maximum average feasible average fuel economy level" that automakers "can achieve" under subsection (a), then NHTSA would be required to consider even those electric vehicles that automakers would produce in response to the standards during the standard-setting years—the one thing everyone agrees NHTSA may not do.

3. Reading Section 32902(h) to mean what it says also will not "make a hash out of subsection (d)." States Supp. Br. 13. Subsection (d) says NHTSA "may exempt" small manufacturers from the fuel-economy standards if it makes certain findings. 49 U.S.C. § 32902(d). Because subsection (d) is not one of the subsections listed in Section 32902(h), NHTSA may consider the fuel economy of electric vehicles in making its discretionary decision whether to grant an exemption. But if NHTSA decides to grant an exemption, it may not consider the fuel economy of electric vehicles in setting the alternative standard. The reason is that NHTSA must set the alternative standard at "the maximum feasible average fuel economy level for the manufacturers to which the alternative standard applies," *id.* § 32902(d)(1)(B)—a decision in which NHTSA must consider the factors in subsection (f) and, therefore, may not consider the fuel economy of electric vehicles, *id.* § 32902(f), (h)(1).

4. Finally, faithfully applying Section 32902(h) creates no "absurd results." States Supp. Br. 13. The "minimum standard" under Section 32902(b)(4) will not exceed the maximum standard because the standards are tethered: NHTSA sets the domestic minimum standard at 92 percent of what it projects will be required for the combined fleet. Pet. Reply Br. 13. NHTSA's interpretation of Section 32902(b)(4) is correct: Section 32902(b) requires NHTSA to prescribe standards specifying the "average fuel economy" that automakers must achieve for "passenger automobiles manufactured" in "each model year" "in accordance with this subsection." 49 U.S.C. § 32902(b)(1)(A). The minimum standard provision is in that same subsection, and is most naturally read as requiring NHTSA to set the minimum standard based on the average fuel economy projected by the Secretary to be *required for* the fleet, not the fuel economy projected to be *achieved by* the fleet, as the States would have it.

It is the *States'* interpretation of Section 32902(b)(4), not NHTSA's, that creates the potential for the States' minimum-exceeds-the-maximum "absurdity." States Supp. Br. 13. Under NHTSA's interpretation, that result is impossible. What's more, under the States' interpretation of Section 32902(b)(4), the "absurdity" they identify could occur even on

their (and NHTSA's) interpretation of Section 32902(h). They concede that, in setting the maximum standard, NHTSA may not consider the fuel economy of the electric vehicles it projects automakers will produce in response to the standards during the standard-setting years. And if the number of electric vehicles in that projection is high enough, then the fuel economy projected to be achieved by the fleet could be high enough that the minimum standard would exceed the maximum.

As for the States' concern about automakers generating "worthless" compliance credits, that was based on the exceptionally high fuel economy imputed to electric vehicles. *See* States Supp. Br. 14; States Br. 23. The Department of Energy has recently revised the petroleum-equivalency factor used to calculate the imputed fuel economy of electric vehicles and is phasing out the "0.15 multiplier" the States said would generate "such large credit banks." *See* 89 Fed. Reg. 22,041, 22,049–22,054 (Mar. 29, 2024); *see also* Pet. Reply 10–11.

CONCLUSION

The Court should vacate NHTSA's unlawful rule.

Dated: August 29, 2024

Respectfully submitted,

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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.

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CERTIFICATE OF SERVICE

I certify that on August 29, 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.

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