Nos. 17-2780 (L), 17-2806

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

On Petition for Review of a Rule of the
National Highway Traffic Safety Administration

PETITIONERS' MOTION FOR SUMMARY VACATUR OR, IN THE ALTERNATIVE, STAY PENDING JUDICIAL REVIEW

Ian Fein
Irene Gutierrez
Michael E. Wall
Natural Resources Defense Council
111 Sutter St., 21st Floor
San Francisco, CA 94104
(415) 875-6100
ifein@nrdc.org

Counsel for Petitioner Natural Resources Defense Council

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Alejandra Núñez
Joanne Spalding
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 997-5725
alejandra.nunez@sierraclub.org

Counsel for Petitioner
Sierra Club

Vera Pardee
Howard Crystal
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org

Counsel for Petitioner
Center for Biological Diversity

CORPORATE DISCLOSURE STATEMENT

Petitioners Natural Resources Defense Council, Inc. (NRDC), Sierra Club, and Center for Biological Diversity are non-profit organizations with no parent corporations and no outstanding stock shares or other securities in the hands of the public. NRDC, Sierra Club, and Center for Biological Diversity do not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in NRDC, Sierra Club, or Center for Biological Diversity.

Dated: October 24, 2017

/s/ *Ian Fein*
Ian Fein

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INTRODUCTION

The National Highway Traffic Safety Administration (Administration) recently suspended, without notice or comment, an important final rule that increased civil penalties for violating fuel-economy standards. Congress mandated that increase because decades of inflation had eroded the penalty's deterrent effect. After the recent change in administration, however, the agency indefinitely delayed the penalty increase without statutory authority and in blatant disregard of the Administrative Procedure Act (APA). 82 Fed. Reg. 32,139 (July 12, 2017) [ADD-2-3[1]]. This Court should summarily vacate the unlawful delay because it directly contravenes settled Circuit precedent.

This Court's decision in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), is dispositive. Like the present case, *Abraham* involved an agency's attempt, at the start of a new presidential administration, to delay an energy efficiency rule promulgated by the prior administration. This Court rejected the agency's assertion, also made here, that such a delay was within its "inherent power," as well as its further claim that the imminent

[1] Attachments are included in an Addendum and cited as ADD-__.

effective date of the rule constituted "good cause" to delay it without notice or comment. This Court vacated the agency's unlawful delay and reinstated the energy efficiency rule as of its original effective date.

The Administration here has done precisely what this Court forbade in *Abraham*. It relied on the same meritless justifications this Court already rejected. And it did so one week after the D.C. Circuit summarily vacated another agency's similar attempt to suspend a final rule, without notice or comment, based on non-existent "inherent authority." *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).

This Court too should summarily vacate the Administration's manifestly invalid suspension.

A quick ruling is important here because delay is precisely what the Administration has sought to achieve with its unlawful behavior; any further delay would reward its disregard for Circuit precedent. Further delay would also harm Petitioners' members and the public. Automakers are deciding, now, whether to comply with fuel-economy standards based on the applicable penalty: delaying the long-overdue penalty increase will thus lead to less efficient vehicles and greater emissions of harmful air pollutants. Meanwhile, the only countervailing purpose for the delay is to make it easier for automakers to evade the

standards. Thus, even if the Court does not grant summary vacatur, it should stay the suspension and expedite its review of the merits.[2]

BACKGROUND

Civil penalties deter violations of fuel-economy standards

The Energy Policy and Conservation Act of 1975 (Energy Conservation Act) requires the Secretary of Transportation to establish mandatory fuel-economy standards for cars and light trucks. 49 U.S.C. §§ 32901-32919. The fleet-wide standards must be set at the "maximum feasible" levels. *Id.* § 32902; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1182-85 (9th Cir. 2008). Although designed primarily to reduce the nation's oil consumption, the standards also reduce emissions of harmful air pollutants and thereby benefit public health. *See* 77 Fed. Reg. 62,624, 63,003 (Oct. 15, 2012).

The Energy Conservation Act further requires the Secretary to enforce the fuel-economy standards by assessing civil monetary penalties against automakers that produce noncompliant fleets. 49 U.S.C. § 32912. The Secretary delegated these responsibilities to the

[2] Petitioners notified Respondents' and Movants' counsel of the instant motion. Respondents and Movants oppose the requested relief and intend to file responses.

Administration. 49 C.F.R. § 1.95(a). The purpose of the penalties is to deter violations of the fuel-economy standards and "foster compliance with the law." *Id.* § 578.2. However, when it is cheaper for automakers to pay the penalty than to meet the standards by implementing fuel-saving technology, many automakers will choose to forego the improvements and pay the penalty instead—as they have in the past, *see* Nat'l Highway Traffic Safety Admin., CAFE Pub. Info. Ctr., Civil Penalties, https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html (last visited Oct. 24, 2017).

In 1975, when Congress first created the fuel-economy penalties, it set the penalty rate at $5 per tenth of a mile per gallon.[3] *See* 49 U.S.C. § 32912(b). In 1997, the Administration raised that rate slightly, to $5.50. 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997).

By 2010, many experts had concluded that the outdated $5.50 penalty rate "may not provide a strong enough incentive for manufacturers to comply" with the fuel-economy standards. Gov't

[3] The formula for calculating the civil penalty is: (penalty rate) x (number of tenths of a mile per gallon by which a non-compliant fleet falls short of the fuel-economy standard) x (number of vehicles in the non-compliant fleet).

Accountability Office, GAO-10-336, *Vehicle Fuel Economy* 17 (2010) [hereinafter GAO Report] [ADD-31].[4] The Government Accountability Office thus recommended that the Administration consider increasing the penalty to restore its deterrent effect. *Id.* at 18 [ADD-32].

The Administration increases the outdated penalties

In October 2015, Petitioner Center for Biological Diversity formally requested that the Administration increase the fuel-economy penalties. *See* Ctr. for Biological Diversity, Petition for Rulemaking 13-14 (Oct. 1, 2015) [hereinafter Environmental Petition] [ADD-46-47].[5]

One month later, while the Administration was considering that request, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Pub. L. 114-74, § 701, 129 Stat. 584, 599 (codified at 28 U.S.C. § 2461 note). That law recognized that inflation had significantly eroded the deterrent effect of many civil penalties. Congress thus required that agencies "shall" increase their penalties with an initial catch-up adjustment in 2016, followed by subsequent annual inflation adjustments. *Id.* § 701(b)(1)(D). And

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[4] Available at http://www.gao.gov/assets/310/301194.pdf.

[5] Available at http://www.biologicaldiversity.org/programs/climate_law_institute/transportation_and_global_warming/fuel_economy_standards/pdfs/15_10_1_Center_Petition_re_Civil_Penalties.pdf.

because these increases were long overdue, Congress required agencies to act promptly: It instructed that the initial increase "shall take effect no later than August 1, 2016," and the subsequent adjustments "not later than January 15 of every year thereafter." *Id.* § 701(b)(1)(A), (D).

In July 2016, the Administration issued an interim rule updating the various civil penalties that it administers. 81 Fed. Reg. 43,524 (July 5, 2016) [ADD-17-22]. The agency found, based on changes in the Consumer Price Index, that the original fuel-economy penalty rate of $5 would be $22 as adjusted for inflation. *Id.* at 43,526 [ADD-19]. The Administration thus raised the $5.50 penalty rate by the maximum adjustment of 150 percent, to $14 per tenth of a mile per gallon. *Id.*

The Alliance of Automobile Manufacturers and Association of Global Automakers acknowledged the Administration was "obligated" to increase the fuel-economy penalty rate. All. of Auto. Mfrs. & Ass'n of Glob. Automakers, Petition for Partial Reconsideration 1 (Aug. 1, 2016) [hereinafter Industry Petition] [ADD-49].[6] They requested, however, that the agency not apply the $14 penalty rate to pre-Model Year 2019

[6] Available at https://www.globalautomakers.org/system/files/document/attachments/joint_petition_for_reconsideration_cafe_civil_penalties_8-01-16_final.pdf.

vehicles. *Id.* at 5-6 [ADD-53-54]. They argued that, given the time involved in designing and producing a fleet, automakers had already decided whether to comply with the standards for Model Years 2016, 2017, and 2018 based on the $5.50 penalty rate. *Id.*

In December 2016, the Administration issued a final rule addressing both the Industry and Environmental Petitions. 81 Fed. Reg. 95,489 (Dec. 28, 2016) [hereinafter Penalty Rule] [ADD-12-15]. The agency concluded that, because the purpose of the civil penalty is to "encourage manufacturers to comply with the [fuel-economy] standards," it would allow manufacturers additional time "to design and produce vehicles in response to the increased penalties." *Id.* at 95,490-91 [ADD-13-14]. The Administration thus granted automakers' request to apply the $14 penalty rate beginning with Model Year 2019 fleets. *Id.* The agency also determined that the Penalty Rule effectively addressed the Environmental Petition because "the increased penalty will accomplish [the] goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles in those future model years." *Id.*

The Administration published the final Penalty Rule in the Federal Register on December 28, 2016, with an effective date of January 27, 2017. *Id.* at 95,489 [ADD-12].

The Administration unlawfully suspends the penalty increase, without notice or comment

On January 20, 2017, the Trump administration announced plans to postpone final regulations that had not yet taken effect. 82 Fed. Reg. 8346 (Jan. 24, 2017). Among these was the Penalty Rule. 82 Fed. Reg. 8694 (Jan. 30, 2017). The Administration temporarily delayed the rule three times, setting a new effective date of July 10, 2017. *Id.*; 82 Fed. Reg. 15,302 (Mar. 28, 2017); 82 Fed. Reg. 29,009 (June 27, 2017).[7]

On July 12, 2017, two days after that new effective date, the Administration announced that it had *indefinitely* delayed the Penalty Rule as of July 7. 82 Fed. Reg. 32,139 [hereinafter Delay Rule] [ADD-2-3]. The agency did not provide any notice or opportunity to comment on the delay. It asserted that the delay was "consistent with [its] statutory authority to administer the [fuel-economy] program and its inherent authority to do so efficiently." *Id.* at 32,140 [ADD-3]. And it further claimed that it had "good cause" to evade notice-and-comment procedures because the effective date of the Penalty Rule was "imminent." *Id.*

[7] The Administration did not provide notice or an opportunity to comment on these temporary delays, claiming they were exempt as "rules of … procedure" under the APA, 5 U.S.C. § 553(b)(3)(A).

The Administration also announced that it was reconsidering the penalty rate and accepting public comments on that reconsideration. 82 Fed. Reg. 32,140 (July 12, 2017) [ADD-5-10]. The agency provided no timeline for completing its reconsideration. And based on the Delay Rule, it asserted that "[d]uring reconsideration, the applicable civil penalty rate is $5.50." *Id.* at 32,143 [ADD-8].

Petitioners timely asked this Court to review the Delay Rule. *See* 49 U.S.C. § 32909(a)(2); *Abraham*, 355 F.3d at 192-94 (court of appeals had jurisdiction to review delays to effective date of final rules under Energy Conservation Act). So did several states. Case No. 17-2806.

ARGUMENT

I. The Delay Rule Is Unlawful and Should Be Summarily Vacated

A. The Administration lacked authority to delay the effective date of the final Penalty Rule

It is "well-established" that "'an agency literally has no power to act … unless and until Congress confers power upon it.'" *Abraham*, 355 F.3d at 202 (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). That is because an agency, as a "creature of statute," has "*only* those authorities conferred upon it by Congress." *Id.* (internal quotation marks omitted); *see also Clean Air Council*, 862 F.3d at 9 (it is

"axiomatic" that agencies "may act only pursuant to authority delegated to them by Congress").

The Delay Rule is invalid because Congress did not authorize suspending the Penalty Rule. Congress has permitted agencies to postpone or stay a final rule's effective date in narrow circumstances, *e.g.*, 5 U.S.C. § 705; 42 U.S.C. § 7607(d)(7)(B), none of which apply here.

In fact, Congress instructed the Administration here *not* to delay—much less suspend indefinitely—the effective date of the long-overdue increase to the fuel-economy penalty rate. Instead, Congress directed that the inflation adjustment "shall take effect not later than August 1, 2016." Pub. L. 114-74, § 701(b)(1)(D), 129 Stat. at 599. Congress mandated this prompt increase because decades of inflation had significantly eroded the deterrent effect of the fuel-economy penalty. And Congress further instructed that the Administration "shall" make subsequent annual adjustments "not later than January 15 of every year thereafter." *Id.* § 701(b)(1)(A). The agency's indefinite delay of the penalty increase thus violates at least two separate statutory deadlines.

The Administration here did not explain how indefinitely delaying the Penalty Rule could be squared with Congress's instruction for a

prompt penalty increase and subsequent annual adjustments. Nor can it belatedly do so now. This Court "'must judge the propriety of [the Delay Rule] solely by the grounds invoked by the agency' when it acted." *Clean Air Council*, 862 F.3d at 9 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *accord Abraham*, 355 F.3d at 204 n.13 ("[I]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))).

Instead, the Administration suggested that summarily suspending the penalty increase was somehow "consistent with" its statutory authority to administer the fuel-economy program and its "inherent authority" to do so efficiently. 82 Fed. Reg. at 32,140 [ADD-3]. This vague assertion does not support the ultra vires action.[8]

The Administration's authority to administer the fuel-economy program derives from the Energy Conservation Act. 49 U.S.C. §§ 32901-32919. That statute contains no provision authorizing the suspension of

[8] *See generally* Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, Harv. L. & Pol'y Rev. (forthcoming) (manuscript at 7-14), https://ssrn.com/abstract=3049004 (explaining how agencies under the Trump administration have failed to identify legal authority for their delay or suspension of dozens of final rules).

a final rule. *See Abraham*, 355 F.3d at 202 (comparing Clean Air Act section 307(d)(7)(B), which authorizes staying a final rule for three months during reconsideration in limited circumstances, to Energy Conservation Act provisions that do not even provide for reconsideration, much less a stay). And an agency's general authority to administer a regulatory program does not alone provide the power to suspend final rules—especially where, as here, Congress separately established deadlines for those rules to take effect. *See Nat. Res. Def. Council v. Reilly*, 976 F.2d 36, 40-41 (D.C. Cir. 1992) (rejecting agency's contention that its "general authority" to prescribe regulations "includes the power to stay regulations already promulgated").

Lacking any statutory authorization for the delay, the Administration also resorted to claiming an "inherent authority" to suspend the penalty increase during reconsideration. 82 Fed. Reg. at 32,140 [ADD-3]. But the agency "cites nothing for the proposition that it has such authority, and for good reason." *Clean Air Council*, 862 F.3d at 9. This Court in *Abraham* already "reject[ed] the contention" that an agency has "'inherent power' to suspend a duly promulgated rule where no statute conferred such authority." *Id.* (citing *Abraham*, 355 F.3d at 202). The Administration's assertion of such inherent authority here is

thus even more "puzzling" than the Department of Energy's similar meritless claim that this Court already rejected in *Abraham*. 355 F.3d at 202.

In short, the Administration "must point to something in [the relevant statutes] that gives it authority" to delay the Penalty Rule. *Clean Air Council*, 862 F.3d at 9. It did not, because it cannot. The Delay Rule must therefore be "set aside" as "in excess of statutory … authority." 5 U.S.C. § 706(2)(C).

B. The Administration violated the APA by failing to provide notice or an opportunity to comment

Even if the Administration had authority to delay the Penalty Rule (which it did not), the Delay Rule is *still* plainly unlawful because the agency failed to provide notice or an opportunity to comment and thus acted "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

The APA generally requires notice and comment for all agency rulemakings, including the amendment or repeal of a final rule. *Id.* §§ 551(5), 553(b)-(c). These procedures "serve the need for public participation in agency decisionmaking" and "ensure the agency has all

pertinent information before it when making a decision." *Time Warner Cable Inc. v. Fed. Commc'ns Comm'n*, 729 F.3d 137, 168 (2d Cir. 2013).

Because suspending a rule is tantamount to an amendment or repeal, notice and comment is also required for any such suspension. *See Abraham*, 355 F.3d at 204-06 (agency violated APA by delaying final rule without notice or comment); *Nat. Res. Def. Council v. Envtl. Prot. Agency* (*NRDC v. EPA*), 683 F.2d 752, 762-64 & n.23 (3d Cir. 1982) (same); *see also Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) ("agency action which has the effect of suspending a duly promulgated [rule] …. constitutes rulemaking subject to notice and comment requirements").

The APA provides a limited exception to the notice-and-comment requirement where the agency for "good cause" finds that such procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). But this Court has repeatedly made clear that the exception "should be narrowly construed and only reluctantly countenanced." *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) (internal quotation marks omitted), *superseded by statute on other grounds*, 8 U.S.C. § 1101(a)(42). It is "not an 'escape clause'"; a "true and … supportable finding of necessity or emergency must be made and

published." *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 385 (2d Cir. 1978) (internal quotation marks omitted).

Each of the justifications that the Administration offered for invoking the good-cause exception here has already been squarely rejected by this Court.

First, the Administration claimed it had good cause to circumvent notice-and-comment procedures because the effective date of the Penalty Rule was "imminent" and it needed "additional time" to reconsider the rule. 82 Fed. Reg. at 32,140 [ADD-3]. But the APA does not permit an agency to suspend a rule without notice or comment simply because the agency decides to revisit it on the eve of its effective date. This Court rejected precisely the same argument in *Abraham*, where the agency claimed that it "wished for more time to 'review and consider[]'" the final rule that had an "imminent" effective date. 355 F.3d at 205. This Court held that such imminence does not provide good cause to avoid notice-and-comment procedures. *Id.* And the Third Circuit reached the same conclusion when the Environmental Protection Agency sought to postpone and reconsider a rule at the start of the Reagan administration. "[T]he imminence of a deadline … is not sufficient to constitute 'good cause' within the meaning of the APA," the

court explained, because otherwise an agency "could simply wait until the eve of a … deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *NRDC v. EPA*, 683 F.2d at 765 & n.25.

Second, the Administration attempted to justify its failure to follow APA procedures here because it is "already seeking out public comments" as part of its penalty rate reconsideration. 82 Fed. Reg. at 32,140 [ADD-3]. But providing "notice and comment procedures *after* the postponement [of a final rule] does not cure the failure to provide them *before* the postponement." *NRDC v. EPA*, 683 F.2d at 768 (emphasis added). Inviting comment on the appropriate penalty rate "cannot replace" the requirement to separately solicit comment on "whether the [rule] should [have] be[en] postponed in the first place." *Id.* Thus, in *Abraham*, this Court rejected as "without merit" the agency's argument that providing notice and comment on replacement efficiency standards either "cured or mooted the absence of notice and comment prior to the amendment of the original standards' effective date." 355 F.3d at 206 n.14. This Court explained that the reconsideration process "addressed questions wholly different from

those that would have been addressed in a proceeding to amend the standards' effective date." *Id.* So too here.

Third, and finally, the Administration also suggested that "no party will be harmed by the delay" because the Penalty Rule would "not affect the civil penalty amounts assessed against any manufacturer for violating a [fuel-economy] standard prior to the 2019 model year." 82 Fed. Reg. at 32,140 [ADD-3]. But as *Abraham* made clear, notice-and-comment procedures are required to delay the effective date of a final rule even when that rule's compliance date may be years away. *See* 355 F.3d at 189 (compliance date for unlawfully delayed efficiency rule was five years after original effective date); *see also California v. Bureau of Land Mgmt.*, No. 17-cv-03804-EDL, 2017 WL 4416409, at *7-8 (N.D. Cal. Oct. 4, 2017) (postponement of rule's effective date was unlawful, even where compliance date of delayed rule was several months away).

And in any event, the Administration's suggestion is also factually mistaken because the public here *is* harmed by the unlawful delay. The Delay Rule weakens the deterrence for fuel-economy violations, and thus likely will result in less efficient vehicles and greater emissions of harmful air pollutants because automakers are deciding now whether to comply with fuel-economy standards in future model years. *See infra* at

19-24. Indeed, if there were no "concrete impact from the delay," as the Administration falsely suggests, 82 Fed. Reg. at 32,140 [ADD-3], that would undermine any reason for the Delay Rule in the first place—much less the asserted "good cause" to circumvent notice-and-comment procedures. *See Abraham*, 355 F.3d at 205 (exception applies only where such procedures would pose a "threat to the *public* interest" or do "real harm"); *Nat'l Nutritional Foods*, 572 F.2d at 385 (exception requires a "supportable finding of necessity or emergency").

In short, "indefinite postponement of the effective date of the [Penalty Rule] required notice and comment," and the Administration "did not have good cause for dispensing with the APA's requirements." *NRDC v. EPA*, 683 F.2d at 767. Because the Delay Rule was "promulgated without complying with the APA's notice-and-comment requirements" and "failed to meet any of the exceptions to those requirements," it is an "invalid rule" that must be vacated. *Abraham*, 355 F.3d at 206.

II. In the Alternative, the Court Should Stay the Delay Rule

If the Court does not summarily vacate the Delay Rule, it should stay that rule and expedite its review of the merits. Issuance of a stay involves consideration of four factors: (1) likelihood of success on the

merits; (2) irreparable injury absent a stay; (3) substantial injury to other parties if a stay is granted; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). As discussed above, the Delay Rule is clearly unlawful, so the first factor strongly favors a stay. As discussed below, so do the other three.[9]

A. Delaying the penalty increase irreparably harms Petitioners

Unless the Delay Rule is stayed (or quickly vacated), it will irreparably injure Petitioners by reducing compliance with fuel-economy standards, resulting in greater emissions of dangerous air pollutants that harm their members' health.

Vehicle fuel consumption, as well as the production and distribution of that fuel, results in emissions of harmful air pollutants like nitrogen oxide, particulate matter, and volatile organic compounds. *See* 77 Fed. Reg. at 62,901-08, 63,003. These air pollutants have immediate and harmful effects on local air quality and human health; exposure to such pollutants is associated with higher rates of

[9] Petitioners informed Respondents of their desire to stay the Delay Rule pending judicial review. Respondents stated they oppose such relief. *See* Fed. R. App. P. 18(a)(2)(A).

respiratory disease, especially among children, and even premature death. *Id.* Fuel-economy standards reduce emissions of these pollutants and can result in "significant declines in the adverse health effects" they cause. *Id.* at 63,062.

Civil penalties play a key role in achieving these public health benefits by deterring violations of fuel-economy standards. *See* 49 C.F.R. § 578.2 (fuel-economy penalties "foster compliance with the law"). Automakers admit that they decide whether to comply with the standards based in part on the penalties they would pay if they do not. Industry Petition at 2, 5 [ADD-50, 53]. The Administration recognizes this too. 81 Fed. Reg. at 95,490-91 [ADD-13-14]. The penalties are also important because they influence the price of credits that some automakers purchase in lieu of achieving the standards. *See* 49 U.S.C. § 32903; Industry Petition at 3 [ADD-51] (acknowledging the price of credits are "directly related" to the penalty amount). And because "manufacturers will pursue the strategy … that results in the lowest overall cost to the manufacturer," 81 Fed. Reg. at 43,527 [ADD-20], a higher penalty rate means that more automakers will actually achieve the standards by implementing fuel-saving technology, rather than merely purchasing credits or paying penalties instead.

Absent a stay, the Delay Rule will thus likely result in more violations of fuel-economy standards (and greater emissions of harmful air pollutants) because it reverts to the $5.50 penalty rate that does "not provide a strong enough incentive for manufacturers to comply." GAO Report at 17 [ADD-31]. That outdated penalty rate is only one-fourth the original $5 statutory rate as adjusted for inflation, *see supra* at 6, and is significantly less expensive than the costs to achieve the fuel-economy standards, Tonachel Decl. ¶¶10-15 [ADD-66-70]. Indeed, the Administration acknowledges that "many manufacturers are falling behind the [fuel-economy] standards for model year 2016 and … 2017," 82 Fed. Reg. at 32,141 [ADD-6], years when automakers based their compliance decisions on the $5.50 penalty rate, *see* Industry Petition at 5 [ADD-53]. If the $5.50 rate did not sufficiently incentivize compliance with the standards in those years, it will not do so for future model years either, given the standards "are set to rise at a significant rate over the next several years," 82 Fed. Reg. at 32,141 [ADD-6].

By contrast, if the Court stays the Delay Rule, the reinstated $14 penalty rate will properly deter violations because the resulting penalties would be comparatively more expensive than the costs to achieve the fuel-economy standards. *See* Tonachel Decl. ¶¶11-15 [ADD-

67-70]; *see also* 28 U.S.C. § 2461 note, § 2(b)(2) (inflation adjustments "maintain the deterrent effect of civil monetary penalties"). Indeed, the Administration itself "expects that increasing the level of the [fuel-economy] penalty rate will lead to … increased compliance with [the fuel-economy] standards, which would result in greater fuel savings and other benefits." 82 Fed. Reg. at 32,142 [ADD-7].[10]

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[10] For the same reasons, Petitioners have standing to challenge the unlawful Delay Rule. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Petitioners are dedicated to protecting human health and the environment by promoting energy efficiency and curbing harmful pollution. Tonachel Decl. ¶¶4-5 [ADD-64-65]; Trujillo Decl. ¶5 [ADD-74]; Linhardt Decl. ¶¶3-5 [ADD-76-77]; Siegel Decl. ¶¶2-6 [ADD-83-84]. Petitioners have members who were procedurally injured when the Administration failed to allow comment on the Delay Rule. Munguia Decl. ¶¶14-15 [ADD-96-97]; Woodfield Decl. ¶¶10-11 [ADD-102]; Hume Decl. ¶¶9-10 [ADD-107-108]; Blomquist Decl. ¶9 [ADD-112]; Dietzkamei Decl. ¶16 [ADD-120]. That rule also substantively injures these members because they live close to oil refineries and major highways, and thus face increased health risks from greater emissions of harmful air pollutants. Munguia Decl. ¶¶2-13 [ADD-93-96]; Woodfield Decl. ¶¶2-9 [ADD-99-102]; Hume Decl. ¶¶5-10 [ADD-105-107]; Blomquist Decl. ¶¶6-9 [ADD-111-112]; Dietzkamei Decl. ¶¶8-15 [ADD-116-120]; *see LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (petitioner had standing where she lived and worked near sulfur dioxide-emitting solid waste facility and had "no choice but to breathe the air"); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 325-26 (2d Cir. 2003) (similar). These harms are traceable to the Delay Rule and redressable by this Court because reinstating the Penalty Rule will deter violations of fuel-economy standards and lessen harmful pollution. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 187 (2000) ("civil penalties provide sufficient deterrence to support redressability").

This harm is irreparable, absent a stay, because automakers are already designing their Model Year 2019-and-after fleets and deciding whether to comply with the fuel-economy standards based on the applicable penalty. Unless the Delay Rule is stayed, a later ruling on the merits likely will not result in sufficient compliance because, by automakers' own account, they will have less ability to improve the fuel-economy of their fleets at that time. *See* Industry Petition at 5, 8 [ADD-53, 56] (claiming that once automakers "set their compliance plans" for a particular model year, they have "very limited technology options" to improve the fuel-economy of their fleets). Nor does the Administration's ongoing reconsideration of the penalty rate provide adequate relief, because the agency has not set a deadline for completing that process and has indicated that it likely will not apply its new rate to Model Year 2019 fleets. *See* 82 Fed. Reg. at 32,143 [ADD-8] (noting the agency "expects that its inflationary adjustment will provide lead time in advance of assessing a new [fuel-economy] penalty").

It is therefore critical to stay the Delay Rule (or vacate it quickly). Otherwise, the air pollutants emitted by non-compliant fleets will

continue for the life of those vehicles. And the harms caused by those emissions cannot be undone.[11]

B. The public interest and balance of equities support a stay

The final two stay factors—harm to opposing parties and weighing the public interest—"merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Here, the public benefits from staying the Delay Rule far outweigh any countervailing interest in preserving the Administration's invalid delay. *See League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action.").

A stay will cause no harm to the Administration. It will simply restore the $14 penalty rate that the agency previously promulgated pursuant to the Energy Conservation Act and Inflation Adjustment Act. Enforcing that rate while this Court reviews the Delay Rule's merits "do[es] not constitute substantial harm" to the Administration because it is "no different from [the agency's] burdens under the statutory scheme[s]." *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604,

[11] If the Court does not grant a stay, Petitioners respectfully request that it still expedite briefing and argument in this case.

615 (D.C. Cir. 1980). Nor will a stay prevent the Administration's ongoing reconsideration of the penalty rate.

A stay will not substantially harm automakers either. The Penalty Rule did not impose any new regulatory standards on automakers. Instead, it merely increased the penalty for automakers who choose to violate the "feasible" fuel-economy standards. 49 U.S.C. § 32902(a). Any technology investments automakers make in response to a stay will thus be to achieve standards that govern irrespective of the applicable penalty rate. Nor will a stay itself result in any higher penalties paid by automakers, because this Court will have resolved the merits of Petitioners' challenge before any Model Year 2019 penalties are due.

Meanwhile, on the other side of the scale, the public benefits from a stay are substantial. In addition to the public health benefits described above, staying the Delay Rule and incentivizing greater compliance with fuel-economy standards will also promote the nation's energy security, save consumers money at the pump, encourage technology innovation, and reduce emissions of greenhouse gases that destabilize the global climate. *See* 77 Fed. Reg. at 62,658-62, 62,999-63,006, 63,055-62; *see also* Tonachel Decl. ¶¶16-18 [ADD-70-71]

(societal benefits from $14 penalty rate far outweigh those from $5.50 rate). A stay will thus further Congress's twin goals of enforcing the fuel-economy program, 49 U.S.C. §§ 32901-32919, and "maintain[ing] the deterrent effect of civil monetary penalties," 28 U.S.C. § 2461 note, § 2(b)(2). "[T]here is a substantial public interest in having governmental agencies abide by the federal laws that govern their … operations." *League of Women Voters*, 838 F.3d at 12 (internal quotation marks omitted).

In short, the public benefits from staying the Delay Rule far outweigh any hypothetical interest in making it cheaper for automakers to evade the fuel-economy standards.

CONCLUSION

The Court should grant the motion, vacate the unlawful Delay Rule, and reinstate the Penalty Rule as of its prior effective date. In the alternative, the Court should stay the Delay Rule pending its review of the merits.

Dated: October 24, 2017 Respectfully submitted,

/s/ *Ian Fein*
Ian Fein
Irene Gutierrez
Michael E. Wall
Natural Resources Defense Council
111 Sutter St., 21st Floor
San Francisco, CA 94104
(415) 875-6100
ifein@nrdc.org

Counsel for Petitioner Natural Resources Defense Council

Alejandra Núñez
Joanne Spalding
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 997-5725
alejandra.nunez@sierraclub.org

Counsel for Petitioner Sierra Club

Vera Pardee
Howard Crystal
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org

Counsel for Petitioner Center for Biological Diversity

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Motion complies with the type-volume limitations of Rule 27(d)(2)(a) because it contains 5,170 words, excluding parts of the document exempted by Rule 32(f).

Dated: October 24, 2017

/s/ *Ian Fein*
Ian Fein

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 24, 2017.

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

/s/ *Ian Fein*
Ian Fein