IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Natural Resources Defense Council, *et al.*, Petitioners, v. National Highway Traffic Safety Admin., *et al.*, Respondents.	No. 17-2780 (L) consolidated with
State of New York, *et al.*, Petitioners, v. National Highway Traffic Safety Admin., *et al.*, Respondents.	No. 17-2806 (Con)

RESPONDENTS' OPPOSITION TO
MOTIONS FOR SUMMARY VACATUR OR STAY

Respondents National Highway Transportation Safety Administration (NHTSA), et al., hereby oppose the two motions filed by petitioners in these consolidated cases.[1] The interim remedies plaintiffs seek—summary

[1] Petitioners' motions are duplicative, and this filing responds to both.

disposition or stay—are neither necessary nor appropriate here, and the case should proceed to full briefing and argument on the merits.

STATEMENT

These consolidated petitions for review challenge a limited procedural decision by NHTSA, extending the effective date of an earlier rule. 82 Fed. Reg. 32139 (July 12, 2017) (delay decision). On the same day, and relatedly, NHTSA announced its sua sponte reconsideration of that earlier rule, and invited public comment on the underlying substantive issues. 82 Fed. Reg. 32140 (July 12, 2017) (sua sponte reconsideration). The effective date of that earlier rule is delayed pending the ongoing reconsideration.

The delay decision is merely one interim step—a procedurally appropriate but practically and legally insubstantial step—in NHTSA's continuing review of issues concerning the civil penalty amounts applicable to future violations of regulations establishing the corporate average fuel economy (CAFE) standards for certain motor vehicles. The delay decision itself does not address or resolve any of the substantive questions currently being considered by the agency, nor does it alter any CAFE penalty rate. The

agency's consideration of the underlying issues began in 2016 following the passage of a statute, the Federal Civil Penalties Inflation Adjustment Act Improvement Act, Pub. L. No. 114–74, Section 701, 129 Stat. 584, 599 (Nov. 2, 2015). That statute directed federal agencies across the government to adjust civil monetary penalties through an interim final rulemaking procedure. *Id.* § 701(b)(1)(D), 129 Stat. 599. NHTSA issued an interim final rule in July 2016, establishing new maximum values for a variety of civil monetary penalties applicable to violations of statutes and regulations administered by the agency, including CAFE standards. 81 Fed. Reg. 43524 (July 5, 2016) (IFR).

After NHTSA issued the IFR, automobile manufacturers and their trade associations sought reconsideration of that rule, contending that the increased civil penalties for CAFE violations would cause a negative economic impact, and that any increased penalty amount should not apply to certain model years. NHTSA granted reconsideration in part, determining that the increased penalty amounts would not be applied until the 2019 model year. 81 Fed. Reg. 95489 (Dec. 28, 2016) (reconsideration rule). The reconsideration rule had a nominal effective date of January 27,

2017, although it would not have any practical significance until sometime in 2020, the earliest date that penalties could be assessed for violations of CAFE standards by a manufacturer for its model-year 2019 vehicle fleet. 82 Fed. Reg. 32140. The nominal effective date of the reconsideration rule was subsequently extended until July 10, 2017. 82 Fed. Reg. 8694 (Jan. 30, 2017); 82 Fed. Reg. 15302 (Mar. 28, 2017); 82 Fed. Reg. 29009 (June 27, 2017). Those earlier extensions have not been challenged.

On July 7, 2017, NHTSA took two further steps related to its ongoing consideration of those issues. First, the agency issued the delay decision, which has been challenged here. Second, the agency announced that it was reconsidering the appropriate civil penalty rate for CAFE violations, and invited public comments on a range of substantive issues related to CAFE penalty rates. Both of those documents were published in the Federal Register on July 12, 2017. 81 Fed. Reg. 32140; 81 Fed. Reg. 32139. The period for public comment closed on October 10, 2017. The agency is currently in the process of considering those issues and the comments submitted.

In the delay decision, NHTSA explained its rationale for extending the effective date of the December 2016 reconsideration rule, and also invoked the good-cause exception of the Administrative Procedure Act (APA), which provides that notice and comment procedures are not required where the agency finds that they would be "impracticable, unnecessary, and contrary to the public interest in these circumstances." 81 Fed. Reg. 32140 (quoting 5 U.S.C. § 553(b)(B)). Here, NHTSA made such a finding, noting first that "the effective date of the [reconsideration] rule is imminent." Second, prompt action was appropriate because the agency on the same date announced its sua sponte reconsideration of the earlier reconsideration rule, and sought public comment concerning the underlying issues surrounding the appropriate level for the civil penalty for CAFE standard violations. Because "additional time will be required to thoughtfully consider and address those comments before deciding on the appropriate course of regulatory action," the agency concluded that a delay in the effective date was "consistent with NHTSA's statutory authority to administer the CAFE standards program and its inherent authority to do so efficiently and in the public interest." *Ibid.*

Finally, NHTSA explained that delay of the effective date would have "no immediate, concrete impact" because no civil penalties could be assessed under the increased rates until "sometime in 2020" (after sales were completed following the 2019 model year). *Ibid.* For that reason, the agency concluded that "no party will be harmed by the delay in the effective date of the rule." *Ibid.*

ARGUMENT

1. This case is not appropriate for summary disposition. This Court has "not employed a procedure equivalent to a summary reversal." *Plante* v. *Dake*, 599 Fed. Appx. 13, 14 (2d Cir. 2015) (Summary Order).[2] Indeed, even summary *affirmance* is rarely appropriate in this Court. *Ibid.* ("In this Circuit, '[s]ummary affirmance of a district court's decision in place of full merits briefing * * * is, and should be treated as, a rare exception * * *.'").

[2] The Court's practice of resolving some cases on the merits by issuing summary orders (instead of published opinions), see 2d Cir. R. 32.1.1, is unlike the extraordinary relief requested by petitioners here: disposition on motion without briefing on the merits.

In other circuits, where summary disposition is well established, summary reversal is rarely granted. The D.C. Circuit has explained that summary reversal is appropriate only where the merits are "so clear [that] plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Sills* v. *BOP*, 761 F.2d 792, 793-94 (D.C. Cir. 1985); see also, *e.g.*, *James A. Merritt & Sons* v. *Marsh*, 791 F.2d 328, 331 (4th Cir. 1986) ("Summary reversals are reserved for extraordinary cases."). And such a step would be even more extraordinary and unwarranted where this Court considers an agency action in the first instance, rather than an appeal from a district court decision.

Moreover, as explained infra, 26-28, petitioners lack standing because they have not identified an injury in fact that is fairly traceable to the agency action before the court. See *Clapper* v. *Amnesty Int'l*, 568 U.S. 398 (2013). One motion (NRDC Mot. 22 n.10) mentions standing only in a footnote, and the other is silent on the subject. The need to address this fundamental jurisdictional requirement further demonstrates that this case is not appropriate for summary disposition before briefing.

Nor is there any urgency warranting disposition before the parties and this Court have an opportunity to brief the merits. Cf. NRC Mot. 2-3. Petitioners waited two months to seek judicial review of the delay decision. They waited another six weeks to file the motions seeking summary disposition. They have not sought expedited briefing or argument on the merits.

And the limited relief sought in this case further demonstrates the inappropriateness of summary disposition. The effective date of the December 2016 reconsideration rule does not alter any substantive standard, and an earlier effective date would have no practical impact before 2020, as NHTSA explained. See 82 Fed. Reg. 32140. Petitioners' motions largely address the underlying substantive issues concerning the appropriate value for the CAFE penalty rate—a question that NHTSA is still considering—not any independent legal or practical significance of the effective date alone. But petitioners do not contend that the relief they seek here—limited to the timing of the effective date for the earlier reconsideration rule—could

prevent or limit the agency's ongoing policy analysis in the pending reconsideration.

Any challenge to the agency's ongoing reconsideration would be premature, as NHTSA has not yet completed its reconsideration. But it is important to note that the agency retains its full range of policy options, including the possibility of retaining the $14 penalty rate and the previous determination that such a rate should be applied as early as model year 2019. Petitioners are simply wrong to assume that those earlier determinations have been or must be abandoned.

This case, especially at this stage, is ultimately much ado about very little of substance. Although petitioners' motions appear to suggest that this Court should pre-judge the agency's ongoing reconsideration of substantive issues, the case instead presents a more limited question. Briefing will demonstrate that petitioners' arguments about the delay rule are mistaken and should be rejected. But petitioners' motions are no substitute for the ordinary process of appellate litigation.

2. a. This case seeks review of a discrete and limited agency action—a single decision that extended the effective date of an earlier agency decision (the December 2016 reconsideration of the July 2016 interim final rule). This most recent step is just one small part of the agency's ongoing review of the underlying substantive issues. When that process is complete, any new rule setting CAFE penalty rates will be subject to judicial review. See 49 U.S.C. § 32909. But the only agency action before the Court now is the delay decision itself, and the only question is whether the agency reasonably and permissibly decided to extend the effective date to facilitate the ongoing reconsideration, including evaluation of public comments.

NHTSA explained that it was simultaneously reconsidering the appropriate level of CAFE penalty rates, and was seeking public comment on that issue. A delay of the effective date was appropriate in light of the time needed to consider the public comments; address the substantive legal, factual, and policy questions arising from the pending reconsideration; and determine the appropriate penalty rate following the conclusion of the reconsideration process. That rationale was amply supported and entirely

sensible. And nothing in the governing statutes or the APA precluded NHTSA from extending the effective date to accommodate the agency's ongoing process of substantive reconsideration. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties") (quotation marks omitted).

Petitioners contend that NHTSA was barred from extending the effective date. NRDC Mot. 9-13; States Mot. 11-13. But NHTSA explained that it has "inherent authority" to "administer the CAFE standards program * * * efficiently and in the public interest." 82 Fed. Reg. 32140. That authority includes the authority to reconsider its rules, whether in response to a petition or sua sponte. And where a delay of the effective date would facilitate that reconsideration, including consideration of public comment, nothing in the APA or the CAFE statutory scheme prohibits the agency from taking that step.

Petitioners cite to other explicit statutory *grants* of agency authority to delay an effective rule, suggesting that those statutes are exclusive of any other inherent agency power. NRDC Mot. 10; States Mot. 10. But petitioners cite no authority to support the proposition that an agency lacks the authority to delay the effective date of a rule in these circumstances merely because it would have different authority to do so in other circumstances.

This Court has not held that agencies lack the authority to delay the effective dates of all rules. Petitioners cite to this Court's decision in *NRDC* v. *Abraham*, 355 F.3d 175 (2d Cir. 2004). But that case did not announce any such categorical prohibition. The Court's reasoning and holding in *NRDC* relied on a specific legislative prohibition against adopting less stringent substantive standards, which does not apply here.

In *NRDC*, this Court considered an agency's delay of the effective date of a substantive rule, and did so in the context of the substantive policy at issue there (less stringent energy conservation standards for certain appliances) after the agency had completed its reconsideration. See *id.* at 190, 204. *NRDC* does not apply here because the Court in that case relied on

a statutory prohibition—the anti-backsliding provision, 42 U.S.C. § 6295(o)(1)—that does not exist in the CAFE-penalty statutory scheme. And the issue of effective dates arose in that case because the Court concluded that the agency's new substantive policy was barred by statute unless the effective date had been validly extended. *Id.* at 205 ("DOE's own interpretation of section 325(o)(1) imbues the designated effective date with considerable substantive significance: the passage of the date determines whether DOE may thereafter amend efficiency standards downward").

For similar reasons, *NRDC* concluded that the Department of Energy was precluded by the anti-backsliding provision from reconsidering the substantive rule at issue there. See *NRDC*, 355 F.3d at 194-197. But there is no corresponding statutory constraint here. Thus, the fundamental premise of *NRDC* is absent from this case, and the decision there is not dispositive of the much different and narrower question presented here.[3]

[3] *NRDC*, unlike this case, included a challenge to the Department of Energy's revised rule, following reconsideration. Although the Court concluded that the agency there lacked authority to reconsider a published regulation without notice and comment, 355 F.3d at 202-204, that question is

b. Petitioners also argue that the agency should have undertaken notice-and-comment rulemaking procedures before extending the effective date of the earlier reconsideration rule. NRDC Mot. 13-18; States Mot. 13-16. But that contention ignores the nature of the agency action here.

As a legal matter, the agency's delay decision was merely an interim procedural step, facilitating the agency's own ongoing consideration of the underlying issues; it was not a legislative rule requiring notice and comment. This Court recently recounted some of the distinctions between procedural and substantive or legislative rules. See *Time Warner Cable Inc.* v. *FCC*, 729 F.3d 137, 168 (2d Cir. 2013) (quoting cases). The delay decision was not subject to the notice-and-comment requirement at all because it did not "create new law, rights, or duties" or "change existing rights and

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not presented here because the agency's reconsideration is ongoing and any judicial review would be premature. Moreover, NHTSA has long provided for reconsideration of rulemaking decisions. See, *e.g.*, 49 C.F.R. §§ 553.35 – 553.39. And courts have recognized NHTSA's actions on reconsideration. See, *e.g.*, *Public Citizen* v. *Mineta*, 343 F.3d 1159 (9th Cir. 2003).

obligations"; it did not "itself alter the rights or interests of parties" or "impose new substantive burdens." *Ibid.* (quotation marks omitted).[4]

As a practical matter, petitioners do not explain how NHTSA could have sought comment on whether to further extend the effective date of the December 2016 reconsideration rule. And the agency did, in its contemporaneous sua sponte reconsideration, solicit public comment on the underlying substantive issues. Petitioners identify no purpose that would have been served by seeking public comment in two steps rather than one.[5]

NHTSA explained that its action was permitted by the statutory good-cause exception, which provides that notice and comment are not required where those additional procedures are "impracticable, unnecessary, and

[4] Earlier agency decisions that did alter substantive standards and affect the rights or interests of parties have not been challenged.

[5] NHTSA had extended that same effective date in three previous decisions that petitioners did not challenge, although they also were issued without notice and comment. See 82 Fed. Reg. 8694; 82 Fed. Reg. 15302; 82 Fed. Reg. 29009. Presumably, under petitioners' theory, NHTSA could have issued an extension of a few months (like those earlier actions) to allow notice and comment, and could have then issued the same indefinite extension of the effective date following a comment period. But there would have been little purpose to such additional complexity.

contrary to the public interest." 5 U.S.C. § 553(b)(B). Here, NHTSA so found because "the effective date of the rule [was] imminent," and the agency was "already seeking out public comments on the underlying issues" in its sua sponte reconsideration. 82 Fed. Reg. 32140. Moreover, because the increased penalty rates would not be applied until 2020 at the earliest, a delay of the effective date would have no immediate practical effect. *Ibid.*

The APA's good-cause exception "is inevitably fact- or context-dependent." *Mid-Tex Elec. Coop., Inc.* v. *FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). And "[t]he interim status of the challenged rule is a significant factor" in applying that contextual inquiry. *Ibid.* ("a rule's temporally limited scope is among the key considerations in evaluating an agency's 'good cause' claim"). Here, the context of NHTSA's limited, interim step—extending the effective date of the earlier reconsideration decision while the agency undertakes further reconsideration—confirms that the good-cause exception was properly invoked here.

NHTSA's initial foray into the substantive issues here was undertaken, pursuant to statutory direction, as an interim final rule without notice and

comment, based on the good cause exception. See 81 Fed. Reg. 43527. Industry groups sought reconsideration of that interim final rule on a variety of grounds, and NHTSA granted reconsideration in part, again without notice and comment. See 81 Fed. Reg. 95489. And the agency continued to consider the other issues raised in that petition for reconsideration, which led to the ongoing agency reconsideration, and which was facilitated by the delay decision under review in this case. Petitioners did not take issue with any of the agency's earlier steps in that ongoing agency effort to address the substantive issues concerning the CAFE penalty rate. And the agency's substantive consideration of the policy issues will be based on notice-and-comment procedures. See 82 Fed. Reg. 32140. In context, the delay decision was not required to be preceded by notice-and-comment procedures.

The nature and context of the agency decision here is unlike the more consequential actions that courts have held must be preceded by notice and comment. The cases petitioners cite concern agency decisions that changed substantive policy. See, *e.g.*, *Zhang* v. *Slattery*, 55 F.3d 732, 746 (2d Cir. 1995) (rule "creates a new basis on which aliens may be granted refugee status; it

changes an existing policy"). Petitioners cite no case holding that an analogously interim, procedural step in an ongoing agency proceeding is barred in the absence of cumbersome and unnecessary notice-and-comment procedures.

As NHTSA explained, notice-and-comment procedures were "impracticable" here because there was not enough time after the agency's July 7, 2010, decision to reconsider the underlying issues concerning the CAFE penalty rate, and before the end of the latest extension of the effective date a few days later (July 10, 2017). And additional procedures would have been "unnecessary" both because the agency was simultaneously inviting public comment about the substantive issues in the related reconsideration proceeding that the extension facilitated, and because the interim extension of the effective date would have no practical effect.

Those determinations are consistent with the "unnecessary" prong of the good-cause exception, which "refers to the issuance of a minor rule in which the public is not particularly interested." *Utility Solid Waste Activities Group* v. *EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (quoting Attorney General's

Manual on the Administrative Procedure Act 31); see also *ibid.* (prong applies when an administrative rule is "a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public") (quoting *South Carolina* v. *Block*, 558 F. Supp. 1004, 1016 (D.S.C. 1983)). Here, the public's interest is principally on the appropriate level of the penalty rates themselves, as evidenced by petitioners' arguments in this case and the comments received in the ongoing agency reconsideration. By comparison with those substantive issues, the effective date itself, which has no practical impact, did not warrant separate notice-and-comment procedures.

And "a situation is 'impracticable' when an agency finds that due and timely execution of its functions would be impeded by" notice-and-comment procedures. *Id.* at 754 (quoting Attorney General's Manual at 30). Although a *substantive* change to an agency's rules may be justified on this ground based on a "threat to the environment or human health or * * * some sort of emergency," *id.* at 755, no such dire circumstance is required to support NHTSA's conclusion that an interim extension of the practically

insignificant effective date was warranted to facilitate the agency's substantive reconsideration of the underlying issues.

This Court's decision in *NRDC* is not to the contrary. There, the Court concluded that—because the Department of Energy had determined that the effective date was a significant event that triggered the constraints of the anti-backsliding provision—the agency could not describe the effective date as insignificant. See *NRDC*, 355 F.3d 204-205. But there is no practical or legal significance attached to the effective date in the circumstances here. For that reason as well, NHTSA's ongoing reconsideration of the substantive issues is permissible whether or not the effective date was extended. Cf. *id.* at 205 n.14.

There is no reason to believe—and petitioners notably do not argue—that comment on the effective date alone was essential. Any comment would presumably have addressed issues about the propriety of a particular penalty rate. But those substantive issues are not relevant to the question whether the agency should have taken the interim procedural step of extending the effective date, which is the only question now before this

Court. They are instead precisely the topics on which the agency has invited and received substantive comments (including from petitioners) in the course of its ongoing reconsideration of those issues. See 82 Fed. Reg. 32142-32143.

Notice-and-comment procedures were also unnecessary because, as NHTSA explained, there would be "no immediate, concrete impact from the delay" of the effective date. 82 Fed. Reg. 32140. The December 2016 reconsideration rule—which petitioners did not challenge—"does not increase CAFE penalties before Model Year 2019, and therefore, the delay will not affect the civil penalty amounts assessed against any manufacturer for violating a CAFE standard prior to the 2019 model year at the earliest, *i.e.*, until sometime in 2020." *Ibid.* Because NHTSA is proceeding expeditiously with its reconsideration, there will be no practical impact attributable solely to the extension of the effective date.[6]

[6] Petitioners do not argue that agency action has been unreasonably delayed or unlawfully withheld, and this case would in any event not be an appropriate vehicle for such a claim. See 5 U.S.C. § 706(1).

The issue is not whether, but when and how, NHTSA should solicit and consider public comments on the underlying substantive issues. NHTSA correctly determined that the APA's good-cause exception applies where the agency takes an interim procedural step with no practical effect in order to facilitate a substantive reconsideration of issues that will itself be based on notice and comment.

All of these considerations together demonstrate that the additional delay and complexity of notice-and-comment procedures would have been "contrary to the public interest." 5 U.S.C. § 553(b)(B). The D.C. Circuit has emphasized "the combined effect of the cited considerations" in agreeing with an agency "that delaying its interim rule would be contrary to the public interest." *Mid-Tex*, 822 F.2d at 1133.

3. Petitioners' motions request a "stay pending judicial review" in the alternative. NRDC Mot. 18-26; States Mot. 16-22. But interim equitable relief is unwarranted here, and a temporary stay would make no sense in this context.

First, petitioners have not complied with Rule 18, which requires that "[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order." FRAP 18(a)(1). Despite the passage of more than three months since the agency issued the rule under review, petitioners made no effort to seek relief before the agency in the first instance. Nor have they demonstrated "that moving first before the agency would be impracticable." FRAP 18(a)(2)(A)(i).[7]

In any event, a stay is simply inapt in the context of NHTSA's interim step of extending the effective date. A stay in this case would not relieve any entity of any regulatory burden, nor would it alter any legal relationships. The delay decision under review does not impose any affirmative obligations on petitioners or industry or anyone else. It is instead a limited procedural decision with no immediate practical consequences. There is accordingly nothing to stay.

[7] In a footnote, petitioners in No. 17-2780 suggest that they need not comply with Rule 18's requirements because, pursuant to this Court's Local Rule, they sought the government's position on their motion. NRDC Mot. 19 n.9. There is no support for reading Local Rule 27.1 to override Rule 18.

Petitioners' request for a stay is effectively a motion for a mandatory injunction requiring NHTSA to impose an earlier effective date during the pendency of ongoing reconsideration proceedings. A stay would thus be tantamount to final relief—preventing the agency from delaying the effective date while it undertakes reconsideration of the December 2016 rule. That request is indistinguishable in effect from petitioners' unsupported motions for summary disposition. Both requests are unwarranted.

The delay decision merely preserves the status quo while the agency proceeds with reconsideration and considers public comments. There is no need to prematurely impose a nominal effective date for an earlier rule that remains under reconsideration, especially where the effective date would have no practical significance, and this Court will have ample time to decide this case before any penalties would be applicable.

Petitioners' stay motion also fails at the threshold because they cannot demonstrate any irreparable harm from the delay decision itself. They assert that the delay decision will harm the environment and the health of individuals. NRDC Mot. 19-20; States Mot. 18-20. But those assertions of

harm are neither imminent nor certain, and they would not be redressed by a stay pending judicial review.

"To establish irreparable harm," a stay movant "must demonstrate 'an injury that is neither remote nor speculative, but actual and imminent.'" *Tucker Anthony Realty Corp.* v. *Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). The injuries that petitioners complain of here are remote, indirect, uncertain, and speculative. They are inadequate to support an interim equitable remedy.

Fundamentally, the claims of harm are not based on the delay decision itself but on the premature assumption that NHTSA will definitely end up establishing a different, lower penalty rate applicable to CAFE violations in model year 2019 and later. And even that assumption is not enough to establish actual and imminent injury because petitioners' claims depend on the further premise that manufacturers will base their compliance decisions on that same assumption. But there is no way to know what steps manufacturers will take, what factual or legal basis will motivate those actions, or what effect any such actions would have on the environment.

NHTSA's ongoing reconsideration encompasses a variety of issues, and will consider multiple comments from petitioners and others, as well as from industry representatives, concerning the environmental and economic impact of and justification for a $14 CAFE penalty. See 82 Fed. Reg. 32142-32143. There is no guarantee that the agency will reduce that penalty rate, nor that it will do so by any particular amount that would support the kind of economic decision-making by manufacturers that forms the premise of petitioners' assertions of injury. Where an asserted harm depends on multiple uncertain factors and on unknown and unknowable independent decisions of NHTSA and third parties, a stay or other equitable remedy is not warranted. Applying the related injunction standard, the Supreme Court has emphasized that a party "seeking preliminary relief must demonstrate that irreparable injury is *likely* in the absence of" that remedy. *Winter* v. *NRDC*, 555 U.S. 7, 21 (2008). The attenuated and uncertain claims of injury here do not suffice.

For similar reasons, petitioners lack standing, which provides an additional basis for this Court to deny the requested stay. See, *e.g.*, *Amnesty*,

568 U.S. at 410-414. *Amnesty* held that a plaintiff or petitioner must show more than merely an objectively reasonable likelihood that injury will result. The Supreme Court emphasized instead the "requirement that 'threatened injury must be certainly impending to constitute injury in fact.'" *Id.* at 410. Such an injury cannot be based on "a highly attenuated chain of possibilities." *Ibid.* Thus, the *Amnesty* plaintiffs could not "rest[] on their highly speculative fear" about the government's unknown implementation decisions and the subsequent independent actions of judges. *Ibid.* So too here: Petitioners do not know how NHTSA will implement any decisions it ultimately makes after the ongoing reconsideration process is complete, nor can they predict how independent actors—automobile manufacturers—will choose to exercise their own judgment both before and after the government's decisions. And just as plaintiffs in *Amnesty* could not know whether any resulting surveillance would even be a result of the statute they sought to challenge, *id.* at 410-411, petitioners here cannot be certain that any business decisions of manufacturers that might increase emissions of carbon are fairly traceable to the extension of the effective date or even to the

underlying CAFE penalty rates that are, for now, unknown. That "highly attenuated chain of possibilities" cannot suffice to demonstrate the certainly impending harm required by Article III. *Id.* at 410; see also, *e.g.*, *Ziemba* v. *Rell*, 409 F.3d 553 (2d Cir. 2005) (denying equitable relief and affirming dismissal for lack of standing).[8]

Petitioners also cannot prevail on the other stay factors. For the same reasons that summary disposition is not warranted, they cannot demonstrate a likelihood of success on the merits. And NHTSA has an interest in ensuring the orderly administration of its administrative proceedings, which weighs strongly in the balance favoring NHTSA's decision, which itself preserved the status quo.

Petitioners appear to believe (though they have not explicitly argued) that obtaining relief in this case will somehow constrain the agency's

[8] The State petitioners also lack standing for the additional reason that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982). Unlike the petitioner in *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the state petitioners here do not assert any proprietary or other injury distinct from the harm they allege to their citizens. See *id.* at 522-523 (noting loss of coastal land).

ongoing reconsideration of the appropriate CAFE penalty rate. As we have explained, the effective date is not itself a substantive or significant event, and any action by NHTSA or this Court that addresses the effective date in isolation cannot preclude the separate substantive review of CAFE penalty rates. But to the extent that petitioners' motion appears to be premised on a different and unexplained assumption, this Court should be wary of a request for a stay with potentially uncertain consequences.

CONCLUSION

For the foregoing reasons, this Court should deny petitioners' motions for summary vacatur or stay pending review.

Respectfully submitted,

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OCTOBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing opposition complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). The document was prepared using Palatino Linotype, a proportionally spaced font, in 14-point typeface. This filing contains 5194 words, excluding the parts of the filing excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ H. Thomas Byron III
H. THOMAS BYRON III

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, I electronically filed the foregoing opposition and cross-motion with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ H. Thomas Byron III
H. THOMAS BYRON III