17-2780 (L)

17-2806 (CON)

United States Court of Appeals for the Second Circuit

NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF VERMONT; STATE OF MARYLAND; STATE OF PENNSYLVANIA,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; JACK DANIELSON, in his capacity as acting Deputy Administrator of the National Highway Traffic Safety Administration, United States Department of Transportation; ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,
Respondents.

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

RESPONSE OF PROPOSED INTERVENOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. TO PETITIONERS' MOTIONS FOR SUMMARY VACATUR OR TO STAY

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Alliance of Automobile Manufacturers, Inc., is a 501(c)(6) tax exempt corporation incorporated under the laws of the State of Delaware. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

As this Court recently noted, "[w]hile we have thus recognized the occasional propriety of summary affirmance, so far as we have been able to determine, we have not employed a procedure equivalent to a summary reversal." *Plante v. Dake*, 599 F. App'x 13, 14 (2d Cir. 2015). Courts grant summary vacaturs only "where the merits of the appeal or petition for review are so clear that plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the] decision." *Cascade Broad. Grp., Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam; internal quotation marks omitted).

Even if there were any precedent in this Circuit for summary vacatur of an agency decision, this case would be "a poor candidate for its use." *Plante*, 599 F. App'x. at 14. The issues here are far too complex and important to resolve through 5,200-word motions. Indeed, it appears that petitioners are seeking to short-circuit this Court's full consideration of the issues and prevent the respondent and proposed intervenors from fully presenting the arguments in support of NHTSA's reasonable decision to defer the civil penalty adjustment temporarily.

The Court should thus receive full briefing on the jurisdictional and substantive issues raised by the petitions for review.

The most significant jurisdictional issue is whether the Petitioners have Article III standing, which we discuss below. Because of space limitations, however, we can only advert to other significant jurisdictional issues here.

One such issue is whether the petitions for review were timely filed. The statutory provision generally governing judicial review of NHTSA fuel economy regulations provides that petitions for review "must be filed not later than 59 days after the regulation is prescribed." 49 U.S.C. § 32909(b).

In construing a similar statute providing that petitions for review of NHTSA safety standards "must be filed not later than 59 days after the order is issued" (49 U.S.C. § 30161(a)), the Ninth Circuit rightly focused on when the public had *notice* of the agency action, and concluded that a regulation is "issued" under Section 30161(a) "on the date that the regulation is made available for public inspection," and that date is presumed to be the filing date at the Federal Register. *Pub. Citizen Inc. v. Mineta*, 343 F.3d 1159, 1167-68 (9th Cir. 2003); *see also* 44 U.S.C. § 1507 ("Unless otherwise specifically provided by statute, filing of a document [at the Office of the Federal Register] . . . is sufficient to give notice of the contents of the document to a person subject to or affected by it."). The same analysis

should apply to Section 32909(b), which refers to when the regulation is "prescribed."

Here, although the temporary deferment of the civil penalty adjustment was *published* in the Federal Register on July 12, 2017, it was *filed* at the Federal Register on *July 7, 2017*. *See* 82 Fed. Reg. 32,139, 32,140 (July 12, 2017). The Federal Register's daily inspection list shows the document was, in fact, made available for public inspection on July 7, 2017. *See* https://www.federalregister.gov/public-inspection/2017/07/07. In addition, on July 7, NHTSA issued a press release (https://www.nhtsa.gov/press-releases/us-department-transportation-reexamine-civil-penalty-rate-corporate-average-fuel) headlined "U.S. Department of Transportation to reexamine civil penalty rate for Corporate Average Fuel Economy [CAFE]." Below the headline is italicized text stating, "*National Highway Traffic Safety Administration opens period for comment, publishes notice delaying effective date of CAFE penalties rule.*" The press release also stated, "NHTSA is publishing two notices in the Federal Register (docket numbers NHTSA-2016-0136 and NHTSA-2017-0059). The first notice indicates that NHTSA is reconsidering the December 28, 2016, final rule, and seeks comment on the appropriate inflationary adjustment. The second notice delays the effective date of this rule during NHTSA's reconsideration period." The press release provided a link

to the Federal Register daily inspection list. Thus, the public—including Petitioners—clearly had constructive, and (depending on whether they are on the distribution list for NHTSA press releases) perhaps actual, notice of the action under challenge on July 7, 2017.

Because Petitioners did not file their petitions for review until September 7, 2017—62 days after the Federal Register filing date of the action under review—their petitions were filed late under Section 32909(b).[1]

Ripeness is another jurisdictional issue requiring further development than is possible in a response to a motion for summary disposition. To the extent the Petitioners are challenging NHTSA's decision to reconsider the civil penalty adjustment in an ongoing proceeding, their petition would be raising issues that are not yet ripe for review.

These jurisdictional issues require full briefing and argument, not the truncated rush to judgment sought by Petitioners. In addition, Petitioners' claims on the merits require far more discussion than can be provided in a 5,200-word response to a motion for summary disposition, but even on first blush, they do not persuade, as we explain below. Before Pe-

[1] At a minimum, the filing of the temporary deferment notice on July 7, 2017—three days before the expiration of the previous deferment—means that the deferment notice was filed prior to the previous July 10, 2017 effective date of the civil penalty adjustment. *See* 82 Fed. Reg. at 32,139 (noting the civil penalty is not effective and "would currently become effective on July 10, 2017").

titioners' merits arguments may be considered, however, they must establish Article III standing. They have failed to do so.

I. PETITIONERS DO NOT HAVE ARTICLE III STANDING

Standing is an element of the Article III limitation of the judicial power to "Cases" and "Controversies." *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). To establish standing:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (alterations, internal footnote, and quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

"Where, as here, a litigant complaining of procedural or substantive injury is not the regulated party, the litigant must demonstrate that favorable action by the agency is likely to result in favorable action by the regulated party in addition to demonstrating a link between the procedural or substantive injury to the litigant and the adverse agency action."

Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 229 (2d Cir. 2012); *see also id.* ("plaintiff injured by a regulated third party must demonstrate a likelihood that the third party would change action in the event that the defendant agency changes action, notwithstanding the fact that plaintiff has alleged a procedural injury") (approvingly citing *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008)).

Unique features of the CAFE civil penalty scheme enhance Petitioners' difficulties in establishing standing. While we cannot fully explore the scheme in this opposition, several unusual features of the CAFE program are critical for the Court's consideration. First, unlike most federal regulatory programs, under which standards are established and all regulated parties are expected to comply, Congress established a very different scheme to regulate CAFE.[2] Congress directed NHTSA to establish each year's CAFE standard at the "maximum feasible" level. In legislative history, Congress further directed NHTSA to take "industrywide considerations into account" in setting the CAFE standards, and not to set the

[2] The CAFE statute was enacted as part of the Energy Policy and Conservation Act of 1975, Pub. L. 94-163.

standard at the level that the least capable manufacturers could achieve for all years.[3]

Thus, from the program's beginning, Congress acknowledged that not all manufacturers will be able to meet the CAFE standards in a given model year.

Consistent with the legislative history of the concept of "maximum feasible" standards quoted above, NHTSA has always interpreted the law as permitting manufacturers to elect to pay a civil penalty in lieu of achieving the numeric standards. Indeed, NHTSA itself has described the CAFE law as providing five separate "compliance flexibilities" to satisfy shortfalls with the CAFE standard for a given year: carryforward credits (which can be carried forward for five years after they are earned), carryback credits (which can be carried back for three years after they are projected to be earned), civil penalty payment, credits acquired in trade from other manufacturers and credit holders, and credits transferred within a manufacturer's own fleets of regulated vehicles.[4] *None* of these compliance flexibilities reduces emissions in the shortfall fleet. The choice of which of these compliance flexibilities to employ to address a shortfall be-

[3] S. Rep. 94-516, at 154 (1975) (Conf. Rep.).

[4] http://www.nhtsa.gov/CAFE_PIC/CAFE_PIC_home.htm, last accessed October 30, 2017.

longs to the manufacturer, who may choose different strategies in different model years. Petitioners do not know which strategies will be selected by which manufacturers in future model years, nor the effect of any given selection on fuel consumption by that manufacturer's fleet.

Petitioners here also face a difficult burden because they predicate their alleged standing on the risk of future injuries. To support standing, an asserted future injury "must be certainly impending" or at least a "substantial risk." *Clapper*, 568 U.S. at 401, 414 n.5 (internal quotation marks omitted).

Fears of future consequences that are unfounded or not "based in reality" are not an adequate basis for standing. *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999). So too, future injury based on "an extended chain of contingencies" cannot support standing. *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016). "When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015), *cert. denied* 136 S. Ct. 900 (2016) (internal quotation marks omitted). "A plaintiff therefore lacks standing if his 'injury' stems from an in-

definite risk of future harms inflicted by unknown third parties." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011).

There is no standing "where the court 'would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct].'" *Role Models Am., Inc. v. Harvey*, 459 F. Supp. 2d 28, 35 (D.D.C. 2006), *aff'd on other grounds sub nom. Role Models Am., Inc. v. Geren*, 514 F.3d 1308 (D.C. Cir. 2008) (quoting *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980)).

There also must be a "substantial likelihood the requested relief will remedy the alleged injury in fact." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (internal quotation marks omitted).

A. The state petitioners do not have standing

The States predicate their standing on their alleged "concrete and particularized interest in protecting their citizens and their environment" from "increased air pollution and greenhouse gases in future years." States' Mot. 10 (citing *Mass. v. EPA*, 549 U.S. 497, 520 (2007)). This showing is insufficient. Although States receive "special solicitude in [the] standing analysis" (*id.* at 520), nothing in *Massachusetts v. EPA* suggests it is sufficient for States merely to refer to global warming or rely on

conclusory assertions about possible future harm to establish their standing.

When the States specify the interests they seek to protect, they say the challenged agency action will "decrease dairy production in New York and Vermont; lower crop yield in California; increase flooding in densely-populated New York City; reduce coastal land in Maryland; and cause droughts in California." States' Mot. 19. These are harms that would be suffered by their citizens, rather than harms to the States' proprietary interests as quasi-sovereigns, and as such are improper bases for State standing to challenge federal agency actions.

"[T]here is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what [*Mass. v.*] *Mellon* [262 U.S. 447 (1923)] prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17. A State merely asserting an interest in protecting the well-being of its citizens against Federal action does not have standing under *Massachusetts v. EPA*.

Thus, the D.C. Circuit has explained that in *Massachusetts v. EPA*:

> The Court noted further that it was critical that Massachusetts sought to assert its own rights as a state under the Clean Air Act, and was not seeking to protect the rights of its citizens under the Clean Air Act. * * * With respect to Massachusetts's inju-

> ry, the Court found that Massachusetts 'owns a substantial portion of the state's coastal property' that had already been harmed by the EPA's inaction, and that the EPA's failure to regulate these gases would cause additional harm to its shoreline. * * * In other words, by showing that climate change had diminished part of its own shoreline, Massachusetts itself had shown that it had been affected 'in a personal and individual way' by the EPA's failure to regulate greenhouse gases.

Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 476 (D.C. Cir. 2009) (citations omitted).

Here, unlike in *Massachusetts v. EPA*, the States have invoked the interests of their citizens and their environment (without specifying any particular property interests belonging to the States) as a basis for standing. Thus, notwithstanding the "special solicitude" (*Mass. v. EPA*, 549 U.S. at 520) accorded States in the standing analysis, the asserted basis for the States' standing is inadequate.

The States' arguments about injury, causation, and redressability also reflect fundamental confusions about the NHTSA action being challenged. First, NHTSA is not proposing to alter fuel economy *standards*.[5]

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[5] This renders irrelevant the California activities discussed in footnote 6 of the States' motion and the declaration of Joshua M. Cunningham. The California activities discussed in the motion and declaration largely relate to "CAFE standards and vehicle greenhouse gas emission standards" (States' Mot. at 10 n.6), not to penalty adjustments relating to fleet compliance with those standards. To the extent Mr. Cunningham discusses California interests in the *penalties*, he merely discusses the same sorts of

Indeed, NHTSA's action does not even change the penalty adjustment for fleet deviations from fuel economy standards. The agency action here is a temporary deferment of an adjustment to rectify serious calculation errors in the setting of the adjustment and to consider the societal effects associated with the adjustment, as contemplated by Congress. Because the temporarily-deferred adjustment would not have an impact before the 2019 model year, and a manufacturer with a shortfall in model year 2019 has until model year 2022 to generate, purchase or transfer credits to demonstrate compliance, the temporary deferment will not increase vehicle emissions, certainly not during the pendency of this appeal (making a stay completely unnecessary).

Even if there were some basis for the States' prediction that the penalty adjustment deferral will reduce compliance with CAFE standards for MY 2019 and beyond, resulting in emissions of conventional pollutants and greenhouse gases that would not occur if the automakers complied with the standards, it is speculative whether the judicial remedies the States (as well as the Organizational Petitioners) seek would redress the alleged injuries. Given the unusual structure of the CAFE law, there are

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interests in the protection of the State's citizens and environment the Court in *Massachusetts v. EPA* found *not* to be a basis for State standing when challenging federal actions.

numerous ways a manufacturer can respond to the CAFE standard in a given model year, including transferring credits within its own fleet, acquiring credits from a manufacturer that has a surplus (there is a private trading market for these), carrying credits forward or backward from future or prior years, or just paying the penalty—all of which are contemplated by the statute and none of which reduces emissions.

Indeed, NHTSA has predicted that the "CAFE credit market moving into model year 2015 for each compliance fleet is robust enough to allow manufacturers not meeting standards to continue to comply for the next several model years."[6] An increase in the civil penalty amount will affect the price of these credits in the marketplace, and affect the transfer of wealth from credit users to credit surplus holders, but it is speculative whether it will improve emissions, especially given NHTSA's predictions about the use of the credit market for several years into the future.

The decision whether to employ any of these strategies is entirely up to individual manufacturers. Thus, the ***actual*** environmental effects of the civil penalty adjustment rule (and the deferral of the effective date)

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[6] Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 by EPA, NHTSA and California Air Resource Board at 3-19 (Docket No. NHTSA-2016-0068-0001, July 2016).

will be determined by the independent actions of "third part[ies]." *See, e.g.*, *Lujan*, 504 U.S. at 560. And because of the complexities and intended flexibility of the CAFE program, it is speculative how these actions will be affected (if they are affected at all) by the civil penalty adjustment rule.

The manufacturers are not the only third parties whose independent actions would determine whether the Petitioners' proposed relief would redress their alleged injuries. The motoring public also would have a significant impact on the level of emissions that would result from the Petitioners' desired increase on CAFE penalties.[7]

First, if—as is likely—increased penalties were passed through to the public in increased prices for new vehicles, consumers might delay purchasing new, more fuel efficient vehicles, resulting in larger numbers of older, less fuel efficient vehicles remaining on the roads longer, leading to more, rather than fewer, emissions. In addition, it is well known that driving (and, hence, emissions) will increase if the cost of driving is reduced through lower fuel prices or more efficient vehicles.

Because the independent choices of third parties—including non-regulated third parties—can profoundly affect whether the remedies

[7] Although the issue here is the *temporary deferral* of the civil penalty adjustment, the fact that a challenge to the penalty adjustment itself would not satisfy the redressability requirement for standing is relevant to assessing Petitioners' standing in this matter.

would, in fact, redress the harms the Petitioners complain of, it is speculative, rather than likely, that the remedies sought by the Petitioners would redress the harms they allege.

In short, the States do not have standing.

B. The organizational petitioners do not have standing

To establish standing, an association must, among other things, demonstrate that "at least one of its members would have standing to sue in his own right." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003). Despite submitting numerous declarations, the Organizational Petitioners have not demonstrated at least one of their members has standing.

First, some of the declarations articulate generalized grievances or political views—for the most part, about air pollution generally. *See* Decl. of Faviola Munguia ¶¶ 7-14; Declaration of Kathleen Woodward ¶¶ 6-10; Declaration of Diana Hume ¶¶ 7-10; Declaration of James T. Blomquist ¶¶ 7-9. Such policy positions do not suffice for establishing concrete, personal injuries. *See*, *e.g.*, *Lujan*, 504 U.S. at 573-78.

A number of the declarants also discuss their "concerns" about health risks associated with air pollution. Munguia Decl. ¶ 7; Woodward Decl. ¶ 5; Declaration of Janet DietzKamei ¶ 14. For standing purposes, however, an asserted future injury "must be certainly impending" or at

least a "substantial risk." *Clapper*, 568 U.S. at 401, 414 n.5 (internal quotation marks omitted); *see also Welborn v. IRS*, 218 F. Supp. 3d 64, 77 (D.D.C. 2016) ("[G]eneral anxiety does not establish standing."). The declarants' general concerns about future possible risks—concerns that appear to be directed to air pollution generally—are not a sufficient basis for standing.

Many of the declarants fail to demonstrate the harm they complain of is "fairly traceable" to the agency action at issue. Instead, they speculate about health risks of air pollution generally, and assert that any reduction in air pollution would be beneficial. This not only expresses a general policy preference, but also fails to support standing because the putative link between the agency action complained of and actual or imminent injuries rests on the same misunderstanding of the CAFE rubric betrayed by the States. *See supra* at 11-15.

Several declarants discuss their residence near oil refineries or other stationary sources of emissions. *E.g.*, Munguia Decl. ¶ 3; Woodward Decl. ¶ 4.[8] But they do not address the specific products the refineries produce or where they distribute their products, and they do not show that these

[8] Declarant Woodward lives near both a highway and refineries. Woodward Decl. ¶ 4. But she does not address the impact of the agency action under challenge upon emissions from the nearby highway.

refineries would close or reduce output, rather than shift production for overseas sales, if domestic demand for petroleum products were reduced as a result of civil penalties (assuming that such a reduction would even occur).

Some declarants take a shotgun approach to pollution. Thus, declarant Hume discusses a host of pollutants from an array of sources (including train tracks) (Decl. ¶¶ 5, 7), and speculates about causal relations between those pollutants and illnesses in her area (*id.* ¶¶ 5, 7-8), but she does not establish that she faces actual or imminent injury that is fairly traceable to the temporary deferment of the penalty adjustment. Similarly, declarant Blomquist states he has lived near highways and, because of pollution, wears a mask while working around his house. Blomquist Decl. ¶ 6. But it is unclear whether he has any basis for asserting that the pollution he complains about actually comes from vehicles and whether a reduction in emissions from vehicles on a highway near his home would improve his health. Nor does he offer anything but speculation about whether the deferment of the civil penalty adjustment will aggravate his health issues.

Declarant Jane DietzKamei provides the most detailed claims about the alleged impact of pollutants on her health, but even she fails to establish that vehicle emissions from nearby highways, rather than the activi-

ties of nearby refineries, have affected her health. In fact, she suggests the refineries are the source of the problems that she describes: "I am aware that the pollutants that affect me so seriously are emitted by these refineries and by the big oil tankers that bring gasoline to the gas stations where I live, and I am worried about their effects on my health and mobility." DietzKamei Decl. ¶13. And she does not establish that the activities of the refineries or oil tankers are fairly traceable to the temporary deferment of the civil penalty adjustment or that the relief sought by the Petitioners would alter the refineries' activities.

These inadequacies are not remedied by the Organizational Petitioners' citations (Orgs.' Mot. 22 n.10) to *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 325-26 (2d Cir. 2003) ("*NYPIRG*"), and *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002). Both cases deal with emissions from stationary sources, unlike the mobile source emissions (vehicles) at issue here. In both cases, the complaining parties established a clear likelihood of increased exposure to emissions as a result of the challenged government action (in light of their location near stationary sources of emissions). [9]

[9] As noted above, some of the declarants discuss their proximity to stationary sources of emissions, specifically, refineries—entities neither regulated by NHTSA nor subject to the civil penalties at issue here. The effects of the temporary deferment of the penalty adjustment on emissions

Here, because of the CAFE program's unique complexity and flexibility, and the fact that it relates to mobile sources of emissions, the effects of the deferment of the penalty adjustment on the emissions to which the declarants would be exposed are speculative, at best.

* * *

For the foregoing reasons, the petitioners lack standing, mandating dismissal of both their motions for summary disposition and the petitions for review.

II. NHTSA HAD AUTHORITY TO DEFER THE EFFECTIVE DATE OF THE PENALTY ADJUSTMENT PENDING RECONSIDERATION

Petitioners' claim on the merits—*i.e.*, that NHTSA lacked authority to defer the effective date of the civil penalty adjustment—is also wrong in any event, because NHTSA acted appropriately in deferring the effective date of the adjustment temporarily in order to comply with its statutory mandate to consider whether increasing the penalty rate to $14 per mile per gallon would harm the economy. That conclusion requires denial of both the motions for summary vacatur *and* the petitions for review.

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from refineries are even more speculative than would be the effects on emissions from vehicles. Thus, unlike *NYPIRG*, this case does not present a scenario in which the "cessation of the injury-causing action . . . would have necessarily followed" from the desired agency action. *Town of Babylon*, 699 F.3d at 229 n.6 (explaining and distinguishing *NYPIRG*).

The Improvements Act expressly authorized NHTSA to provide notice and opportunity for comment and to adjust the penalty rate by less than the amount otherwise required by the Act if it determined that the statutory adjustment would "have a negative economic impact" or entail "social costs" that outweighed the benefits of the adjustment. 28 U.S.C. § 2461 note, § 4(c)(1). And contrary to Petitioners' suggestions, the statute also provided the agency with time to make this determination properly: it dictated that the agency adjust the penalty through an interim final rule taking effect not later than August 1, 2016 (*id.* § 2461 note, § 4(b)(1)(A)-(B))—while reserving to the agency the ability to initiate a separate rulemaking on the question whether the adjustment should be smaller (*id.* § 2461 note, § 4(c)(1)).

Prior to the July 2017 rule requesting comment, NHTSA had never availed itself of this statutory authority; the interim final rule did not provide for notice and comment. The actions challenged here, therefore, represented NHTSA's compliance with Congress's directions to provide for public comment. In addition, had NHTSA not deferred the effective date of the penalty rule and sought public comment on the economic impact of the statutorily-mandated adjustment, it arguably would have permanently lost the ability to address the issue, because the statute could be read to

provide for an economic exception to the required penalty adjustment only "[f]or the first adjustment." 28 U.S.C. § 2461 note, § 4(c).

The Improvements Act's express provision for the use of an interim final rule adjusting penalties and taking effect by a specified date, followed by possible notice and comment and reconsideration of the statutorily-mandated penalty adjustment, distinguishes this case from *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004), and *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017), which are the linchpins of Petitioners' arguments. In those cases, the statutes at issue contained far stricter limits on the agencies' ability to revisit issues. In *Clean Air Council*, the only available statutory authority for reconsideration was Section 307 of the Clean Air Act, which permits reconsideration only when a regulated party raises an objection that would have been "impracticable to raise during the comment period" and that is of central relevance to the outcome of the rule (42 U.S.C. § 7607(d)(7)(B))—and those circumstances were not present when EPA acted. *Clean Air Council*, 862 F.3d at 10 (internal quotation marks omitted). And in *Abraham*, the statute contained a "unique" (355 F.3d at 203) anti-backsliding provision "intended to limit the agency's discretion" to adjust applicable standards (*id.* at 205). The Department of Energy's attempt to sidestep this provision through reconsideration and amendment of its previously-promulgated rule thus threatened to run afoul of an es-

sential substantive limitation on the Department's authority. Here, by contrast, NHTSA is expressly authorized to adjust the otherwise statutorily-required penalty rate through a notice and comment rulemaking. 28 U.S.C. § 2461 note, § 4(c).

Petitioners' complaint that NHTSA did not go through the notice and comment process prior to deferring the effective date of the final penalty adjustment (Orgs.' Mot. 13-18; States' Mot. 13-16) is misplaced. As petitioners acknowledge, the APA allows an agency to forego notice and comment when "good cause" exists for doing so (5 U.S.C. § 553(b)(B)), and here there was clearly "good cause" for not employing notice and comment before deferring the effective date of the penalty adjustment. As NHTSA explained, deferring 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*." 82 Fed. Reg. at 32,140 (emphasis added). Because there was a risk that the failure to defer the rule would deprive the agency of an opportunity to exercise its authority under the Improvements Act to consider a lower increase than the one statutorily mandated—thereby burdening the economy with a penalty rate increase that NHTSA believed would be deleterious—and because the point of the deferral was to afford an opportunity for public comment on the penalty adjustment, "good cause" existed for forgoing notice and com-

ment and, indeed, the failure to act would have been "contrary to the public interest." 5 U.S.C. § 553(b)(B).[10]

III. PETITIONERS' REQUEST FOR A STAY SHOULD BE DENIED

Petitioners request that, in the alternative, the Court stay the deferral rule pending review. This request also should be denied.

A "stay" in this context would be nonsensical, given that the deferral rule itself stays the effect of the December 2016 final rule. Even worse, a stay might well have broad substantive effect on the penalty adjustment because it might bar NHTSA from ever revisiting the penalty rate in the future. It would be inappropriate to grant Petitioners a complete merits victory in the guise of a "stay."

In any event, Petitioners' assertions that a stay would prevent irreparable harm and benefit public health (*e.g.*, Orgs.' Mot. 19, 25) rest on the same misunderstanding of the CAFE program's flexibility that we discussed above in connection with the Article III standing redressability issue. Moreover, because any increase in the penalty rate would not take ef-

[10] NHTSA's temporary deferral of the civil penalty adjustment is also supported by the fact that, unlike most civil penalty schemes, which establish maximum penalties but confer discretion on the regulatory agency to assess a lesser amount if the circumstances so warrant, the CAFE statute does *not* give NHTSA that discretion. The *maximum* penalty is thus the *actual* penalty, making it critical for NHTSA to set the penalty at the right level in the first place.

fect until model year 2019 at the earliest (82 Fed. Reg. at 32,140), a stay would have no practical impact during the pendency of this proceeding.

CONCLUSION

The motions for summary vacatur or to stay should be denied.

Dated: November 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies that this response:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 5,187 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: November 17, 2017 /s/ *Erika Z. Jones*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing response with the Clerk of the Court using the appellate CM/ECF system on November 17, 2017. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: November 17, 2017 /s/ *Erika Z. Jones*

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November 17, 2017

Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Nat. Res. Def. Council et al. v. NHTSA, Nos. 17-2780 and 17-2806

Dear Ms. O'Hagan Wolfe:

I represent proposed intervenor the Alliance of Automobile, Manufacturers, Inc. (the "Alliance") in the above-captioned cases. Although the Court has not yet ruled on the Alliance's motion to intervene in these cases, the Alliance wishes to file a response to petitioners' motions for summary vacatur or to stay (ECF Nos. 84, 88). Please accept the attached response for filing and for the Court's consideration in the event that the Alliance's motion to intervene is granted.

Thank you for your courtesy and attention to this matter.

Sincerely,

/s/ *Erika Z. Jones*
Erika Z. Jones