IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*, Respondents.	No. 17-2780 (consol. w/ No. 17-2806) [On Petition for Review from the National Highway Traffic Safety Administration, NHTSA-2016-0136]

RESPONSE OF PROPOSED INTERVENOR THE ASSOCIATION OF GLOBAL AUTOMAKERS TO PETITIONERS' MOTIONS FOR SUMMARY REVERSAL OR TO STAY

Of Counsel:

Jacqueline Glassman
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.,
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737

Ashley C. Parrish
Counsel of Record
Justin A. Torres
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.,
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: aparrish@kslaw.com

Counsel for Proposed Intervenor the Association of Global Automakers

Dated: November 17 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' motion for summary reversal or a stay should be denied. The Court should require full briefing on the important, complex issues raised in this appeal.

Petitioners are improperly attempting to prevent the National Highway Traffic Safety Administration ("NHTSA") from reconsidering its revision of an interim rule to ensure that the rule complies with statutory criteria and satisfies the requirements of reasoned decisionmaking. In December 2016, acting under the Federal Civil Penalties Inflation Adjustment Act Improvements Act, Pub. L. No 114-74 (2015) ("2015 Act"), the agency issued a rule that would have nearly tripled the maximum civil penalty for violations of the Corporate Average Fuel Economy Standards ("CAFE"). But the rule was legally invalid. As NHTSA later acknowledged, it issued the rule without responding to substantial comments showing that (1) it used the wrong "baseline year" to calculate the penalty increase, and (2) the increase would have severe economic consequences.

To its credit, NHTSA took steps to address this failure of reasoned decisionmaking by granting petitions for reconsideration and staying

implementation of the rule, so it could comply with statutory requirements and undertake the reasoned analysis that the Administrative Procedure Act ("APA") requires. In doing so, NHTSA acted both responsibly and well within its discretion to correct its own mistakes. Petitioners now urge the Court to pretermit NHTSA's consideration of these critical issues and to force the agency to implement a rule that is invalid and, if it had not been stayed, would have been successfully challenged on appeal. Petitioners' request lacks merit and should be denied.

BACKGROUND

A. The 2015 Act

Annual adjustments to civil penalties under federal statutes are governed by the Federal Civil Penalties Inflation Adjustment Act, Pub. L. No. 101-410 (1990) ("the 1990 Act"). In 2015, Congress amended the statute to require most federal agencies to (1) promulgate an interim rule setting an initial "catch-up" increase to account for inflation and (2) make subsequent annual adjustments using the "catch-up" year as a baseline. 2015 Act § 4(b). The catch-up increase is determined by applying a standard cost-of-living adjustment to the maximum civil penalty in effect when the penalty was "most recently established or

adjusted under a provision of law other" than the 1990 Act. *Id.* § 5(b)(2)(B). Under the statutory scheme, the date that a civil penalty was "established or adjusted" has a substantial impact on the size of the initial catch-up increase. Because of natural compounding, applying a fixed cost-of-living adjustment to a recent "baseline year" yields a much smaller increase than if the baseline year is set far in the past.

Recognizing the importance of setting an appropriate baseline, Congress gave agencies broad discretion to adjust the catch-up increase if applying the statutory formula would yield a civil penalty that was unjustified or economically damaging. With the concurrence of the Office of Management and Budget, agencies may impose a lower catch-up amount when increasing the maximum civil penalty "will have a negative economic impact" or the "social costs . . . outweigh the benefits." 2015 Act § 4(c). Arguably, this exception applies *only* to the initial catch-up. Subsequent annual adjustments key off the initial catch-up increase and are determined by formula, with no discretion to adjust for economic or social consequences. Because the initial increase may dictate the course of future increases, it is therefore important that agencies set the initial increase at an appropriate level.

B. NHTSA's Interim Rule and Global Automakers' Petition

On July 5, 2016, without employing notice-and-comment procedures, NHTSA issued an interim rule setting the catch-up increase applicable to all programs under its supervision, including the CAFE program. *See* 81 Fed. Reg. 43,524 (July 5, 2016). Without any analysis, the agency set 1975 as the baseline, because that was the year the CAFE program and the civil penalties provision were codified. *Id.* at 43,526. For most of the time since then, the maximum fine for a CAFE violation has been $5.50 for each tenth of a mile per gallon ("mpg") that a manufacturer's fleet-average CAFE level falls short, multiplied by the number of fleet vehicles that fail to meet the standard. Applying the cost-of-living adjustment to the 1975 baseline year, NHTSA set the catch-up increase at $14 per 1/10th mpg per vehicle, nearly triple the current maximum. *Id.* The adjustment's effective date made it applicable to the 2014–15 model years, which were completed but for which compliance files were not closed, and the then-current 2016–17 model years.

Based on a simple extrapolation from the average annual amount of civil penalties collected, NHTSA estimated that "increasing the

current civil penalty amount by 150 percent would not result in an annual effect on the economy of $100 million or more," the threshold for significance under Executive Order 12866. *Id.* at 43,257. But NHTSA did not account for the increasing stringency of CAFE standards over time or for falling gas prices that have caused consumers to choose less fuel-efficient vehicles, making the standards more difficult to meet.

Global Automakers, together with the Alliance of Automobile Manufacturers ("the Alliance"), timely filed a petition for partial reconsideration. The petition advanced three arguments supporting reconsideration. *First*, retroactively applying the increase to the 2014–17 model years, long after it was feasible to make design changes, would impermissibly disturb manufacturers' settled expectations. Ex. A at 5–6.

Second, NHTSA had applied the wrong baseline year. In 2007, Congress passed the Energy Independence and Security Act ("EISA"), Pub. L. No. 110-140 (2007), which amended 49 U.S.C. § 32912 — the provision setting forth the CAFE civil penalty — and ratified the current $5.50 per 1/10th mpg per vehicle penalty while changing the uses to which penalties could be directed. *See* EISA § 112. Accordingly,

2007 was the most recent year in which Congress "established or adjusted" the CAFE civil penalty and, therefore, 2007 is the baseline year to which the cost-of-living adjustment should apply. Ex. A at 4–5.

Third, NHTSA's assessment of the economic impact of the increase was vastly understated because the nearly three-fold increase in civil penalties would result in an "average annual cost increase of approximately $1 billion over the baseline." Ex. A at 7. (More recent estimates provided during the recently closed comment period have topped $3 billion.) That calculation was reached by inputting the two civil penalty amounts ($14.00 and $5.50 per 1/10th mpg per vehicle) into the "Volpe Model," the mathematical model that NHTSA relies on to set CAFE standards. *Id.* As the petition noted, the extra $1 billion in annual costs would have serious economic consequences that were not accounted for in the interim rule. *Id.* at 8.

The petition requested alternative relief, asking the agency either (1) to issue a new interim rule that "applies the inflation adjustment to the base year of 2007," or (2) "[i]f NHTSA does not concur that 2007 is the proper baseline year," to exercise the agency's Section 4(c) "discretion with respect to the CAFE penalties." Ex. A. at 11.

C. The Revised Rule and Reconsideration

NHTSA granted the reconsideration petition as to the retroactive application of the catch-up increase, delaying implementation of the rule until model year 2019. *See* 81 Fed. Reg. 95,489, 95,491 (Dec. 28, 2016). NHTSA did not respond, however, to the petition's argument that it should either set 2007 as the baseline year or use its Section 4(c) authority to reduce the catch-up increase. Nor did it acknowledge the $1 billion cost estimate based on the agency's own Volpe Model. Instead, the rule mischaracterized the petition, summarily concluding that because the agency addressed the petition's comment on retroactivity, it "need not address" the petition's "alternative requests" regarding the baseline year or Section 4(c). *Id*. at 95,489–90 & n.7.

NHTSA's revision to the interim rule was initially scheduled to take effect January 25, 2017, but the effective date was delayed several times. *See* 82 Fed. Reg. 8694 (Jan. 30, 2017); *id*. at 15,302; *id*. at 29,009. NHTSA's delay of the rule's effective date and its decision to grant reconsideration before it became effective obviated the need for the industry to challenge the revised final rule.

On July 7, 2017, NHTSA stayed implementation of the revised rule pending reconsideration of issues that had been raised, but the agency had failed to address. The agency corrected its earlier misunderstanding, noting that the petition for reconsideration had

> argued that NHTSA used the wrong base year to calculate the inflationary adjustment to the CAFE civil penalty and raised concerns about applying the adjusted civil penalty retroactively. The Industry Petition also argued that in the event that NHTSA chose not to adopt the base year suggested in the petition, NHTSA should seek comment on whether NHTSA should adopt a lower penalty level than the one in the interim final rule based on "negative economic impacts[.]"

82 Fed. Reg. 32,139, 32,139 (July 12, 2017). NHTSA noted that while it responded to the comments about retroactivity, the rule "did not address the other points raised in" the petition — namely, the alternative requests to use 2007 as the baseline year or to exercise Section 4(c) discretion to reduce the catch-up increase. *Id.* The agency announced that it was "now reconsidering" because its revision to the interim rule "did not give adequate consideration to all of the relevant issues, including the potential economic consequences of increasing CAFE penalties by potentially $1 billion per year, as estimated in the Industry Petition." *Id.* In a separate notice, NHTSA acknowledged

that the "interim final rule did not provide an opportunity for interested parties to provide input fully" on issues related to the baseline year and economic costs, and therefore it was seeking "information concerning the costs and benefits of increased penalties" as well as whether to use 2007 as the baseline. 82 Fed. Reg. 32,140, 32,142 (July 12, 2017).

STANDARD OF REVIEW

Summary reversal is a disfavored remedy because it deprives litigants of a full opportunity to be heard and the Court of a thorough airing of legal and factual issues. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1457 (11th Cir. 1986) (declining to grant the "extraordinary" remedy of summary reversal without "according the adverse party the constitutional imperative of due process—a hearing before this Court"); Fed. Ct. App. Manual § 25:4 (6th ed.) (summary reversal "is an extraordinary remedy reserved for extreme cases"). Summary reversal is not appropriate where disputed issues make a case "clearly worthy of consideration by a merits panel in the course of a full appeal." *Plante v. Dake*, 599 F. App'x 13, 14 (2d Cir. 2015). To be entitled to summary reversal, the movant "bears the heavy burden of establishing" that the merits of the case are "so clear" that expedited action is justified and

that "no benefit will be gained from further briefing and argument." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

Similarly, a stay is "not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009). It is "an exercise of judicial discretion" that should be granted only if the party requesting a stay carries its heavy burden to show "that the circumstances justify an exercise of that discretion." *Id.* The "burden is on the party seeking a stay" to meet all the requirements for a stay, including irreparable injury. *Sussman v. Jenkins*, 642 F.3d 532, 537 (7th Cir. 2011); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 21 (2008).

ARGUMENT

I. Petitioners Are Not Entitled To Summary Reversal.

The motion for summary reversal should be denied. NHTSA's decision to grant reconsideration was an appropriate step necessary to correct the agency's earlier failure to satisfy its obligations to apply the statutory factors and engage in reasoned decisionmaking. Petitioners cite no precedent establishing that an agency must implement a procedurally infirm rule, and the cases they rely on are readily distinguished.

A. NHTSA's Decision to Reconsider the Rule Was Appropriate.

NHTSA's failure to address Global Automakers' arguments that it should use 2007 as the baseline year or exercise its authority under Section 4(c) was arbitrary and capricious. As a result, the agency's revision to the interim rule would not have been able to withstand judicial scrutiny.

"[A]n agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). As part of this obligation, agencies must consider and "respond to all significant comments, for 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.'" *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (quoting *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979)). An agency's "failure to acknowledge ... record evidence directly contradicting its conclusion is arbitrary and capricious." *Islander E. Pipeline Co., LLC v. Connecticut Dep't of Envtl. Prot.*, 482 F.3d 79, 102 (2d Cir. 2006) (citing *State Farm*, 463 U.S. at 43). Requiring agencies to address substantive comments ensures the efficacy of judicial review:

unaddressed comments "leave a reviewing court unable to say that the agency has considered all relevant factors." *Alabama Power*, 636 F.2d at 385. It is also a critical component of the due process right encapsulated by the APA's requirement that "interested person[s]" be afforded "the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e)*; see also Melrose Credit Union v. City of New York*, 247 F. Supp. 3d 356, 375 (S.D.N.Y. 2017) ("[T]he opportunity to be heard remains the Constitution's 'root requirement.'") (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971)).

An agency's obligation to consider substantive comments and explain its reasoning is heightened in cases where, as here, Congress has prescribed the manner in which the agency is to undertake its statutory duties and identified the factors that are to guide its discretion. *See, e.g.*, *Verizon Telephone Co. v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) (agency's decision was arbitrary and capricious because it failed to provide "a reasoned explanation for denying forbearance according to the statutory requirements"). In the 2015 Act, Congress directed agencies to choose a baseline year and what factors to consider when determining whether to reduce the catch-up increase to a civil

penalty. Significantly, Congress left it to the agencies to determine whether particular programs required something less than the automatic adjustment.

Global Automakers' petition for reconsideration argued that, under the statute's plain language, the agency had selected the wrong baseline year. Global Automakers also objected that the agency's own model showed that using a 1975 baseline and nearly tripling the maximum civil penalty would cause serious negative economic consequences. NHTSA was therefore required to consider adjusting the catch-up increase, as Congress expressly permitted.

NHTSA was obliged to address these comments and, in failing to do so, it "entirely failed to consider an important aspect of the problem" identified by Congress. *State Farm*, 463 U.S. at 43. Moreover, the agency's initial excuse for ignoring Global Automakers' comments — that it was an "alternative request for relief" mooted by the agency's decision to apply the catch-up increase starting in model year 2019 — was wrong. The petition's arguments on retroactivity were independent of its arguments about the baseline year and the cost of the catch-up increase. *See* Ex. A. at 11. Because Global Automakers'

comments regarding the baseline year and the cost of compliance, "if true, raise points relevant to the agency's decision [that] if adopted, would require a change" to the rule, the agency could not just brush them aside. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).

Given the procedural infirmities of the revised rule, NHTSA appropriately decided to defer implementation to consider the industry's comments. Agencies often grant reconsideration to correct their own mistakes, and an agency's decision to grant reconsideration is not reviewable. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011) (noting that review is available only "if reconsideration is *denied*" (emphasis added)). As courts have explained, agency requests to reconsider are "commonly grant[ed]" because it is preferable for "agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record" that is "incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *see also Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) ("administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done

in a timely fashion"); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977). Indeed, although NHTSA characterized its action as a stay pending *re*-consideration, in reality the agency stayed implementation to consider *in the first instance* Global Automakers' substantial comments that went directly to the statutory factors Congress set forth in Section 4(c). NHTSA acknowledged that the rule did not respond to Global Automakers' comments on these points, and it therefore stayed the rule to undertake the reasoned decisionmaking that is required by law. *See* 82 Fed. Reg. at 32,142. NHTSA's authority for acting responsibly in this fashion is clear: the requirement embedded in 5 U.S.C. § 553(e) to give meaningful consideration, and respond to, substantial comments that address "important aspect[s] of the problem" before promulgating a rule. *State Farm*, 463 U.S. at 43.

B. NHTSA's Decision To Stay the Rule Was Consistent With The Requirements Of Reasoned Decisionmaking.

Petitioners cannot dispute that NHTSA did not respond to substantial comments by Global Automakers and others before revising the interim rule. Nor can it dispute that when an agency fails to respond to comments, the agency must be given an opportunity to consider them in the first instance. Petitioners nonetheless urge the

Court to prevent the agency from staying implementation of the rule while it complies with these bedrock requirements of reasoned decisionmaking. Their position is meritless.

1. *Abraham* and *Clean Air Council* Do Not Apply.

Petitioners rely principally on *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), and *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) ("*CAC*"). Both cases are readily distinguished.

In *Abraham*, the statutory provision that was "at the heart of the[] proceedings," 355 F.3d at 187, prohibited the agency from revising appliance standards downward to make them less energy efficient. *See* 42 U.S.C. § 6295(o)(1) ("The Secretary may not prescribe any amended standard which . . . decreases the minimum required energy efficiency, of a covered product."). In light of the statutory mandate, this Court determined that publication of the final rule was the date on which standards were locked in and that the statute's "anti-backsliding" provision prevented the agency from granting reconsideration. *Abraham*, 355 F.3d at 195–97. In contrast, in this case, the 2015 Act describes certain conditions that give the agency discretion to reduce

the catch-up increase, and Global Automakers made a substantial showing that those conditions are satisfied. As NHTSA has correctly recognized, it must consider that showing before its interim rule can lawfully take effect.

More fundamentally, in both *Abraham* and *CAC*, the agencies seeking to stay implementation had fully considered the objections that later became the grounds for reconsideration; there was no failure to consider and respond to substantive comments. In *Abraham*, this Court noted that the agency had "invited . . . public comment" on its proposed rule "and set a date for a public hearing." 355 F.3d at 189. The agency received "extensive submissions of public comment, and as the result of the[se] processes . . . promulgated a final rule." *Id.* Likewise, in *CAC*, the industry groups that eventually sought reconsideration filed comments, and EPA "[r]espond[ed] to these comments in the final rule." *CAC*, 862 F.3d at 11. The D.C. Circuit noted that "[t]he final rule thus responded directly to comments and information" received from regulated parties, *id.*, and "[t]he administrative record . . . makes clear that industry groups had ample opportunity to comment on all . . . issues . . . and . . . the agency incorporated those comments directly into

the final rule," *id.* at 14. In fact, the petitioner's argument for jurisdiction rested on its acknowledgement that "all of the issues [the agency] identified [as reasons for staying implementation] could have been, *and actually were*, raised (and *extensively deliberated*) during the comment period." *Id.* at 6 (second emphasis added).

In *Abraham* and *CAC*, the agencies stayed a final rule to re-weigh a record that was complete and accounted for all "important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. These cases thus reflect the general principle that an "agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion." *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417–18 (6th Cir. 2004). But NHTSA's decision here to grant reconsideration, far from being arbitrary, was required. NHTSA has admitted that it failed to consider Global Automakers' comments regarding the baseline year and the cost of compliance when it revised its interim rule. *See* 82 Fed. Reg. at 32,140. This failure renders the underlying rule fatally flawed and unsupportable, and makes petitioners' reliance on *Abraham* and *CAC* inapt.

2. The 2015 Act's Statutory Deadline Is Not Cause To Issue an Invalid Rule.

Petitioners argue that the revised interim rule must be implemented because the statutory deadline to adjust civil penalties has already run. But petitioners cite no authority for the proposition that a statutory deadline requires the agency to issue a rule that short-circuits the APA's meaningful-consideration and adequate-explanation requirements. Statutory deadlines are not an excuse to act arbitrarily. *Cf. Americans for Clean Energy v. EPA*, 864 F.3d 691, 719 (D.C. Cir. 2017) (even when an agency misses a statutory deadline, it remains "bound by our precedents (not to mention basic principles of due process) . . . [to] reasonably balance its statutory duties with the rights of the entities it regulates"). NHTSA's statutory duty is not to issue any rule, but a *valid* rule that complies with the basic requirements of reasoned decisionmaking.

Petitioners have made no showing of "egregious[ly]" unreasonable delay that courts have generally required when asked to compel agency action, even in cases of a missed statutory deadline. *See TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984); *see also* 5 U.S.C. § 555(b). Nor could they. NHTSA has stated that it will act after appropriate notice-and-

comment procedures to adjust civil penalty amounts consistent with the 2015 Act, and the comment period closed on October 10, 2017. *See* TRAC, 750 F.2d at 80 (declining to compel agency action where agency was "moving expeditiously" to complete proceedings).

In any event, the Court's power to compel withheld action extends only that far — to compel the agency to act, not to impose a particular substantive outcome. *See McHugh v. Rubin*, 220 F.3d 53, 61 (2d Cir. 2000). Forcing the agency to implement a legally flawed rule will only cause more, not less, delay and uncertainty. The interim rule, if implemented as revised, will be immediately vulnerable to challenge — a challenge that must succeed given the agency's acknowledged failure to consider and respond to substantial comments. The remedy for this serious procedural infirmity is remand to the agency. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 341 (D.D.C. 2016) (remanding rule to the agency to "respond to significant comments made" by petitioner).

Remand would put the parties in the same position they occupy now — waiting as NHTSA takes comment on whether to use a different baseline year or to adjust the formula-derived catch-up increase. Nor

could the rule be implemented during the comment period. Respondents would have strong arguments in favor of a stay pending remand, since they would be directly harmed (and the public indirectly so) by the imposition of $1 billion in additional compliance costs and civil penalties. *See id.* at 341–42 (remanding a rule to consider substantial comments while "stay[ing] implementation of the rule so as to avoid potentially irreparable harm" to petitioner).

Indeed, given the agency's acknowledgement that it failed to consider substantial comments implicating statutory factors, the agency *itself* would be justified in seeking a voluntary remand for reconsideration in response to a challenge to the rule. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 453 (2d Cir. 2007) (court previously granted agency's request for remand and stay), *rev'd on other grounds and remanded*, 556 U.S. 502 (2009). Judicial review of agency action is not meant to be "a ping-pong game," *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006), and the Court should not create uncertainty and disruption in the market by forcing the agency to implement a rule that is plainly flawed.

C. Petitioners' Motion Implicates Other Issues Not Appropriate For Summary Consideration.

Petitioners' motion raises a host of issues relating to the statute and the posture of this petition that require more probing treatment than is possible on summary consideration. *See Plante*, 599 F. App'x at 14 (summary reversal inappropriate where disputed issues make a case "clearly worthy of consideration by a merits panel in the course of a full appeal"). Those issues include:

Jurisdiction, Ripeness, and Statute of Limitations: There are substantial questions that should be addressed on the merits, including (1) petitioners lack standing; (2) the fact that petitioners' challenge is not ripe, because the increase in civil penalties will not apply to vehicles until the 2019 model year, and compliance files for those vehicles will not be closed for several years after that; (3) petitioners have defaulted on the deadline to file this petition; and (4) a challenge to NHTSA's rule on civil penalties must be brought in the district court. These issues deserve more extensive briefing than can be afforded on summary consideration.

Connection to the CAFE statutory requirements: Petitioners' motion is silent on how the increase in civil penalties interacts with the

CAFE statute itself, but this critical issue also should not be approached haphazardly. Under the CAFE statute, civil penalties are not a punitive, action-forcing tool, but are instead part of a suite of measures that provide "compliance flexibilit[y]." NHTSA, CAFE Overview, *available at* https://one.nhtsa.gov/cafe_pic/CAFE_PIC_home.htm. A manufacturer whose fleet over-complies with an applicable standard can bank "credits" equal to the exceedance that can be "spent" on past or future shortfalls, carrying them forward over five model years or carrying them back three model years. Credits can also be traded, transferred, and purchased to cover shortfalls or, if more efficient, shortfalls can be resolved by paying civil penalties.

A critical issue that the agency — and ultimately, the courts — must consider is whether a large increase in civil penalty amounts will disrupt this carefully balanced scheme. The agency's approach also should be considered in light of the explicit statutory directive that NHTSA balance environmental and energy concerns with economic practicability in setting standards and penalties. *See* 49 U.S.C. § 32902(f). Petitioners' motion takes a simplistic approach that is based on speculative assumptions at odds with the complexity of the statutes

involved. The Court should not pretermit NHTSA's consideration of these complex issues — and certainly not on summary briefing.

II. Petitioners Are Not Entitled To A Stay.

Petitioners' alternative request for a stay of NHTSA's action deferring implementation of the final rule should also be denied. The purpose of a stay is to preserve the status quo pending review of a contested change. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004); *Chobani, LLC v. Dannon Co.*, 157 F. Supp. 3d 190, 201 (N.D.N.Y. 2016). A stay is justified only if it is required to prevent irreparable harm from some imminent government action. *See, e.g.*, *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). Here, petitioners seek not to stay government action but to lock in a contested regulatory outcome that is legally flawed and will result in significant harm, both to consumers and to an entire industry. Essentially, the stay petitioners seek would be akin to a mandatory injunction requiring the agency to act to alter the status quo, but they have not come close to making the "more rigorous" showing required. *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008).

Likelihood of success: Petitioners are not likely to prevail on their argument that the agency must implement a rule that is procedurally infirm. They have identified no precedent supporting their reading of the APA and the requirements of due process. As noted above, the cases they do cite are readily distinguished.

Irreparable Harm: Petitioners argue that failing to immediately implement the catch-up increase will increase pollution. That is wrong. They ignore that the new civil penalty amount will not actually take effect, and thus drive compliance — even to the limited extent that CAFE civil penalties are compliance forcing — until model year 2019. In fact, the full effect of the increased civil penalty will not be felt for several more years after that, because the "carry-forward" and "carry-back" provisions permit manufacturers to use existing credits to cover shortfalls before paying civil penalties.

Petitioners also ignore that CAFE standards are part of a joint rule issued by NHTSA and the Environmental Protection Agency ("EPA") addressing motor vehicle fuel economy and greenhouse gas emissions, under the same regulatory framework. *See* 77 Fed. Reg. 62,624 (Oct. 15, 2012). EPA retains full authority to implement and

enforce its mobile source standards under the Clean Air Act, and petitioners make no showing that EPA will fail to do so. Against this speculative, non-imminent harm, Global Automakers has shown that using 1975 as the baseline year and failing to adjust the catch-up increase under Section 4(c) will add more than $1 billion in increased compliance costs and civil penalties.

Public Interest Factors: The public interest factors also weigh in favor of denying the stay. There is a strong public interest in ensuring that agencies not set civil penalties at a level that has negative economic consequences. The public also has a clear, overriding interest in seeing that agencies adhere to their duty to give meaningful consideration to substantive comments. Although petitioners argue that staying implementation of the civil penalty increase will cause market disruption, forcing the agency to implement a flawed rule would cause more market disruption and be more unsettling to consumer and industry expectations than allowing the agency to get things right and undertake the reasoned decisionmaking that the law requires.

CONCLUSION

The motion should be denied.

Respectfully submitted,

/s/ *Ashley C. Parrish*
Ashley C. Parrish
Counsel of Record
Justin A. Torres
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
Email: aparrish@kslaw.com

Of Counsel:

Jacqueline Glassman
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737

Counsel for Proposed Intervenor the Association of Global Automakers

Dated: November 17, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this response:

(i) complies with the type-volume limits of Rule 27(d)(2)(A), as it contains 5,112 words, including footnotes and excluding the parts of the document exempted by Rule 32(f); and

(ii) complies with the typeface and style requirements of Rule 32(a)(5)–(6), as it has been prepared using Microsoft Word 2013 and is set in 14 point Century Schoolbook font.

/s/ *Ashley C. Parrish*
Ashley C. Parrish

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 17th day of November, 2017, served a copy of the foregoing document on all parties through the Court's CM/ECF system.

/s/ *Ashley C. Parrish*
Ashley C. Parrish