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

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

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

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# PETITIONERS' REPLY IN SUPPORT OF SUMMARY VACATUR OR, IN THE ALTERNATIVE, STAY PENDING REVIEW

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## INTRODUCTION

Summary vacatur is appropriate here because this case is simple and controlled by settled law. The National Highway Traffic Safety Administration indefinitely delayed the effective date of a final rule, without providing notice or an opportunity to comment on the delay. This Court forbade such action in *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004), and other Circuits have held the same. *See Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017); *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982).

This Court should "not sh[y] away from summarily deciding" the case based on this "settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016). The merits are "so clear" that further briefing "would not affect [the Court's] decision." *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985). And "speedy resolution" is important in cases like this, challenging the suspension of a final rule, because a "lengthy appeal will exacerbate [the] delays" caused by the agency's unlawful behavior. *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982).

As in *Clean Air Council*, the suspension should be summarily vacated.

## ARGUMENT

### I. The Delay Rule Is Clearly Unlawful

#### A. The agency (still) identifies no authority for the suspension

It is settled law in this Circuit that a federal agency, as a creature of statute, has *only* those authorities conferred by Congress. *Abraham*, 355 F.3d at 202. To suspend the effective date of a final rule, then, an agency "must point to something in the [governing statutes] or the APA that gives it authority" to do so. *Clean Air Council*, 862 F.3d at 9.

Respondents identify no such authority here. Instead, they contend that "nothing in the governing statutes or the APA *precluded* [the agency] from extending the effective date." RESP-11 (emphasis added).[1]

But the D.C. Circuit recently held, citing this Court's decision in *Abraham*, that an agency lacks "inherent authority to issue a brief stay of a final rule . . . while it reconsiders it." *Clean Air Council*, 862 F.3d at 9 (internal quotation marks omitted). There, as here, the agency "cite[d]

[1] This reply cites Respondents' opposition as RESP-__; the opposition of Alliance of Automobile Manufacturers (Alliance) as ALL-__; the opposition of Association of Global Automakers (Global) as GLO-__; Petitioners' motion as MOT-__; and materials in the motion's Addendum as ADD-__.

nothing for the proposition that it has such authority, and for good reason: . . . agencies may act only pursuant to authority delegated to them by Congress." *Id.* (internal quotation marks omitted). Respondents try to distinguish *Abraham* on the facts, but they avoid its holding about agency authority. They ignore *Clean Air Council* altogether. And they *still* cite nothing that supports their purported inherent authority.[2]

Moreover, Congress here *has* precluded the agency from indefinitely delaying the long-overdue increase to fuel-economy penalties. Respondents contend the contrary only by ignoring the Improvements Act and its command that the penalty increase "shall take effect not later than August 1, 2016," followed by subsequent annual adjustments "not later than January 15 of every year thereafter." Pub. L. No. 114-74, § 701(b)(1)(A), (D), 129 Stat. 584, 599

[2] Global's belief that the final rule was flawed, GLO-14-15, does not authorize its unilateral suspension. Had Global challenged the rule, the agency perhaps could have postponed its effective date "pending judicial review." 5 U.S.C. § 705. But that provision does not apply here, so the agency must identify some other source of authority for the suspension—which it does not.

(2015). The Delay Rule is thus not only unauthorized, it is prohibited by these statutory deadlines.[3]

### B. Suspending the effective date required notice and comment

It is also settled law that an agency must provide notice and comment before suspending a final rule, and may not avoid that requirement merely by soliciting comments on the rule's substantive reconsideration or because the rule's effective date was imminent. *See Abraham*, 355 F.3d at 205-06 & n.14; *NRDC v. EPA*, 683 F.2d at 761-67.

These and other cases foreclose Respondents' initial argument that the indefinite delay is a procedural rule "not subject to the notice-and-comment requirement." RESP-14. "[A]gency action which has the effect of suspending a duly promulgated regulation is normally subject

[3] Alliance suggests the Improvements Act somehow authorized the Delay Rule by permitting a reduced initial penalty adjustment after notice and comment. ALL-20-22. But any such action was supposed to begin *before* the initial adjustment in August 2016. *See* Office Mgmt. & Budget, M-16-06 at 3 (Feb. 24, 2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf (requiring that agencies submit proposed reduced adjustments "as soon as possible, and no later than May 2, 2016"). And even Alliance's interpretation would not support an *indefinite* delay of the penalty increase, given Congress's instruction for subsequent annual adjustments by specific dates.

to APA rulemaking requirements." *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983). This is because "delaying the rule's effective date . . . [is] tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6. And because the APA specifically provides that amending or repealing a rule requires notice and comment, 5 U.S.C. §§ 551(5), 553(b)-(c), the "indefinite postponement of [a rule's] effective date" requires them too. *NRDC v. EPA*, 683 F.2d at 762.

Respondents' reliance on the "good cause" exception of the APA, 5 U.S.C. § 553(b)(B), fares no better. *See Abraham*, 355 F.3d at 204 ("exceptions to the APA requirements should be narrowly construed and only reluctantly countenanced" (internal quotation marks omitted)). Respondents' primary theory is that notice and comment were "unnecessary" here because the suspension purportedly "ha[d] no practical effect." RESP-18. But the agency indefinitely suspended a final rule that affected automakers' *current* compliance decisions. 81 Fed. Reg. 95,489, 95,490-91 (Dec. 28, 2016). Automakers are designing Model Year 2019-and-after fleets now, and basing their compliance plans "on the civil penalty amounts in effect." *See* All. of Auto. Mfrs. & Ass'n of Glob. Automakers, Petition for Partial

Reconsideration 5 (Aug. 1, 2016) [hereinafter Industry Petition] [ADD-53]. The suspension slashed the applicable penalties by roughly a third, and did so indefinitely[4]—thus plainly altering automakers' incentives for complying with fuel-economy standards in their current decisions.

Indeed, this real-world, practical effect is presumably why automakers have sought to intervene in this case. Their asserted economic interest in the delay, as well as the challenges brought by five states and three environmental membership organizations, disproves Respondents' contention that the Delay Rule "did not warrant" notice and comment because it was purportedly "'inconsequential to the industry and to the public.'" RESP-19 (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001)).

Finally, there is an obvious answer to Respondents' question "how [the agency] could have sought comment on whether to further extend the effective date." RESP-15. Petitioners "see no reason, and none has been supplied," why the agency could not have solicited comments on a

[4] The delay was indefinite and thus not "temporally limited [in] scope." RESP-16 (quoting *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987)); *see also* ALL-12 (erroneously describing the delay as a "temporary deferment").

proposed suspension "at the time of the initial postponement." *NRDC v. EPA*, 683 F.2d at 766; *cf., e.g.*, 82 Fed. Reg. 46,458 (Oct. 5, 2017) (soliciting comments on proposed suspension of final rule during reconsideration). Nor can the subsequent comment period on the rule's reconsideration cure "the absence of notice and comment prior to the amendment of the [rule's] effective date." *Abraham*, 355 F.3d at 206 n.14; *accord NRDC v. EPA*, 683 F.2d at 768. If afforded the opportunity, Petitioners would have submitted comments specifically opposing the proposed suspension: They would have highlighted the agency's lack of authority and, among other things, refuted the agency's erroneous claim that an indefinite delay of the rule has no practical effect.

## II. Petitioners Have Standing, and the Petition Is Timely

**A.** Petitioners have standing because the Delay Rule directly affects automakers' fuel-economy compliance and therefore the emissions of dangerous air pollutants that harm Petitioners' members. MOT-19-23.

***Injury-in-Fact*:** Vehicle fuel consumption, as well as the production and refining of that fuel, results in emissions of "criteria" air pollutants that harm human health. *See* 77 Fed. Reg. 62,624, 62,901-08, 63,003 (Oct. 15, 2012). Non-compliance with fuel-economy standards

thus injures Petitioners' members who live near busy highways and refineries and are exposed to additional pollutants emitted because of the resulting increases in fuel consumption and production. *See id.* These members' "likely exposure to additional [pollution] in the air where [they live] is certainly an 'injury-in-fact' sufficient to confer standing." *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002); MOT-22 n.10 (citing declarations).[5]

Alliance of Automobile Manufacturers (Alliance) appears to question whether increased air pollution from fuel-economy violations harms these nearby residents, ALL-15-18—including Janet Dietzkamei, who lives 1400 feet from a busy highway and, because of her asthma, cannot leave home without a mask whenever air quality levels drop from good to moderate, Dietzkamei Decl. ¶¶9-12 [ADD-117-118]. Respondents, notably, do not make the same claim, having already projected that fuel-economy compliance would "result in significant declines in the adverse health effects that result from . . . exposure to

[5] One member declarant is also injured for the additional reason that the Delay Rule's effect on fuel-economy compliance will decrease the availability of fuel-efficient cars that she would like to purchase. Munguia Decl. ¶¶8-13 [ADD-95-96].

these pollutants." 77 Fed. Reg. at 63,062; *see also Baur v. Veneman*, 352 F.3d 625, 637-40 (2d Cir. 2003) (government statements acknowledging risk of harm "weigh in favor of concluding that standing exists"). And while Alliance might question the total amount of pollutants emitted as a result of fuel-economy violations, "[t]he injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice." *LaFleur*, 300 F.3d at 270 (internal quotation marks omitted).

***Causation***: The Delay Rule will result in greater non-compliance with fuel-economy standards (and thus increased emissions of air pollutants) because it leaves in place an outdated penalty rate that has not deterred violations in recent years, and will not do so in upcoming model years either. MOT-21 (citing Tonachel Decl. ¶¶10-15 [ADD-66-70]). Indeed, the very purpose of the penalty increase that the agency suspended was to restore the "deterrent effect of [fuel-economy] penalties and [to] promote compliance with the law." 28 U.S.C. § 2461 note, § 2(b)(2).

Respondents suggest the causal chain is too "attenuated" because it involves independent actions by automakers. RESP-26-28. They maintain that Petitioners merely *assume* that automakers "will base their compliance decisions" on the applicable penalty rate. RESP-25.

But automakers themselves have *admitted* that they make their compliance decisions "based on the civil penalty amounts in effect." Industry Petition at 5 [ADD-53]. And they presumably would have had no reason to intervene in this case if the Delay Rule did not affect their decisions.[6] Automakers' own actions and assertions thus establish the causal link and, at a minimum, a "'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

***Redressability***: Vacating the Delay Rule would reinstate the penalty increase for the duration of the reconsideration. The agency projects that increased penalties will "increase[] compliance with the [fuel-economy] standards, which would result in greater fuel savings and other benefits." 82 Fed. Reg. 32,140, 32,142 (July 12, 2017). The agency's own models also confirm as much. *See* Tonachel Decl. ¶¶15-17 [ADD-69-71]. Thus, "the [increased] penalties would redress"

[6] The agency's ultimate reconsideration decision, *see* RESP-27, is beside the point. Suspending the penalty increase injures Petitioners, irrespective of the reconsideration's outcome, because automakers are designing their fleets now and deciding whether those vehicles will comply with fuel-economy standards.

Petitioners' injuries by deterring fuel-economy violations. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 188 (2000).[7]

To be sure, some automakers may purchase or transfer credits to cover fuel-economy shortfalls. 49 U.S.C. § 32903. But Alliance's claim that this eliminates standing, ALL-12-13, elides a crucial difference between credits and penalties. Credits are earned from "over-compliance" with fuel-economy standards; penalties are assessed for "non-compliance." 82 Fed. Reg. at 32,140-41 & n.3. Thus credits, unlike penalties, still reflect a corresponding reduction in emissions. Moreover, because a penalty increase "will affect the price of these credits," ALL-13, vacating the Delay Rule means that more automakers will decide to comply with the standards instead of purchasing credits. Either way, a favorable decision by this Court is "likely to result in favorable action by the regulated party." *Town of Babylon*, 699 F.3d at 229.

**B.** This petition is timely. Petitioners filed their challenge 57 days after the Delay Rule was published in the Federal Register. The

[7] These facts distinguish this case from others where even plaintiffs did not assert that the regulated party "would act differently were the [agency action] vacated." *Town of Babylon v. Federal Housing Finance Agency*, 699 F.3d 221, 229 (2d Cir. 2012).

operative judicial review provision of the Energy Policy and Conservation Act allows a petition "not later than 59 days after the [challenged] regulation is prescribed." 49 U.S.C. § 32909(b). This Court has already held, in the context of materially identical judicial review provisions in the same statute, that the term "prescribe" is "interchangeable" with "*publication* in the Federal Register." *Abraham*, 355 F.3d at 196 & n.8. That holding forecloses Alliance's theory that the limitations period began to run when the Delay Rule was *filed* with, rather than *published* in, the Federal Register. ALL-2-3. The instant petition is timely under this Court's precedent.

## III. A Stay and Expedited Review Are Also Warranted

If the Court does not summarily vacate the Delay Rule, a stay is warranted to prevent automakers—who are making their compliance decisions *now*—from designing and producing non-compliant fleets while this case is pending. The harm resulting from such non-compliance is irreparable: once fleets are produced, emissions from their inefficient fuel consumption will continue for the vehicles' lifetimes.

Respondents' notion that there is "nothing to stay" relies on the faulty premise that suspending the penalty increase had no "practical

consequences." RESP-23.[8] A stay pending judicial review of the Delay Rule would reinstate the penalty increase and restore its deterrent effect for vehicles being designed now. And a stay would not be "tantamount to final relief," RESP-24, or "a complete merits victory," ALL-23, because, in the unlikely event Respondents ultimately prevailed here, the stay would lift and the Delay Rule would go back into effect.

Irrespective of whether the Court grants a stay, it should—at least—expedite briefing and argument to ensure the agency is not rewarded for its unlawful delay. Respondents' assertion that Petitioners have not sought expedition, RESP-8, is mistaken. *E.g.*, MOT-24 n.11 (requesting that the Court "expedite briefing and argument"). Petitioners respectfully reiterate the request here.

[8] Contrary to Respondents' suggestion, RESP-23, a party seeking a stay under Rule 18 need not move first before the agency where doing so "would be an exercise of futility"—as Respondents' stated opposition to a stay demonstrated that it "would have been here." *Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983).

## CONCLUSION

The Court should vacate the Delay Rule. In the alternative, the Court should stay the rule or, at the very least, expedite briefing and argument.

Dated: December 1, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Reply complies with the type-volume limitations of Rule 27(d)(2)(c) because it contains 2,540 words, excluding parts of the document exempted by Rule 32(f).

Dated: December 1, 2017

/s/ *Ian Fein*
Ian Fein

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on December 1, 2017.

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

/s/ *Ian Fein*
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