ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF VERMONT, STATE OF MARYLAND and COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; et al.,

Respondents.

REPLY IN SUPPORT OF THE STATES' MOTION FOR SUMMARY VACATUR OR, IN THE ALTERNATIVE, FOR STAY PENDING JUDICIAL REVIEW

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

AAM	the Alliance of Automobile Manufacturers
AGA	the Association of Global Automakers
APA	the Administrative Procedure Act
CAFE standards	corporate average fuel economy standards
DOE	Department of Energy
EPA	Environmental Protection Agency
EPCA	the Energy Policy and Conservation Act of 1975
NHTSA	National Highway Traffic Safety Administration

INTRODUCTION

In 2015, Congress directed agencies to update civil penalties for inflation and gave them a formula and a deadline. NHTSA complied and promulgated a final rule last December that increased the penalty for violating the CAFE standards. Six months later, spurning Congress' direction, NHTSA reversed course and indefinitely suspended this rule. NHTSA's opposition raises no colorable grounds to support its illegal delay. Indeed, NHTSA concedes that it lacks express statutory authority to indefinitely delay the rule's effective date, and this Court has rejected the argument that an agency has "inherent authority" to delay a final rule. Moreover, NHTSA cannot identify any emergency that would justify forgoing the required notice-and-comment procedures.

NHTSA complains about the exceptional nature of petitioners' request for summary vacatur. But that relief is warranted by NHTSA's extraordinary and unjustified disregard of Congress's commands and its own prior determinations. This Court should summarily vacate NHTSA's suspension of the penalty increase or issue a stay pending further briefing.

ARGUMENT

I. NHTSA'S INDEFINITE DELAY SHOULD BE SUMMARILY VACATED

Summary disposition is widely employed by circuit courts to resolve appeals efficiently where the merits of the parties' positions are clear. *Sills v.*

Bureau of Prisons, 761 F.2d 792, 793-94 (D.C. Cir. 1985); *see also Saunders v. United States Parole Comm'n*, 665 F. App'x 133, 136 (3d Cir. 2016). Here, summary vacatur is warranted because NHTSA's suspension of the Civil Penalties Rule is plainly barred by controlling precedents, and lengthy judicial review would permit exactly the delay that NHTSA has illegally imposed. *Cf. Plant v. Dake*, 599 Fed. App'x 13, 14 (2d Cir. 2015) (denying summary reversal where there was "disagreement between the Circuits" on "a central issue"). Indeed, the D.C. Circuit reached this conclusion in *Clean Air Council v. Pruitt* ("*CAC*"), 862 F.3d 1 (D.C. Cir. 2017), summarily vacating EPA's suspension of a final rule pending reconsideration because the agency lacked the requisite authority. Resolving the time-sensitive issues here similarly involves no more than a straightforward application of settled law.

A. NHTSA Lacked Authority to Delay the Civil Penalties Rule

1. NHTSA's Delay Is *Ultra Vires* and Violates the Inflation Adjustment Act.

NHTSA's assertion that no "statutory constraint" confines its authority to delay the penalty increase (Respondents' Opposition ("NHTSA") 13) is simply incorrect. The 2015 amendments to the Inflation Adjustment Act expressly directed NHTSA to implement "catch-up" penalties "not later than August 1, 2016." 28 U.S.C. § 2461, note, sec. 4. The Act also requires subsequent annual

adjustments, a further mandate that NHTSA violates. *Id.* NHTSA offers no justification whatsoever for disregarding these unambiguous commands.[1]

Even ignoring Congress's express direction, NHTSA's delay is plainly unlawful. NHTSA admits that it lacks any express statutory authority to postpone the effective date of a rule without notice or comment. But it asserts that it may delay the penalty increase because "nothing in the governing statutes or the APA *precluded* NHTSA from extending the effective date." NHTSA 11 (emphasis added). This Court has already rejected this precise argument, holding that an agency lacks "inherent" power to suspend and reconsider a final rule because "an agency has no power to act … unless and until Congress confers that power on it." *NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (quotation marks omitted). As the D.C. Circuit recently held when applying *Abraham* to summarily vacate EPA's similar delay of a rule's effectiveness, an agency lacks "'inherent authority' to 'issue a brief stay' of a final rule" while the agency "reconsiders it." *CAC*, 862 F.3d at 9 (citing *Abraham*). Instead, an agency issuing a final rule is

[1] While the Association of Global Automakers ("AGA") suggests that petitioners must show that NHTSA has egregiously delayed its statutory obligations, AGA Response ("AGA") 19-20, that standard applies only when parties seek to compel unlawfully withheld agency action, not when, as here, petitioners seek to vacate *ultra vires* action.

"bound by the rule until that rule is amended or revoked." *Id.* (quotation marks omitted).

NHTSA asserts that *Abraham* turned on "a specific legislative prohibition" that is not at issue here, NHTSA 12, but NHTSA misreads *Abraham*. While other holdings in *Abraham* hinged on a provision prohibiting the agency from weakening energy-efficiency requirements, this Court did not rely on that prohibition in rejecting the agency's assertion of "inherent" power. *See* 355 F.3d at 202-03. Instead, it relied only on the absence of express authority—authority that is equally absent here. In any event, even if *Abraham* did turn on some specific legislative direction, Congress directed NHTSA to update its penalties by August 2016.

2. Proposed Intervenors' Alternative Theories Fail.

The Alliance of Automobile Manufacturers ("AAM") asserts that NHTSA had authority under the Inflation Adjustment Act's authorization to conduct rulemaking on whether to issue a reduced catch-up adjustment based on economic impact or social costs. AAM Response ("AAM") 20-22. But NHTSA did not pursue this course before issuing the Civil Penalties Rule, and the statute nowhere authorizes NHTSA's delay of that rule. Notably, NHTSA does not invoke this argument, relying instead on its "inherent" authority claim.

AGA contends that the rule's purported flaws, which it asserts would not survive judicial review, justify NHTSA's delay. NHTSA did not base its action on that rationale, however, and a court may "consider only the justifications supplied by the agency at the time it took its action." *See Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008). Moreover, AGA conflates NHTSA's reconsideration with its suspension of the rule: the legality of the former is not at issue, while clear precedent forbids the latter. *See Abraham*, 355 F.3d at 202-03; *CAC*, 862 F.3d at 9.

B. NHTSA Lacked Good Cause to Forgo Notice and Comment

Neither NHTSA nor intervenors address the requirement that an agency invoking 5 U.S.C. § 553(b)(B)'s good-cause exception identify the "emergency situation[]" justifying the lack of notice and comment or the "real harm" that would result. *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995). Instead, NHTSA downplays its delay as "merely an interim procedural step" that required no notice and comment. NHTSA 14.

Courts have uniformly rejected this argument. "The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553." *Envtl. Def. Fund*, 716 F.2d at 920; *accord CAC*, 862 F.3d at 6 (delaying effective date is "tantamount to amending or revoking a rule"). Absent

good cause, such delays require, at minimum, that the agency do notice and comment. *See NRDC v. EPA*, 683 F.2d 752, 761-62 (effective date is "an essential part of any rule" and "material alterations" are subject to APA's rulemaking provisions).

NHTSA cannot avoid notice-and-comment procedure by asserting the delay has no "practical or legal significance." NHTSA 20. The rule's increased penalty for MY 2019 fleets was specifically designed to affect *current* planning decisions that are underway. *See* 81 Fed. Reg. at 95,490-91; AGA, Ex. A, p. 2 (intervenors requested "a minimum of 18 months' lead time" for any penalty increase "to provide manufacturers time to develop their compliance strategy"). These decisions will be "locked in" if NHTSA is permitted to delay the Civil Penalties Rule until it completes reconsideration.

NHTSA also cannot evade notice and comment by characterizing its delay as "interim." Congress may explicitly authorize an agency to issue an "interim final rule" that is effective prior to notice and comment. *See Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998). But Congress granted NHTSA no such authority to suspend the Civil Penalties Rule through an "interim" rulemaking. NHTSA's reliance on *Mid-Tex Electric Coop, Inc. v. FERC* is misplaced: that case confirms that an agency's designation of a rule as an "interim" measure "cannot in itself justify a failure to follow notice and comment procedures." 822 F.2d 1123,

1132 (D.C. Cir. 1987) (quotation marks omitted). Good cause is still required, and was established there by "irremedial financial consequences" and "regulatory confusion." *Id.* at 1133.

NHTSA also argues that it was "impracticable" to comply with notice-and-comment procedure because the effective date was imminent. NHTSA 18. But this Court in *Abraham* categorically rejected such imminence as grounds to avoid notice and comment.[2] 355 F.3d at 205.

Finally, NHTSA's decision to seek comments on its reconsideration is irrelevant. *See* NHTSA 18. The reconsideration is a separate rulemaking addressing different issues. In any event, "post-promulgation notice and comment procedures cannot cure the failure to provide such procedures prior to the promulgation of the rule at issue." *NRDC v. EPA*, 683 F.2d at 767-68.

II. NHTSA'S THRESHOLD OBJECTIONS TO THE STATES' PETITION ARE MERITLESS

A. The States Have Standing

Standing requires (1) injury that is (2) traceable to the defendant's conduct and (3) redressable by a favorable decision. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). "States are not normal litigants" and are entitled to "special

[2] The States did not challenge NHTSA's previous delays, but those delays were far different—they were for specified periods and did not reinstate the $5.50 penalty rate—and the States do not concede their legality.

solicitude," at least where federal law pre-empts state regulation but gives States the right to challenge a federal agency's action. *Id.* at 518-20. Here, the States' standing to challenge NHTSA's illegal action is clear.

1. Climate Change Injures the States.

In promulgating the CAFE standards that the Civil Penalties Rule enforces, NHTSA specifically found that manufacturers' compliance would meaningfully mitigate climate change, which causes the States injury through droughts, increased flooding, reduced coastal land, and reduced native tree species. *See* States' Motion ("States") 19. NHTSA and AAM contend that the States' *parens patriae* interests are insufficient for standing. This Court need not address that question because the impacts NHTSA identified plainly injure the States' proprietary interests, which indisputably are sufficient to support standing.[3]

In *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), *reversed on other grounds*, 564 U.S. 410 (2011) (affirming standing by an equally divided Court), three of the States here—New York, California, and

[3] If this Court does reach the issue, it should hold that there is no restriction on *parens patriae* standing here. The ordinary presumption against *parens patrie* standing in suits against the United States does not apply when, as here, the States are not suing to *prevent* the application of a federal statute, but instead to "'vindicate the Congressional will' by preventing an agency from violating a federal statute" and harming state residents. *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984); *see also see Massachusetts*, 549 U.S. at 520 n.17.

Vermont—and others sued to limit power plant emissions. This Court ruled that the same types of climate harms NHTSA identified threaten the States' proprietary interests:

- Declining water supplies "obviously injure property owned by" California;
- Sea level rise in New York City and other coastal areas will cause more frequent and severe flooding, harming public infrastructure, accelerating beach erosion, and compromising aquifers; and
- Global warming injures State-owned forests.

Id. at 341-42. These injuries also demonstrate the States' standing here.

California suffers an additional injury. When Congress pre-empted state authority to regulate tailpipe emissions, it established a waiver process that authorized California to impose tougher emission standards than EPA. 42 U.S.C. § 7543(a), (b); States Ex. 2 ¶ 3. For MY 2017-2025 light-duty vehicles, however, California has deemed compliance with federal emissions standards as compliance with California's standards. States Ex. 2 ¶ 6. Because greater fuel efficiency decreases tailpipe emissions, reduced compliance with the CAFE standards threatens to reduce compliance with California's emission standards and increase California's regulatory burden. *See id.* ¶¶ 7-8. NHTSA's delay thus impacts the regulatory integrity of California's emissions reduction program, and gives

California this additional basis for standing. And only one party need have standing to satisfy Article III. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

2. The States' Injuries Are Traceable to NHTSA's Delay and Redressable by Vacatur.

The States' injuries are traceable to NHTSA's action and redressable by vacatur. AAM and AGA told NHTSA that manufacturers take the penalty into account during the production process, AGA, Ex. A, p. 2, and NHTSA found that a higher penalty will increase compliance with the CAFE standards, which mitigate climate change. *See* States 17-18. Concomitantly, suspending the penalty increase is likely to reduce compliance and increase climate change impacts. Vacatur will redress those impacts. *See Massachusetts*, 549 U.S. at 524-25.

NHTSA claims that the States are speculating about the outcome of its reconsideration proceeding. NHTSA 27. But the States have challenged NHTSA's current suspension of the increase, not some future reconsideration decision. Because manufacturers are making decisions now about MY 2019 vehicles, this suspension is causing immediate impacts that will be locked in unless NHTSA's action is vacated.

NHTSA asserts that the States do not know how manufacturers will respond to the suspension. NHTSA 27. And AAM argues that manufacturers can use credits or other options instead of paying penalties. AAM 7-8, 12-14. But the record belies these assertions. NHTSA concluded in 2016 that the penalty increase would "increase[] compliance with the CAFE standards" by affecting manufacturing decisions. 82 Fed. Reg. at 32,142. AAM and AGA also told NHTSA that manufacturers consider the penalty in deciding whether to comply. *See* 81 Fed. Reg. at 95,490-91; AGA, Ex. A, p. 2. And while AAM argues that the delay will have no impact before MY 2019, AAM 12, it told NHTSA that manufacturers make production decisions based on the penalty, and production is underway for MY 2019. *See* 81 Fed. Reg. at 95,490-91. If the penalty increase really has no immediate impact, NHTSA had no reason to suspend the increase and AAM has no reason to argue so vigorously for the suspension.

B. The States' Petition Was Timely

EPCA allows a petition for judicial review "not later than 59 days after the regulation is prescribed," 49 U.S.C. § 32909(b), and the States filed their petition 58 days after the delay notice was published in the Federal Register. AAM argues that the limitations period started when NHTSA filed the notice five days earlier. AAM 2-4. This Court's decision in *Abraham* forecloses that argument, holding that publication in the Federal Register triggered the right to judicial review under

virtually identical language in another provision of EPCA. 355 F.3d at 196 & n.8 (noting that "prescribe" and "publish" are "interchangeable"); *see also United Techs. Corp. v. OSHA*, 836 F.2d 52, 53-54 (2d Cir. 1987) (publication, not filing, triggers limitations period); *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1092-93 (D.C. Cir. 1997) (same).

III. IN THE ALTERNATIVE, THE COURT SHOULD STAY NHTSA'S ACTION

As discussed above, NHTSA's delay was unlawful and will irreparably harm the States.[4] NHTSA argues that petitioners failed to ask it to stay the delay pursuant to Rule 18. That rule on its face applies only to an agency's quasi-judicial "decision or order." *See* 5 U.S.C. § 551(6) (an "order" is not a "rulemaking"). In any event, its requirement that a petitioner "ordinarily" request a stay from the agency is "flexible," *Commonwealth-Lord Joint Venture v. Donovan*, 24 F.2d 67, 68 (7th Cir. 1983), and such a request makes little sense here, where the agency's action itself was a stay. Nevertheless, counsel for the States contacted NHTSA's counsel before filing this motion and asked for consent to a stay. NHTSA declined.

[4] If this Court does not grant summary vacatur, the States support the environmental petitioners' request for expedited briefing.

CONCLUSION

For the above reasons, the Court should vacate, or alternatively stay, NHTSA's indefinite delay of the Civil Penalties Rule's effective date.

Dated: December 1, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), and based on the word count function in Microsoft Word 2016, I certify that this Reply In Support of the States' Motion for Summary Vacatur, or in the Alternative, Stay Pending Judicial Review complies with the type-volume limitations of Rule 27(d)(2)(a) because it contains 2,598 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f), and it complies with the typeface and type style requirements of Rule 32(a)(5) and (a)(6).

Dated: December 1, 2017 *<u>/s/ David Zaft</u>*
David Zaft

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Petitioners' Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via the Court's CM/ECF system on December 1, 2017.

I further certify that participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ David Zaft
David Zaft