

# 19-2395(L)

19-2508 (Con)

---

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

---

STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW JERSEY, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WASHINGTON, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB,  
*Petitioners,*

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JAMES C. OWENS, in his capacity as Acting Administrator of the National Highway Traffic Safety Administration, ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,  
*Respondents,*

ASSOCIATION OF GLOBAL AUTOMAKERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,  
*Intervenors.*

---

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

---

**UNOPPOSED MOTION BY TESLA, INC. FOR LEAVE TO PARTICIPATE  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

---

Joseph Mendelson III  
Tesla, Inc.,  
1333 H Street, NW, 11<sup>th</sup> Fl. West  
Washington, DC 20005  
jmendelson@tesla.com  
(703) 244-1724  
Counsel for *Amicus Curiae* Tesla, Inc.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Tesla, Inc. (“Tesla”) hereby submits the following corporate disclosure statement:

Tesla is a publicly traded corporation (TSLA), incorporated in the State of Delaware on July 1, 2003, with headquarters located at 3500 Deer Creek Road, Palo Alto, CA 94304.

Tesla designs, develops, manufactures, and sells high-performance, fully electric vehicles and designs, manufactures, installs, and sells solar energy generation and energy storage products.

Tesla does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

Respectfully Submitted,  
/s/ Joseph Mendelson III

---

Joseph Mendelson III  
Tesla, Inc.  
1333 H Street, NW, 11<sup>th</sup> Fl. West  
Washington, DC 20005  
jmendelson@tesla.com  
(703) 244-1724

Counsel for *Amicus Curiae* Tesla, Inc.

DATED: November 25, 2019

**UNOPPOSED MOTION BY TESLA FOR LEAVE TO PARTICIPATE AS  
*AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

Pursuant to Federal Rule of Appellate Procedure (“FRAP”) 29, Tesla respectfully moves for leave to participate as an *Amicus Curiae* in support of the Petitioners.

In conformance with Second Circuit Rule 27.1(b), Counsel for all petitioners in these consolidated cases have provided the consent of their clients to *amicus* participation by Tesla. Counsel for federal respondents has indicated that it consents to a timely filing of an amicus brief that complies with the rules. Counsel for intervenor Association of Global Automakers indicated it takes no position on the motion and will not oppose the motion. Counsel for intervenor Alliance of Automobile Manufacturers indicated that it also takes no position on the motion.

On July 26, 2019, Respondent National Highway Safety Traffic Administration (“NHTSA”) issued a final rule entitled “Civil Penalties,” 84 Fed. Reg. 36007 (July 26, 2019), that revokes the inflationary adjustment to the federal corporate average fuel economy (“CAFE”) program civil penalty section, 49 U.S.C. §32912, as required under the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015 (“Improvements Act”), Pub. L. No. 114-74, § 701, 129 Stat. 599 (2015).

Tesla’s mission is to accelerate the world’s transition to sustainable energy. To accomplish its mission, Tesla designs, develops, manufactures, and sells high-

performance, fully electric vehicles, solar energy products, and advanced battery storage systems. Tesla currently produces and sells three EVs: the Model S sedan, the Model X sport utility vehicle, and the Model 3 sedan. All Tesla vehicles offer high-performance and functionality, attractive styling, and zero emissions.

As an automobile manufacturer,<sup>1</sup> Tesla is subject to regulation under NHTSA's CAFE program. Tesla strongly supports maintaining the stability and increasing the stringency of these efficiency and emission-reduction performance standards.<sup>2</sup> Failure to adjust the civil penalty rates in the CAFE program undermines the stability of this program, diminishes the value of performance-based incentives that electric vehicle manufacturers, such as Tesla, accrue under the standards, and reduces the inducement for investment in vehicle innovation.<sup>3</sup>

---

<sup>1</sup> 49 U.S.C. §32901(a)(14); See also, EPA, NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62624 (Oct. 15, 2012).

<sup>2</sup> See Tesla, Comments on the proposed "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks," (Oct. 26, 2018) (opposing reductions in the stringency of the current CAFE standards), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-4186>.

<sup>3</sup> See, Congressional Research Service (CRS), Adjustment of Civil Monetary Penalties for Inflation (Feb 11, 2008) at 12 ("The inability of agencies to adjust civil penalties for inflation may be having a deleterious effect on public policy in certain areas. For example, in August 2007, GAO reported that penalties for violating the Corporate Average Fuel Economy (CAFE) standards had not increased since 1997, when they were increased pursuant to the Inflation Adjustment Act's procedures by 10%, from \$5 to \$5.50 per vehicle for every 0.1 mile per gallon by which a manufacturer's fleet fell short of the CAFE standard. Since then, because of the rounding rules and other factors, NHTSA has been unable to adjust those penalties for inflation.").

Accordingly, Tesla has a direct interest in NHTSA's attempt to roll back the inflation adjustment to the CAFE civil penalty provision. Under the CAFE enforcement regime, Tesla is rewarded for this efficiency performance by accumulating compliance credits that it can bank, trade, and transfer to underperforming manufacturers as these manufacturers seek to meet their annual compliance with the standards.<sup>4</sup>

NHTSA's revocation of the CAFE civil penalty inflation adjustment will interrupt and continue to diminish the incentive to innovate under the standards as the potential sanction faced by technologically stagnant manufacturers fails to keep pace with inflation.<sup>5</sup> This is inconsistent with purpose of the Improvements Act to maintain "the deterrent effect of civil monetary penalties" in preventing violations of Federal law, furthering the energy conservation policy goals of the Energy Policy and Conservation Act's ("EPCA"), 42 U.S.C. § 6201, and ensuring the CAFE statutory

---

<sup>4</sup> Tesla, Inc., SEC Form 10-K (Feb. 19, 2019) at 11 ("In connection with the production, delivery, placement into service and ongoing operation of our zero emission vehicles, charging infrastructure and solar systems in global markets, we have earned and will continue to earn various tradable regulatory credits. We have sold these credits, and will continue to sell future credits, to automotive companies and other regulated entities who can use the credits to comply with emission standards and other regulatory requirements.", <https://ir.tesla.com/static-files/15df7636-8cd8-4b18-989b-4badeeda806c>).

<sup>5</sup> CRS *supra* note 3, at 4 ("Civil monetary penalties are one way agencies enforce federal laws and regulations. . . . Over time, however, inflation can reduce the original punitive and deterrent value of civil penalty maximums."), [https://www.everycrsreport.com/files/20080211\\_RL34368\\_702e35ad8722d53159055717f3d18471810be77a.pdf](https://www.everycrsreport.com/files/20080211_RL34368_702e35ad8722d53159055717f3d18471810be77a.pdf).

and regulatory framework continues to reward innovation. Failing to adjust the civil penalty level also results in a constantly devaluing of the compliance credits awarded to manufacturers that invested in outperforming the standards.

Tesla's *amicus* filing would focus on the innovation and economic benefits that would accrue if the adjustments to the CAFE civil penalty, as directed by the Improvement Acts, are maintained. While NHTSA chooses to ignore it, continued stringency in the existing CAFE performance standards, as well as the properly adjusted civil penalties that enforce and promote compliance with the standards, will continue to create incentives for all innovating vehicle manufacturers to build on the successes demonstrated by Tesla.

Tesla is uniquely positioned to explain the impacts associated with NHTSA's revocation of the inflation adjustment. Tesla can provide the Court with an important business perspective on the purported "negative economic effects" NHTSA asserts are associated with implementing the inflation adjustment that the agency now seeks to withdraw. To date no other automotive manufacturer opposing the NHTSA CAFE civil penalty revocation rule has sought to file an *amicus* brief in this matter.

Tesla's motion is timely. FRAP 29(a)(6) authorizes such motions up to seven days after the filing of the principal brief of the party being supported and encourages the filing of such motions as soon as practicable. Tesla has moved forward promptly with preparing and submitting this motion subsequent the Court's recent scheduling

orders. Order, ECF No. 66. If Tesla's motion is granted, Tesla will file its brief in conformity with the rules of this court.

Respectfully Submitted,

/s/ Joseph Mendelson III

---

Joseph Mendelson III  
Tesla, Inc.  
1333 H Street, NW, 11<sup>th</sup> Fl. West  
Washington, DC 20005  
jmendelson@tesla.com  
(703) 244-1724

Counsel for *Amicus Curiae* Tesla, Inc.

DATED: November 25, 2019

## CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rules of Appellate Procedure 27(d)(1) & (2), Local Rule 27.1, and Fed. R. App. P. 29(a)(3) and 32(a)(5), because it meets the prescribed format requirements and contains 5200 words or less excluding the parts of the document exempted by Fed. R. App. P. 32(f). This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Garamond (serif) font.

Respectfully Submitted,

/s/ Joseph Mendelson III

---

Joseph Mendelson III  
Tesla, Inc.  
1333 H Street, NW, 11<sup>th</sup> Fl. West  
Washington, DC 20005  
jmendelson@tesla.com  
(703) 244-1724

Counsel for *Amicus Curiae* Tesla, Inc.

DATED: November 25, 2019



## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 25th day of November 2019, a true and correct copy of the foregoing motion was filed with the Clerk of the United States Court of Appeals for the Second Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully Submitted,

/s/ Joseph Mendelson III

---

Joseph Mendelson III  
Tesla, Inc.  
1333 H Street, NW, 11<sup>th</sup> Fl. West  
Washington, DC 20005  
jmendelson@tesla.com  
(703) 244-1724

Counsel for *Amicus Curiae* Tesla, Inc.

DATED: November 25, 2019

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-2395 (cons 19-2508) Caption [use short title]

Motion for: Leave to Participate as an Amicus Curiae

Set forth below precise, complete statement of relief sought:

Movant Tesla, Inc. seeks unopposed leave to participate as Amicus Curiae in support of Petitioners

New York, et al. v NHTSA

MOVING PARTY: Tesla, Inc. OPPOSING PARTY: NHTSA

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Joseph Mendelson III OPPOSING ATTORNEY: H. Thomas Byron III
Tesla, Inc, 1333 H Street, NW, 11th Fl. West Washington, DC 20005 (703) 244-1724
U.S. Dept. of Justice, Civil Division, Appellate Staff 950 Pennsylvania Ave, NW, room 7529, Washington, DC 20530 (202) 616-5367

Court- Judge/ Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/ Joseph Mendelson III Date: 11/25/19 Service by: CM/ECF Other [Attach proof of service]

NOTICE OF APPEARANCE FOR SUBSTITUTE, ADDITIONAL, OR AMICUS COUNSEL

Short Title: State of New York, et al v. National Highway Traffic Safety Adm Docket No.: 19-2395 (L) (19-2

Substitute, Additional, or Amicus Counsel's Contact Information is as follows:

Name: Joseph Mendelson III

Firm: Tesla, Inc.

Address: 1333 H Street, NW, 11th Floor West

Telephone: 703-244-1724 Fax: \_\_\_\_\_

E-mail: jmendelson@tesla.com

Appearance for: Tesla, Inc.

(party/designation)

Select One:

Substitute counsel (replacing lead counsel: \_\_\_\_\_)  
(name/firm)

Substitute counsel (replacing other counsel: \_\_\_\_\_)  
(name/firm)

Additional counsel (co-counsel with: \_\_\_\_\_)  
(name/firm)

Amicus (in support of: Petitioners)  
(party/designation)

CERTIFICATION

I certify that:

I am admitted to practice in this Court and, if required by Interim Local Rule 46.1(a)(2), have renewed  
my admission on \_\_\_\_\_ OR

I applied for admission on \_\_\_\_\_.

Signature of Counsel: /s/ Joseph Mendelson III

Type or Print Name: Joseph Mendelson III