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): 21-139 Caption [use short title] NRDC v. NHTSA

Motion for: Expedited Review

Set forth below precise, complete statement of relief sought:

Expedited review, pursuant to 28 U.S.C. § 1657(a), of Petitioners NRDC and Sierra Club's petition for review, on a schedule proposed in the attached motion.

MOVING PARTY: NRDC and Sierra Club **OPPOSING PARTY:** National Highway Traffic Safety Administration et al.

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Gabriel Daly **OPPOSING ATTORNEY:** H. Thomas Byron III

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: National Highway Traffic Safety Administration

Please check appropriate boxes:

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

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

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

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

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

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:

Gabriel Daly **Date:** 2/22/2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Case No. 21-139

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.; and SIERRA CLUB,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; and PETE BUTTIGIEG, in his official capacity as Secretary of the United States Department of Transportation,

Respondents.

PETITIONERS' MOTION FOR EXPEDITED REVIEW

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Dated: February 22, 2021

FEDERAL RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioners Natural Resources Defense Council, Inc. (NRDC) and Sierra Club are non-profit organizations with no parent corporation and no outstanding stock shares or other securities in the hands of the public. NRDC and Sierra Club do not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in NRDC or Sierra Club.

Dated: February 22, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

In the last week of the outgoing Administration, the National Highway Traffic Safety Administration (NHTSA) issued an interim final rule—without notice or opportunity for comment—exempting automakers from the increased penalty rate that this Court has *twice* held is "in force" for violations of the Corporate Average Fuel Economy (CAFE) standards in Model Years 2019 and beyond. *New York v. NHTSA*, 974 F.3d 87, 101 (2d Cir. 2020); *NRDC v. NHTSA*, 894 F.3d 95, 116 (2d Cir. 2018); *see* 86 Fed. Reg. 3016 (Jan. 14, 2021) ("Exemption Rule"). NHTSA did so without statutory authority and in blatant disregard of the Inflation Adjustment Act Improvements Act (IAA or "Improvements Act"), the Administrative Procedure Act (APA), and the National Environmental Policy Act (NEPA). Petitioners seek this Court's expedited review to, once again, restore the lawful CAFE penalty.

Expedited review is necessary to ensure that automakers do not base their compliance decisions—which they are making right now—on the lower penalty rate, which disincentivizes manufacturers from complying with CAFE standards now and in future years. Expedited review will also prevent NHTSA from assessing penalties at the unlawfully reduced rate. Finally, expedited review is necessary to ensure NHTSA is not rewarded for its outright defiance of this Court's decisions.

For the past four years, NHTSA has tried repeatedly and unsuccessfully to delay and undo the inflation adjustment to its CAFE penalties that Congress mandated. Its latest brazen gambit should be promptly vacated. When NHTSA first

attempted, in 2017, to suspend the increased penalty rate, this Court granted expedited review, vacated NHTSA's rule, and issued its mandate within days of oral argument. Petitioners ask that the Court likewise expedite consideration here.

Petitioners have conferred with Respondents, who oppose this motion and intend to file a motion to hold this case in abeyance, on the following schedule, to which the parties have agreed:

- Respondents' abeyance motion and brief in opposition to expedition due March 4;
- Petitioners' response in opposition to abeyance and reply in support of expedition due March 15; and
- Respondents' reply in support of abeyance due March 22.[1]

BACKGROUND

The Energy Policy and Conservation Act of 1975 (EPCA) requires NHTSA to establish mandatory fuel-economy standards for cars and light trucks. 49 U.S.C. §§ 32901 *et seq*. These CAFE standards reduce emissions of air pollutants, including greenhouse gases, that harm human health and the environment. *See* 77 Fed. Reg. 62,624, 63,003-04 (Oct. 15, 2012); U.S. Gov't Accountability Off., GAO-07-921, Vehicle Fuel Economy 7 (2007) (GAO Report), http://tinyurl.com/y9c86e5p. If an

[1] Another action challenging NHTSA's IFR was recently filed in this Court. *New York et al. v. National Highway Traffic Safety Administration*, No. 21-339. Petitioners in that action do not oppose, and, in the event these cases are consolidated, will join in, the relief requested here. Tesla, Inc. recently filed a motion requesting leave to intervene in this action. *See* ECF No. 28. As stated in Proposed Intervenor Tesla's motion to intervene, Tesla intends to move for summary vacatur which, if granted, would moot both the abeyance motion and the motion to expedite; to the extent that the rule is not summarily vacated, Tesla joins the request for expedited briefing.

automaker exceeds the CAFE standard in a given model year, it earns credits that can be used to cover shortfalls for "any of the 3 consecutive model years immediately before the model year for which the credits are earned" and to comply with the standards in "any of the 5 consecutive model years immediately after the model year for which the credits are earned." 49 U.S.C. § 32903(a)(1)-(2).

EPCA requires NHTSA to enforce the CAFE standards by assessing civil monetary penalties on automakers that produce noncompliant fleets. 49 U.S.C. § 32912. If it is cheaper for automakers to pay the penalty than to implement fuel-saving technology to comply with the CAFE standards, many automakers will—as they have in the past, *see* GAO Report at 9-10—choose to forego fuel-efficiency improvements and pay the penalty instead.

NHTSA responds to Congress' demand that it increase the outdated penalties

When Congress first created the CAFE penalty in 1975, it set the penalty rate at $5 per tenth of a mile per gallon.[2] Pub. L. 94-163, § 508(b)(1), 89 Stat. 871, 913 (1975) (codified as amended at 49 U.S.C. § 32912(b)). In 1997, NHTSA raised that rate slightly, to $5.50. 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997).

In 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Pub. L. 114-74, § 701, 129 Stat. 584, 599 (codified at 28 U.S.C. § 2461 note) (IAA). The Improvements Act mandated that federal agencies

[2] The formula for calculating the civil penalty assessed on a non-compliant automaker is: (penalty rate) x (number of tenths of a mile per gallon by which the fleet falls short of the CAFE standard) x (number of vehicles in the automaker's non-compliant fleet).

adjust their civil penalties to account for inflation, with an initial catch-up adjustment that "shall take effect not later than August 1, 2016," followed by mandatory annual adjustments "not later than January 15 of every year thereafter." IAA § 4(a), (b)(1)(B).[3]

In July 2016, NHTSA issued an interim rule updating civil penalties for various statutes and regulations that it administers. 81 Fed. Reg. 43,524 (July 5, 2016). NHTSA found that the CAFE penalty rate of $5.50, as adjusted for inflation, would be $22 in 2016 dollars. *Id.* at 43,526. Because the Improvements Act limited the catch-up adjustment to a 150 percent increase, the agency instead raised the penalty rate to $14 per tenth of a mile per gallon. *Id.*; *see also* IAA § 5(b)(2)(C).

Two trade associations of automakers responded by requesting that, among other things, NHTSA not apply the higher penalty rate to pre-Model Year 2019 vehicles. *See* All. of Auto. Mfrs. & Ass'n of Glob. Automakers, Petition for Partial Reconsideration of the Interim Final Rule on Civil Penalties 5-6 (Aug. 1, 2016) (Industry Petition), https://www.regulations.gov/document?D=NHTSA-2016-0075-0002. These automakers claimed that, because of the lead time needed to design and produce a fleet—as reflected in the 18-month compliance time frame for increased CAFE standards, 49 U.S.C. § 32902(a)—they had already decided whether to comply

[3] As this Court has previously observed, the Improvements Act represented Congress's "renewed effort to tackle the recurring issue of stagnant civil monetary penalties" by curing several flaws in its prior attempts and requiring "implement[ation] on a strict timeline." *NRDC*, 894 F.3d at 110-11.

with the applicable CAFE standards for Model Years 2017 and 2018 based on the preexisting $5.50 penalty rate. Industry Petition at 5-6.

In December 2016, NHTSA issued a final rule addressing the automakers' petition. 81 Fed. Reg. 95,489 (Dec. 28, 2016) (Civil Penalties Rule). As requested by the automakers, NHTSA made the $14 penalty rate applicable beginning in Model Year 2019. *Id.* at 95,490-91. NHTSA published the final Civil Penalties Rule in the Federal Register on December 28, 2016, with an effective date of January 27, 2017. *Id.* at 95,489.

NHTSA unlawfully suspends the penalty increase, without notice or comment

In July 2017, following a change of administration, NHTSA indefinitely suspended the $14 inflation adjustment to the CAFE civil penalty pending reconsideration of the Civil Penalties Rule and purported to reinstate the outdated $5.50 penalty in the interim. 82 Fed. Reg. 32,139 (July 12, 2017) ("Suspension Rule").

Petitioners and several States quickly challenged NHTSA's action in this Court. On January 30, 2018, this Court granted petitioners' motion for expedited review. On April 12, 2018, the Court heard oral argument, *see NRDC*, 894 F.3d at 95, and eleven days later vacated the rule, *id.* at 100. The Court immediately issued its mandate. *See* Mandate, *NRDC*, 894 F.3d 95 (No. 17-2780), ECF No. 196.

In an opinion published later that year, the Court explained that NHTSA lacked authority to suspend the inflation adjustment because the Improvements Act's plain terms and core purposes did not allow the agency to avoid its "clear and

mandatory" deadlines. *NRDC*, 894 F.3d at 108-11. The Court also rejected NHTSA's claim that either EPCA or some "inherent authority" allowed the agency to suspend the adjustment. *Id.* at 112-13. The Court further found that NHTSA violated the APA by suspending the adjustment without providing notice or an opportunity for public comment. *Id.* at 113-15. The Court observed that Congress had required agencies "across the federal government to institute mandatory, inflation-linked increases to numerous federal civil penalties, including the CAFE penalties," and that any contrary preference for "different regulations that are easier or less costly to comply with does not justify dispensing with notice and comment." *Id.* at 115. Finally, the Court expressly declared that, upon vacating the unlawful suspension, the earlier inflation adjustment to the CAFE penalty was "now in force." *Id.* at 116.

NHTSA attempts to reverse the penalty increase through other means

In April 2018—just weeks before this Court vacated the Suspension Rule—NHTSA announced a proposed rule to reverse the 2016 inflation adjustment and reinstate the outdated $5.50 penalty. 83 Fed. Reg. 13,904 (Apr. 2, 2018). The agency finalized its proposal in July 2019. 84 Fed. Reg. 36,007 (July 26, 2019) ("Rollback Rule"). NHTSA's primary justification for this rule was its new position—adopted for the first time, and contrary to its longstanding view—that the CAFE civil penalty is not a "civil monetary penalty" under the Act. 84 Fed. Reg. at 36,008-09. The agency asserted, in the alternative, that even if the Act applies to the CAFE civil penalty,

NHTSA would *still* reverse the 2016 adjustment based on the "negative economic impact exception" to the required catch-up provision. *Id.* at 36,020-23.

Again, Petitioners and several States quickly challenged NHTSA's action in this Court, and again this Court vacated NHTSA's unlawful rule. In August 2020, this Court held that the CAFE civil penalty is unambiguously "a civil monetary penalty" subject to the Improvements Act. *See New York*, 974 F.3d at 95-100. Further, the Court held that NHTSA's limited authority to reduce the initial catch-up adjustment expired, at the latest, in January 2017, and thus NHTSA did not have authority to invoke the "negative economic impact" exception in 2019. *Id.* at 100-01. Once again, the court made clear that "[t]he Civil Penalties Rule, 81 Fed. Reg. 95,489, 95,489–92 (Dec. 28, 2016), raising the CAFE base penalty rate to $14, is now in force." *Id.* at 101.

On October 29, 2020, NHTSA petitioned the *New York* panel for rehearing, which the panel denied three days later. Order, *New York*, 974 F.3d 87 (No. 19-2395), ECF No. 314. The Court's mandate issued November 9, 2020. Mandate, *New York*, 974 F.3d 87 (No. 19-2395), ECF No. 315-1.

Meanwhile, NHTSA grants automakers' petition to undo the inflation adjustment

On October 2, 2020, the Alliance for Automotive Innovation (Alliance)[4] petitioned NHTSA yet again to delay imposition of the $14 penalty rate, this time until Model Year 2022. *See* 86 Fed. Reg. at 3016. For the next three months, the agency refused to make the petition publicly available until, on January 14, 2021, it issued the interim final rule challenged here. *Id.*[5] The Rule provides that the $14 penalty no longer applies to Model Years 2019, 2020, or 2021. *See id.* at 3019. The interim final rule took effect immediately and provided for a post-issuance 10-day

[4] The Alliance "combines the two organizations," the Association of Global Automakers and the Alliance of Automobile Manufacturers, which had participated in earlier rulemaking and litigation in this matter. *See* Updated Rule 26.1 Corp. Disclosure Statement, *New York*, 974 F.3d 87 (No. 19-2395), ECF No. 201.

[5] In December 2020, notice that NHTSA was preparing to issue this Rule appeared in the Fall 2020 Unified Agenda. NHTSA, Corporate Average Fuel Economy (CAFE) Civil Penalties (Fall 2020), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=2127-AM32. Petitioners wrote to NHTSA noting that the petition had been kept secret and urging NHTSA not to issue this Rule. *See* Letter from Ian Fein et al. to Michael Kuppersmith, Attorney-Advisor, NHTSA (Dec. 18, 2020), https://www.regulations.gov/document?D=NHTSA-2021-0001-0001. NHTSA did not respond to that letter.

comment period.[6] Since that comment period closed, NHTSA has taken no further action.

Like its previous rules, NHTSA's Exemption Rule suffers from a series of critical legal defects. First, no provision of EPCA or the Improvements Act gives NHTSA authority to undo or delay the inflation adjustment. This Court has already held that NHTSA's authority to administer EPCA, including *the specific* provisions on which NHTSA now relies, does not permit the agency to delay the Civil Penalties Rule. *See NRDC*, 894 F.3d at 112 (rejecting argument based on NHTSA's "obligation to implement the CAFE standards" and explaining that EPCA does not "confer authority upon NHTSA to delay this penalty as part of its responsibility for administering the fuel economy portions of that statute"); *id.* ("Nothing in Section 32912 authorized the indefinite delay of a penalty increase required by the statute, either pending reconsideration or for any other reason."). Nor can NHTSA seriously contend that the Improvements Act provides such authority, given this Court's holding that the Act's "limited window of time for NHTSA to reduce the initial catch-up inflation adjustment to the CAFE penalty" has long since expired. *New York*, 974 F.3d at 101. Similarly, NHTSA's attempt to forgo notice and opportunity for comment is squarely foreclosed by this Court's previous decision. *NRDC*, 894 F.3d at 113-15; *see id.* at 115 ("That a regulated entity might prefer

[6] The Rule also proposes postponing application of the $14 penalty even longer, until 2023. 86 Fed. Reg. at 3021-22. Petitioners submitted comments during the comment period urging NHTSA to reconsider the interim final rule and lawfully rescind it.

different regulations that are easier or less costly to comply with does not justify dispensing with notice and comment.").

On January 25, 2021, Petitioners filed this challenge to the Exemption Rule.

ARGUMENT

Expedited review is necessary to ensure that NHTSA assesses the lawful penalty rate, that all automakers make compliance decisions based on the lawful rate, and that non-compliant automakers pay that rate. Now and in the immediate future, NHTSA is assessing penalties and automakers are making compliance decisions accounting for those penalties. Swift resolution of this petition will ensure automakers make compliance decisions based on the lawful penalty rate and prevent NHTSA from defying Congress's and this Court's clear directives. Accordingly, there is "good cause" for the Court to expedite review of this petition. 28 U.S.C. § 1657(a). As in *NRDC v. NHTSA*, Petitioners respectfully request that the Court again grant expedited review.

An automaker whose fleet fails to meet a CAFE standard for a given model year has several options besides paying penalties: (1) apply previously generated credits; (2) purchase credits from other, over-compliant manufacturers; or (3) invest in fuel efficiency improvements in any of the next three model years to over-comply with the CAFE standard for those years and thus generate credits to satisfy their

shortfalls. *See* 49 U.S.C. § 32903(a), (f).[7] For automakers choosing among these options, the penalty rate is a critical factor. A low rate incentivizes automakers to pay penalties instead of either complying with the applicable efficiency standards (or investing in efficiency improvements to generate credits in future years) or buying credits from automakers who do.

Automakers are making those compliance decisions now for model years exempted by the Rule. "NHTSA begins to determine CAFE compliance by reviewing projected estimates in pre- and mid-model year reports submitted by manufacturers" by December of the prior model year and July of the current model year—e.g. by December 2020 and July 2021 for Model Year 2021. 77 Fed. Reg. at 63,125; *see* 49 C.F.R. § 537.7. "NHTSA uses these reports for reference to help the agency, and the manufacturers who prepare them, anticipate potential compliance issues as early as possible, and help manufacturers plan compliance strategies." 77 Fed. Reg. at 63,125. At the end of a model year, manufacturers submit final reports (within 90 days), to inform the Environmental Protection Agency's (EPA) calculation of the manufacturer's average fuel economy for that model year. *See* 40 C.F.R. §§ 600.510–12(a)-(c), 600.512–12(b)(1). EPA transmits that data to NHTSA, which then

[7] If a manufacturer fails to meet the standard for a given year and intends to generate or purchase credits in the next three years to satisfy that shortfall, it may submit a plan to NHTSA for approval demonstrating that the manufacturer is likely to be able to do so. 49 U.S.C. § 32903(b)(2); *see* 49 C.F.R. § 536.7(c).

determines manufacturers' CAFE compliance.[8] Once NHTSA finalizes those determinations and notifies automaker with shortfalls, non-compliant manufacturers have 60 days to pay the penalty or choose a credit-based compliance option. 49 C.F.R. § 536.5(d)(2).

The Exemption Rule encourages automakers to forego compliance options and pay penalties instead. Consider a manufacturer currently determining how to meet its anticipated Model Year 2021 CAFE shortfall. The higher, $14 penalty for Model Year 2021 (and by extension, a higher price for credits) incentivizes the manufacturer to invest in marginally cheaper technological improvements to generate credits in future years, rather than planning to pay the penalty. NHTSA recognized this principle in the Rollback Rule. 84 Fed. Reg. at 36,010 (asserting that "an increase in the penalty rate . . . would result in an increase in . . . expenditures" for "credit generation and credit purchases"); *see also* 83 Fed. Reg. at 13,916 (similar). But if manufacturers, despite the Improvements Act and this Court's decisions, gamble that the penalty rate for Model Year 2021 will be $5.50, noncompliant manufacturers may plan to pay

[8] NHTSA generally receives EPA's final reports for a given model year between April and October of the following year. 77 Fed. Reg. at 63,126; *see also* 86 Fed. Reg. at 3019 n.18 (citing 2012 preamble and reiterating that NHTSA determines penalties "no earlier than April for the previous model year's non-compliance"). Based on this schedule, NHTSA should have already begun making Model Year 2019 compliance determinations by October 2020, and NHTSA could begin the Model Year 2020 penalty process as early as April 2021. *See* 86 Fed. Reg. at 3019 n.18. NHTSA has identified no statutory or regulatory provision *requiring* the agency to assess penalties by a certain date, contrary to the agency's claims that it had to make the Exemption Rule effective immediately and without notice and comment. *Cf. id.* at 3023.

penalties for Model Year 2021. Were the penalty rate assessed at $14 for Model Year 2021, those manufacturers would instead be incentivized to *use* their credits (or purchase them from others) to comply with their Model Year 2021 obligations, and then be incentivized to invest in fuel- and emissions-saving technology for later years. *See NRDC*, 894 F.3d at 105 (noting "automakers' own admission" that "the increased penalty has the potential to affect automakers' business decisions and compliance approaches, both with respect to the market for credits automakers can use in lieu of compliance and to 'changes to some design and fleet mix'"); *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 117 (D.C. Cir. 1990) ("Based on experience with the EPCA's credit and penalty scheme, when manufacturers receive CAFE credits for exceeding CAFE standards in a given year, they are likely to respond in future years by producing fewer fuel-efficient vehicles."). Certainty that the $14 penalty does apply now will directly influence the decisions automakers are currently making about whether to invest in efficient vehicles or instead pay penalties for their noncompliance.

That automakers may bet on the unlawful $5.50 penalty rate during the pendency of this litigation is not hypothetical. Over the past five years, as NHTSA has repeatedly attempted to reinstate the $5.50 penalty rate, at least one automaker has accounted for that unlawfully depressed penalty rate in its public financial statements. As NHTSA noted in the Exemption Rule, Fiat Chrysler "accrued estimated amounts for any probable CAFE penalty based on the $5.50 rate," while the Rollback Rule was

in effect. *See* 86 Fed. Reg. at 3021 (quoting FCA N.V. Interim Report, 6-K (Current report) EX-99.1, at 41 (Sept. 30, 2020)). Automakers may do so again, even though the $5.50 penalty cannot lawfully be applied to Model Years 2019, 2020, or 2021.[9]

This Court's expedited review will ensure that manufacturers base their compliance decisions for Model Years 2019, 2020, and 2021—and, in turn, future model years—on the lawful $14 penalty rate, and that NHTSA assesses penalties at that rate. For petitioners, and anyone exposed to pollution from automotive exhaust, these decisions matter: complying, purchasing credits from compliant manufacturers, and investing in technology to improve efficiency in future years all yield reductions in tailpipe emissions; paying penalties does not. Expedited review will ensure greater compliance and thereby reduced emissions.

Finally, this Court's expedited review is warranted in light of NHTSA's continuing refusal to comply with the Court's orders. The Exemption Rule is NHTSA's third attempt at delaying the CAFE civil penalty's inflation adjustment. The Court invalidated the first two, each time instructing that the Civil Penalties Rule's implementation of the $14 adjustment was "now in force." *New York*, 974 F.3d at 101;

[9] To be clear, automakers rely on the $5.50 rate at their peril; the lawful penalty rate is, and has been since 2016, $14. *See NRDC*, 894 F.3d at 115 ("The automobile industry was on notice since 2015, long before the Civil Penalties Rule was promulgated in December 2016, that Congress had established a regime requiring agencies across the federal government to institute mandatory, inflation-linked increases to numerous federal civil penalties, including the CAFE penalties and we are unconvinced the industry was taken by surprise."); *id.* at 116 ("The Civil Penalties Rule, 81 Fed. Reg. 95,489, 95,489–92 (December 28, 2016), no longer suspended, is now in force."); *New York*, 974 F.3d at 101 (same).

NRDC, 894 F.3d at 116. NHTSA nonetheless claims that it must reverse the $14 adjustment for three model years because manufacturers (unreasonably) relied on NHTSA's previous attempts to avoid the adjustment before this Court declared them unlawful. *See* 86 Fed. Reg. at 3021. Allowing NHTSA to bootstrap one unlawful act to another in this fashion—and take advantage of the lag inherent in the judicial review process—would condone indefinite delay through sheer stubbornness.

Making matters worse, NHTSA based the Rule on rationales decisively rejected by the Court's prior opinions. *See supra* pp. 5-7. It did so defiantly, announcing that it "stands by the reasoning set forth in its July 2019 rule," 86 Fed. Reg. at 3019, the very rule this Court had just struck down. Expedited resolution of this case is warranted lest such disregard for congressional and judicial authority be rewarded. *Cf. Cal. Life Scis. Ass'n v. Ctr. for Medicare & Medicaid Servs.*, No. 20-CV-08603, 2020 WL 7696050, at *2 (N.D. Cal. Dec. 28, 2020) ("[E]xecutive branch officials may not circumvent clear legal requirements in the eleventh hour to achieve goals they couldn't accomplish in the normal course."). This Court has ample equitable powers to "[e]nsur[e] compliance with a prior order." *Berger v. Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985). Expedited review is a modest but necessary response to years of agency obstruction.

CONCLUSION

For the foregoing reasons, there is "good cause" under 28 U.S.C. § 1657(a) to expedite review of NHTSA's rule. Petitioners respectfully request that this Court

enter the following schedule for briefing, and set the case for argument at the Court's earliest convenience.

- Petitioners' opening brief due: 45 days after the Court's granting of this motion;
- Respondents' brief due: 45 days thereafter; and
- Petitioners' reply brief due: 14 days thereafter

Dated: February 22, 2021

Respectfully submitted,

/s/ *Gabriel Daly*
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Motion complies with the type-volume limitations of Rule 27(d)(2)(a) because it contains 3,250 words, excluding parts of the document exempted by Rule 32(f).

Dated: February 22, 2021

/s/ *Gabriel Daly*
Gabriel Daly

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 February 22, 2021.

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/ *Gabriel Daly*
Gabriel Daly