21-139

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL RESOURCES DEFENSE COUNCIL, INC.; SIERRA CLUB
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; LANA HURDLE, in her official capacity as Acting Secretary of the United States Department of Transportation
Respondents.

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

MOTION FOR SUMMARY VACATUR OR, IN THE ALTERNATIVE, A STAY PENDING JUDICIAL REVIEW

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RULE 26.1 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 does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

March 4, 2021

/s/ Gary S. Guzy
Gary S. Guzy

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INTRODUCTION

This case concerns an Interim Final Rule (the "2021 Rule" or "Rule") that the prior leadership of the National Highway Traffic Safety Administration ("NHTSA") issued in their last week in office on January 14, 2021, without any advance notice or opportunity for public comment. This "midnight" regulation attempts to circumvent the Congressionally-mandated penalty increases required to be imposed under the Corporate Average Fuel Economy ("CAFE") program by exempting automobile model years 2019, 2020, and 2021 from the required inflation adjustment increase in the penalty rate from $5.50 to $14. That increase was required by statute, and a final rule to effectuate it was issued in 2016. NHTSA's closed-door effort to defer any penalty adjustment undermines the integrity of the CAFE program, contravenes two prior orders of this court, is without any basis in law, and is not supported by relevant factual or policy considerations. NHTSA's third iteration of its lawless actions does not somehow render those actions any more justified. Rather, they highlight NHTSA's ongoing refusal to follow Congress's clear direction and continue to perpetuate years of unjustified market uncertainty created by the prior Administration. This should be promptly remedied.

Accordingly, this Court should summarily vacate NHTSA's unlawful regulation because it directly contravenes and seeks to unlawfully circumvent two of this Court's prior decisions. In 2017, NHTSA tried to suspend indefinitely the

2016 rule. This Court vacated that action because NHTSA lacked that authority and failed to seek public comment, and this Court expressly reinstated the 2016 rule. *NRDC v. NHTSA*, 894 F.3d 95 (2d Cir. 2018) ("*NRDC*"). In 2019, NHTSA next tried to avoid implementing the 2016 rule by claiming that the fee adjustment statute simply did not apply or that, even if it did, NHTSA could decline to implement the increase as a matter of economic policy. This Court disagreed and again reinstated the 2016 rule. *New York v. NHTSA*, 974 F.3d 87 (2d Cir. 2020) ("*New York*"). In spite of this Court's rulings, the previous Administration tried for a third time to impose "the very kind of … delay that [the Improvement Act] … was enacted to end" and to "flout the … core objects of that Act." *NRDC*, 894 F.3d at 111 (internal quotations omitted). This latest attempted action is substantively unlawful, in violation of the Improvement Act, and procedurally unlawful in violation of the Administrative Procedure Act ("APA") and the National Environmental Policy Act ("NEPA"). Any of these flaws alone—but particularly all of them in combination—warrants speedy and decisive action by this Court.

Beyond defying these statutes and this Court's precedent, the previous Administration's action also inflicts immediate and irreparable harm. NHTSA's attempt to yet again avoid required adjustments that maintain the relevance of civil penalties in the CAFE program undermines the program's stability, diminishes the value of performance-based incentives that electric vehicle manufacturers, such as

Tesla, accrue under the standards, and creates an uneven playing field—reducing the consequences of non-compliance. Indeed, every day this rule remains in force casts a cloud over credit-trading markets and devalues the efforts of manufacturers who outperform the CAFE standards.

The previous Administration's egregious action presents a situation as extraordinary as it is unjustified and inflicts immediate and irreparable injury on Tesla and the public, thus warranting summary vacatur (or in the alternative, a stay pending judicial review).[1] No further merits briefing or agency consideration is necessary to yet again evaluate these issues.

BACKGROUND

I. The CAFE Program & Mandated Civil Penalty Increase.

This Court's previous opinions have explained the operation of the CAFE program and Congress's mandate that penalties be adjusted upwards to "maintain the deterrent effect of civil monetary penalties and promote compliance with the law" by accounting for inflation. *NRDC*, 894 F.3d at 109 (citing Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, § 2(b), 104 Stat. 890, 890 (1990)). The CAFE program was established by the 1975 Energy Policy and Conservation Act ("EPCA"), and sets "fuel economy targets for different categories

[1] Tesla is authorized to state that Petitioners NRDC and Sierra Club support the relief requested by Tesla, and, in the alternative, maintain their request for expedited review, and that Respondents oppose this motion.

of vehicles, measured in miles per gallon." *Id.* at 100-01. The statutory scheme includes civil penalties for manufacturers that fail to meet those targets, with the "total civil penalty … calculated by multiplying the civil penalty rate by the number of tenths of mile per gallon by which the car's fuel efficiency fell below the prescribed standard …. multiplied by the number of failing automobiles produced by the manufacturer, less any credits received by the manufacturer for exceeding the standards in prior years." *Id.* at 101. A 2007 amendment to EPCA allowed for these credits to be traded between manufacturers, so over-performing manufacturers may sell their credits to under-performers. *Id.* at 101 n.1; *New York*, 974 F.3d at 91.

Between 1975 and 1997, the civil penalty amount was $5, and a partial inflation adjustment in 1997 increased the amount to $5.50. *NRDC*, 894 F.3d at 101; *New York*, 974 F.3d at 91-92. In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act, "an unusually precise and directive statute" requiring agencies to promptly adjust their penalties upwards to account for historic inflation—and unlike the 1997 statute, the 2015 law did not contain a cap. *NRDC*, 894 F.3d at 100-02, 110-11, 113 n.12. Acting pursuant to that directive, NHTSA published in December 2016 its final rule adjusting the civil penalty amount to $14 to account for inflation, and at the behest of some automobile manufacturers, delayed its application until model year 2019. *Id.* at 102; 81 Fed. Reg. 95,489 (Dec. 28, 2016).

Beginning in 2017, after a change in Administration, NHTSA made two principal attempts to delay and undo the 2016 rule, each of which this Court rejected. *First*, NHTSA temporarily delayed the rule several times, and then suspended it indefinitely, pending reconsideration. *NRDC*, 894 F.3d at 103. In 2018, this Court vacated that suspension, finding that NHTSA lacked authority to delay the effective date of the 2016 rule and also violated the APA by suspending the rule without notice and comment rulemaking. *Id.* at 109, 111, 113. The Court further held that the 2016 rule prescribing the inflation adjustments "no longer suspended, is now in force." *Id.* at 116.

Second, despite this order, NHTSA "responded not by implementing the new rate, but instead by reconsidering whether the Improvement Act applied to the CAFE penalty at all." *New York*, 974 F.3d at 94. In July 2019, NHTSA issued a final rule "reversing the inflation adjustment to the CAFE penalty," based "on its conclusion that the CAFE penalty is not a 'civil monetary penalty,'" subject to any adjustment and, even if it were, concluding that the penalty should not be increased due to a claimed "negative economic impact." *Id.*

This Court again vacated NHTSA's rule, finding that the CAFE penalty is indeed a civil monetary penalty, and that NHTSA's attempt to invoke the "negative economic impact" exception was untimely. *Id.* at 96, 100-01. The Court, for the second time, vacated NHTSA's rule and remarked that, "[a]s we have stated before:

The [2016 rule] raising the CAFE base penalty rate to $14, is now in force." *Id.* at 101. This Court denied rehearing on November 2, 2020.[2]

II. NHTSA's Third Attempt to Delay the Inflation Adjustment.

Despite this Court twice holding that the 2016 rule was in force and that "[t]he Act mandates that all agencies increase penalties by a date certain with no suggestion of delay … and provides no discretion to the agencies regarding the timing of adjustments," *NRDC*, 894 F.3d at 113 n.12, the outgoing Administration made a final attempt to delay that rule. On January 14, 2021, NHTSA promulgated an interim final rule, without prior notice or opportunity for comment, purporting to delay applying the adjustment until "model year 2022," rather than model year 2019, as required by the 2016 rule. 86 Fed. Reg. 3,016, 3,023 (Jan. 14, 2021). NHTSA's claimed rationale was that, because model years 2019 and 2020 were complete, and model year 2021 was underway, applying the $14 penalty rate—which had been established in 2016 and declared by this Court to be in force in 2018 and again in 2020—would be unfairly "retroactive." *Id.*

Despite concluding that manufacturers could do nothing at this point to adjust model years 2019-2021, NHTSA rationalized dispensing with prior notice and comment on the basis that those manufacturers also required "ample advance notice"

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[2] To Tesla's knowledge, no party has to date filed a petition for a writ of *certiorari* regarding this Court's *New York* decision.

so that they could "modify their design, development, and production plans accordingly." *Id.* NHTSA also claimed that because the 2015 Act directed use of interim final rulemaking, NHTSA's rule seeking to delay that inflation adjustment could likewise proceed by an interim final rule. *Id.* NHTSA further invoked the COVID-19 pandemic as both a substantive basis for the rule and a reason for dispensing with notice and comment. *Id.* at 3,022-23. Finally, without explanation, NHTSA provided only an 11-day after-the-fact public comment period and purported to make the newly-relaxed penalty provisions effective immediately. *Id.* at 3,016.

ARGUMENT

Summary vacatur is appropriate where "the position of one of the parties is clearly right as a matter of law" or where "time is of the essence." *United States v. Brown*, 828 F. App'x 675, 676 (11th Cir. 2020) (citation omitted); *Balboa-Longoria v. Gonzales*, 169 F. App'x 383, 384 (5th Cir. 2006) (citation omitted). Summary vacatur is also an appropriate remedy where an agency has unlawfully delayed a duly issued regulation's effective date by suspending its compliance deadlines. *See Clean Air Council v. Pruitt,* 862 F.3d 1 (D.C. Cir. 2017). Each of these considerations is true here: NHTSA's regulation is a blatantly unlawful attempt to defy this Court's prior orders and promote further delay, and every day the rule remains in force it inflicts unlawful and irreparable harm. Moreover, this Court

retains equitable powers to "[e]nsur[e] compliance with a prior order." *Berger v. Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985).

To Tesla's knowledge, this Court has not summarily vacated an agency regulation before. But the extreme circumstances here, involving defiance of multiple decisions of this Court, an act of Congress, and the procedures required by the APA and NEPA, warrant summary vacatur as a timely rebuke to patently unlawful action. Moreover, because this is the third occasion on which these issues have been presented to this Court, and the Court's previous rulings are dispositive of the purely legal questions presented here, there is little new information or argument that the Court should require in resolving this matter. Every day that this rule remains in place perpetuates the uncertainty that the statute and this Court's prior rulings sought to avoid and defers the public climate and health protections that stem from these requirements.

I. The 2021 Rule Is Blatantly Unlawful.

A. The 2021 Rule Is Substantively Unlawful, Because NHTSA Lacks Authority to Delay the Required Penalty Adjustments.

The 2015 Act required inflation adjustments to "take effect not later than August 1, 2016." 28 U.S.C. § 2461, note § 4. This Court has described this "strict timeline" as "clear and mandatory." *NRDC*, 894 F.3d at 109, 111. Despite this command, the 2021 Rule attempts to delay the inflation adjustment by multiple years, until model year 2022.

NHTSA has no statutory basis or lawful rationale for its latest attempt at delay. *First*, NHTSA cites no statutory authority authorizing it to delay the inflation adjustment. While NHTSA may have had authority to harmonize the initial adjustment of penalty amounts with EPCA's lead-time requirements, nothing in the statute or in EPCA authorizes this further delay, and the Rule cites no such authority. *See NRDC*, 894 F.3d at 111-13.

NHTSA's effort at delay runs squarely into this Court's prior holding concerning the unmistakable clarity of the statutory timing requirement for inflation adjustments:

> [T]he Improvements Act is an unusually precise and directive statute. The Act mandates that all agencies increase penalties by a date certain with no suggestion of delay. The text of the statute provides no discretion to the agencies regarding the timing of adjustments. The statutory purpose and legislative history confirm our inflexible reading of the statute. The power of an agency to use its administrative discretion is always cabined by the original grant of authority through statute. The Improvements Act gave no such grant regarding the timing of the penalty increases, and it was therefore unlawful for NHTSA to assume authority it did not possess.

Id. at 113 n.12.

Second, NHTSA's argument that this penalty increase would "raise serious retroactivity concerns" that authorize delay is frivolous. 86 Fed. Reg. at 3,020. The penalty increase was required by a 2015 statute, a regulation implementing the increase was issued in 2016, and in 2018 and 2020 this Court declared the adjustment to be "in force." *Id.* at 116; *New York*, 974 F.3d at 101. NHTSA cites no authority

that would allow it to bootstrap its unlawful attempts to delay or vacate the adjustment increase into impermissible retroactivity concerns that allow the very delay this Court declared unlawful. Indeed, appellate courts have addressed a similar circumstance where a rule is wrongly vacated by a lower court, but later reinstated on appeal, finding that "applying the reinstated regulations to conduct that occurred during the period of vacatur would not give the regulations an impermissible retroactive effect." *Ray v. County of Los Angeles*, 935 F.3d 703, 714 (9th Cir. 2019). There is no reason for a different result to apply where an agency, rather than a court, purports to delay or replace a prior regulation, which would allow agencies to perversely leverage their own unlawful delays to beget further delay. Simply put, each of this Court's decisions lawfully and appropriately reinstated the 2016 rule and reinstated the expectation that it would be applied starting in model year 2019, consistent with "the general rule of long standing that judicial precedents normally have retroactive as well as prospective effect." *Margo v. Weiss*, 213 F.3d 55, 60 (2d Cir. 2000) (internal quotations omitted).

Third, NHTSA's 2021 Rule relies on arguments that have already been considered and rejected in the previous rounds of this litigation. These same arguments over lead time provided the impetus for NHTSA's earlier reconsideration and were the subject of a prior petition to delay the applicability of the penalty

increase.[3] It would be absurd to allow continued litigation over these same claims to become a self-fulfilling prophecy by themselves creating a justification to circumvent this Court's previous rulings.

Finally, NHTSA relies on claimed economic consequences caused by COVID-19. 86 Fed. Reg. at 3,022. Once again, NHTSA cites no statutory authority authorizing a delay of the penalty adjustment on this basis, and indeed its actions run headfirst into this Court's ruling that NHTSA could only reconsider the 2016 rule on economic grounds "before the next required increase due by January 15, 2017." *New York*, 974 F.3d at 101.

B. The 2021 Rule Is Procedurally Invalid, Because It Was Promulgated Without Prior Notice and Comment and Suffered from Other Fatal Procedural Flaws.

The 2021 Rule is also independently unlawful due to the lack of pre-rule notice and comment and other procedural flaws.

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[3] 82 Fed. Reg. 32,140, 32,143 (July 12, 2017) ("Most manufacturers could not alter their compliance plans in response to the increase in civil penalties for several model years, and therefore raising the penalty rate without lead time would seem to impose retroactive punishment without generating any additional fuel savings"); All. of Auto. Mfrs. & Ass'n of Glob. Automakers, Petition for Partial Reconsideration of the Interim Final Rule on Civil Penalties, 1 (Aug. 1, 2016) *available at* https://www.regulations.gov/document/NHTSA-2016-0075-0002.

As this Court has made clear, a change in the effective date of a regulation is a substantive revision requiring notice and comment. *NRDC*, 894 F.3d at 113; *NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004). Such orders are "tantamount to amending or revoking a rule." *Clean Air Council,* 862 F.3d at 6. NHTSA's rule does not dispute this, but instead again attempts to invoke the "good cause" exception. 86 Fed. Reg. at 3,023. That fails.

This Court reviews a "good cause" claim *de novo*, and the agency has the burden to demonstrate that this narrow exception—which is "generally limited to emergency situations, or where delay could result in serious harm"—applies. *NRDC*, 894 F.3d at 113-14 (cleaned up). Each of NHTSA's arguments fails this test.

First, NHTSA claims that manufacturers need advance notice of a penalty increase. As explained above, manufacturers had ample notice, even requesting the model year 2019 start date provided in the 2016 rule, and so there are no retroactivity concerns. In any event, NHTSA's rationale is internally contradictory: NHTSA attempts to justify the *substance* of the rule on the basis that "this rule will have a limited effect, if any, on the composition of the fleet, as model years 2019 and 2020 are complete and model year 2021 is already well underway." 86 Fed. Reg. at 3,023-24. Yet NHTSA then attempts to justify the *procedure* on the basis that manufacturers need "ample advance notice of an increase to the CAFE civil penalty

rate in order to modify their design, development, and production plans accordingly." *Id.* at 3,023. NHTSA does not even attempt to reconcile these conflicting statements, much less explain why a 30-day advance comment period would have been impracticable.

Second, even taking NHTSA's assertions at face value, the supposed justification for avoiding advance notice does not raise an "immediate threat to safety" that would warrant a finding of impracticality. *NRDC*, 894 F.3d at 114. Nor was public comment "unnecessary," as NHTSA's action is the precise opposite of a "determination, insignificant in nature and impact, and inconsequential to the industry … and to the public." *Id.* at 114-15. NHTSA's refusal to accept public comment in advance of issuing the rule is even more suspect given the agency's unwillingness even to acknowledge publicly the receipt of the petition triggering reconsideration. *See* Pet'r Mot. for Expedited Review (ECF No. 31) at 8.

Again, NHTSA's actions run squarely into this Court's prior rulings, where this Court found:

> That a regulated entity might prefer different regulations that are easier or less costly to comply with does not justify dispensing with notice and comment…. 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. There was not an emergency or other extraordinary circumstance that would justify forgoing notice and comment.

NRDC, 894 F.3d at 115 (citation omitted).

Third, NHTSA's attempt to rely on the COVID-19 pandemic falls flat. NHTSA cites no specific facts or evidence as to why the pandemic requires dispensing with notice and comment here, only generalized economic concerns. Instead, the agency "relies more on speculation than on evidence to establish that the COVID-19 pandemic has created an emergency … sufficient to justify dispensing with valuable notice and comment procedures." *Ass'n of Cmty. Cancer Centers v. Azar*, No. 20-3532, 2020 WL 7640818, at *7 (D. Md. Dec. 23, 2020).

Fourth, the fact that the 2015 statute authorized agency action by interim final rule does not somehow allow NHTSA now to delay that action without notice and comment. To the contrary, the point of the interim final rule structure of the 2015 Act was to ensure a swift and straightforward increase in penalty amounts to adjust for inflation. *See New York*, 974 F.3d at 100-01. While Congress has authority to require agencies to act promptly, NHTSA lacks a parallel power to grant itself a dispensation from Congressionally-mandated notice and comment procedures.

At bottom, "it seems obvious—based on both common sense and the way the interim final rule is written—that the reasons the government offers for dispensing with the notice and comment requirements are contrived. The real reason is that the current presidential administration is in its waning days and would not have time to enact the policy if it adhered to these requirements." *Cal. Life Sciences Ass'n v.*

CMS, No. 20-08603, 2020 WL 7696050, at *2 (N.D. Cal. Dec. 28, 2020). The "imminence of [a] self-imposed deadline"—here, the desire to delay the penalties before the end of a presidential Administration—"d[oes] not qualify as good cause to dispense with notice-and-comment." *Abraham*, 355 F.3d at 205 (internal citations omitted). "This is not a situation of acute health or safety risk requiring immediate administrative action." *NRDC*, 894 F.3d at 115. Accordingly, NHTSA's transparent circumvention of the APA's notice-and-comment requirements ought to be swiftly rejected.

Indeed, in its rush to finalize this rule before the change in administration, NHTSA disregarded other basic procedural protections. *First*, despite clear instructions under NEPA to "take a hard look at the environmental consequences" of its actions, *Baltimore Gas and Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (internal quotations omitted), NHTSA concluded that doing so would be inconsistent with its obligations under EPCA, and that, even if it were required to conduct an analysis under NEPA, the rule had no greater effect on the environment than the 2016 rule did. *See* 86 Fed. Reg. at 3,025. This Court has recognized that, for a NEPA analysis to be sufficient, the agency must "identif[y] and evaluate[] adverse environmental effects of its action." *Friends of Animals v. Romero*, 948 F.3d 579, 585 (2d Cir. 2020). But NHTSA ignored the environmental harms that will predictably result from delaying the penalty increase until 2022: By significantly reducing the penalty

for model years 2019-21, the rule incentivizes underperforming automakers to pay the lowered penalties and save their available credits for subsequent years,[4] undermining the effectiveness of fuel economy standards and resulting in higher future emissions. By failing to take a "hard look" at these impacts—much less any look—NHTSA fell far short of the procedures required by law.

Second, despite the APA's requirement for a 30-day period between a rule's publication and its effective date, 5 U.S.C. § 553(d), NHTSA announced that this rule would take effect immediately, without identifying any pertinent "emergency situation[]" providing good cause to expedite the statutorily-mandated timeline. *NRDC*, 894 F.3d at 113-14.

Third, NHTSA without explanation only allowed for a short 11-day post-rule public-comment period. "Although the APA has not prescribed a minimum number of days necessary to allow for adequate comment, based on the important interests

[4] Under the CAFE program, automakers receive credits for over compliance that can be used to make up for failing to meet the target standard in any three years before or five years after the credit is earned. *See* 49 U.S.C. § 32902(a). Automakers whose fleets fail to meet the standard for a given year may choose between using available credits or paying the penalty for non-compliance. *See* 49 C.F.R. § 536.5(d)(2) (manufacturer must "either" explain how it "will allocate existing credits or earn, transfer and/or acquire credits; *or* pay the appropriate civil penalty" (emphasis added)); Inst. for Policy Integrity, Comments on "Civil Penalties" 4-5 n.24 (Jan. 25, 2021), *available at* https://policyintegrity.org/documents/Comments_of_the_Institute_for_Policy_Integrity_1.pdf.

underlying these requirements … the instances actually warranting a 10–day comment period will be rare. Such instances are generally characterized by the presence of exigent circumstances in which agency action was required in a mere matter of days." *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (internal citation omitted).

In short, NHTSA jettisoned a host of basic procedural requirements merely because it wished to out-pace an impending change to the political landscape and find any means to perpetuate a policy that has repeatedly been held by this Court to be unlawful.

II. The 2021 Rule Inflicts Ongoing, Irreparable Injury.

Tesla designs, develops, manufactures, and sells high-performance, fully electric vehicles that generate zero emissions. As an automobile manufacturer, Tesla is subject to the CAFE program; as a result, Tesla's significant investments and business planning are dependent upon maintaining the stability, predictability, and enforceability of NHTSA's efficiency performance standards under the CAFE program.[5] As established by Congress in 49 U.S.C. § 32903(f), the CAFE

[5] Tesla satisfies the requirements for standing. *See* ECF No. 28 at 8-11. Tesla publicly reports the economic benefit of CAFE credit sales in its financial reporting. *See Tesla, Inc.*, SEC Form 10-K (Feb. 8, 2021) at 10 ("We earn tradable credits in the operation of our business under various regulations related to zero-emission vehicles ("ZEVs"), greenhouse gas, fuel economy, renewable energy and clean fuel. We sell these credits to other regulated entities who can use the credits to comply with emission standards, renewable energy procurement standards and other

enforcement program is specifically designed to recognize and encourage investment by manufacturers to exceed these standards by rewarding compliance "credits" to manufacturers that, like Tesla, have invested in superior performing vehicles. Manufacturers can bank or trade these credits, and even transfer them for compensation to under-performing manufacturers that fail to meet the annual CAFE requirements. As a result, CAFE compliance credits create a powerful incentive for manufacturers to invest and develop superior performing vehicles. Failure to adjust the 2019-2021 model-year civil penalty levels would subvert this fundamental purpose by resulting in a devaluation of the compliance credits. Through its 2021 Rule, NHTSA also retroactively undermines the settled regulatory expectations of automakers like Tesla, that have made economic decisions in reliance on the $14 inflation adjusted penalty rate. *See* 86 Fed. Reg. at 3,021 ("[I]t is likely that manufacturers make long-term plans in determining how to acquire and apply credits.").

"Common sense and basic economics" indicate that, all else being equal, lower penalty amounts will also reduce the value of credits used to demonstrate compliance. *NRDC*, 894 F.3d at 105 (cleaned up). As other automobile

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regulatory requirements."), https://ir.tesla.com/_flysystem/s3/sec/000156459021004599/tsla-10k_20201231-gen.pdf.

manufacturers have noted, "the price of credits is connected to the penalty amount."[6] And NHTSA acknowledges in the 2021 interim final rule, a higher penalty rate "is likely to lead to an increase in the price of credits." 86 Fed. Reg. at 3,021; *see also* 83 Fed. Reg. 13,904, 13,906 (Apr. 2, 2018) ("[I]t is likely that credit purchases involve significant expenditures and that an increase in the penalty rate would correlate with an increase in such expenditures."). Thus, use of a $5.50 penalty for model years 2019-2021 will lead to a significant devaluation of credits generated for those years, as compared to the $14 penalty rate established by the 2016 rule and twice reaffirmed by this Court. That perverse result will penalize automakers that have led the industry in investing in and deploying technological innovation to enhance energy conservation with superior performing vehicles. *See generally NRDC*, 894 F.3d at 105 (noting that adjusted penalties may affect "the market for credits").[7] It will also harm the CAFE program's goals, for, as NHTSA has acknowledged, with an inflation adjustment "[a] manufacturer who is already

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[6] All. of Auto. Mfrs. & Ass'n of Glob. Automakers, Petition for Partial Reconsideration of the Interim Final Rule on Civil Penalties, NHTSA Docket 2016-0075, 81 Fed. Reg. 43,524 (July 5, 2016) (Aug. 1, 2016) at 3, *available at* https://www.regulations.gov/document/NHTSA-2016-0075-0002.

[7] Tesla cannot avoid the adverse consequences of NHTSA's latest action simply by delaying sales of credits, because it has in place contracts with credit pricing tied to these penalty amounts. Nor can Tesla recover its damages from the United States due to sovereign immunity, rendering Tesla's injury irreparable. *See United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983).

generating or possesses over-compliance credits will find itself with much more valuable credits to sell and may use this additional capital to invest more heavily in research and development, marketing, add other features to its vehicles which make them more desirable to consumers, or reduce the price of its vehicles." 83 Fed. Reg. at 13,914-15.

The inflation adjustment can have profound impacts, as "[a] hypothetical manufacturer with 10 million credits could see the potential value of its credits increase from $55 million to $140 million, while a hypothetical manufacturer with 100 million credits could see the potential value even more dramatically increase from $550 million to $1.4 billion." *Id.* at 13,915; *see* 86 Fed. Reg. at 3,021. NHTSA's most recent reporting indicates that manufacturers face a significant projected shortfall for model year 2019 CAFE compliance credits that is, in the aggregate, greater than $1.5 billion.[8]

As this Court has previously recognized:

> [T]he 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." … Tellingly, NHTSA itself has concluded that emissions reductions from compliance with higher fuel economy standards would "result in significant declines in the

[8] NHTSA, MY 2011-2019 Industry CAFE Compliance at 3 (Oct. 15, 2019), *available at* https://one.nhtsa.gov/cafe_pic/MY%202011-MY_2019_Credit_Shortfall_Report_v08.pdf.

> adverse health effects that result from population exposure to these pollutants."

NRDC, 894 F.3d at 105.

The broader public interest also strongly supports summary vacatur. Every day of delay undermines further progress in promoting the nation's energy security, saving consumers money at the pump, encouraging technology innovation, and reducing emissions of greenhouse gases that destabilize the global climate. *See* 77 Fed. Reg. 62,624, 62,658-62, 62,999-63,006, 63,055-62 (Oct. 15, 2012).

The timing of this Court's consideration of the 2021 Rule is critical to avoiding these harms and preserving the program benefits. These considerations are immediate, for at the end of a model year, manufacturers submit final reports (within 90 days), to inform the Environmental Protection Agency's calculation of the manufacturer's average fuel economy for that model year. 40 C.F.R. §§ 600.510–12(a)-(c), 600.512–12(b)(1). The model year 2019 process could begin at any time, and NHTSA could begin the model year 2020 penalty process as early as April 2021. *See* 86 Fed. Reg. at 3,019 n.18.

Other automakers and the government have previously acknowledged the importance of prompt judicial resolution of regulatory issues surrounding the structure of the CAFE program, arguing that, "expedition is warranted here because this case affects the near-term decision-making of a significant sector of the economy, the automotive industry. Its plans for the design, production, and

distribution of passenger cars and light trucks … will be directly impacted by the outcome of this case."[9] So too here is this Court's prompt intervention critical.

CONCLUSION

NHTSA's actions flagrantly contradict this Court's rulings, the 2015 Act, the APA, and NEPA. No further merits briefing or agency consideration is necessary to yet again evaluate these issues. Further delay is harmful and unwarranted, and will cause immediate harm to Tesla, as well as undermine the public benefits derived from the CAFE program. In light of these extreme circumstances, the 2021 Rule should be summarily vacated, or alternatively stayed pending review.

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[9] Federal Respondents' Motion to Expedite, *Union of Concerned Scientists v. NHTSA*, No. 19-1230, at 2 (D.C. Cir. filed Dec. 18, 2019), *available at* https://www.edf.org/sites/default/files/content/24_EPA_and_NHTSA_Motion_to_Expedite_CADC_12-18-19.pdf; Motion by Automaker Intervenors for Expedition (filed Dec. 24, 2019), *available at* https://www.edf.org/sites/default/files/content/22_Automakers_Motion_to_Expedite_CADC-12-24-19.pdf.

Respectfully submitted,

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March 4, 2021

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,194 words, exclusive of the parts of the motion exempted by Rule 32(f). This motion complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

March 4, 2021

/s/ Gary S. Guzy
Gary S. Guzy

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing motion to be filed 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 March 4, 2021. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

March 4, 2021

/s/ Gary S. Guzy
Gary S. Guzy