IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL RESOURCES DEFENSE COUNCIL, INC., et al., Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al., Respondents.	No. 21-139

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR EXPEDITED BRIEFING AND CROSS-MOTION TO HOLD PETITION IN ABEYANCE

Petitioners have moved for expedited consideration of this case, which challenges a January 14, 2021 interim final rule issued by the National Highway Traffic Safety Administration (NHTSA), an operating administration of the U.S. Department of Transportation. Respondents respectfully oppose petitioners' motion, as expedited treatment of this case is unnecessary and could impede the government's ongoing review of the interim final rule at issue. Pursuant to Federal Rule of Appellate Procedure 27(a)(3)(B), respondents urge this Court instead to hold this case in abeyance pending NHTSA's review of the interim final rule pursuant to a January 20, 2021 Executive Order issued by President Biden. The interim final rule is currently under close scrutiny by the agency, and NHTSA is likely to conclude its review and

decide upon the appropriate path forward before petitioners' challenge to the interim final rule can be finally resolved. Because the interim final rule may well not reflect the agency's ultimate decision at the conclusion of its review, this Court should await the resolution of that ongoing agency review. Expedited consideration of this case is thus not warranted. Rather, this case should be held in abeyance to afford NHTSA a full and unconstrained opportunity to review the interim final rule, and to preserve the parties' and the Court's resources.

I. Petitioners seek review of a January 14, 2021 interim final rule issued by NHTSA that relates to corporate average fuel economy (CAFE) civil penalties. *See* 86 Fed. Reg. 3016 (Jan. 14, 2021). That interim final rule concluded that an inflation-based adjustment in the CAFE civil penalty rate from $5.50 to $14 should take effect beginning with penalty assessments for model year 2022 vehicles, rather than model year 2019 vehicles. *See id.* at 3022-23. NHTSA invited public comments on the interim final rule until January 25, 2021. *Id.* at 3016.

On January 20, 2021, President Biden signed Executive Order 13990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037. The Executive Order establishes a policy to, *inter alia*, "improve public health," "listen to the science," "hold polluters accountable," and "reduce greenhouse gas emissions." *Id.* at 7037. The Executive Order directs executive agencies "to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and

other actions during the last 4 years that conflict with these important national objectives," and to "consider suspending, revising, or rescinding" those agency actions. *Id.* The Executive Order directed agencies to review certain specifically identified rules, but the directive was not limited to the enumerated rules. *See id.*

The Secretary of Transportation has concluded that the interim final rule at issue in this case is within the scope of Executive Order 13990. *See* Memorandum from John E. Putnam to Ann Carlson, *Implementation of Executive Order 13990* (Jan. 22, 2021), https://www.transportation.gov/sites/dot.gov/files/2021-02/Memo-to-NHTSA.pdf. The Department of Transportation has accordingly ordered NHTSA to "review[]" the interim final rule "pursuant to" the Executive Order, and to "carry out the requirements of the [Executive Order]." *Id.* That review is ongoing, and the agency intends to take appropriate action as soon as it concludes the review directed by the President.

II. In light of the agency's ongoing review of the interim final rule at issue in this case, this Court should deny petitioners' motion to expedite proceedings. The President has directed federal agencies to "immediately review" the rules within the scope of Executive Order 13990, 86 Fed. Reg. at 7037-38, and the government has determined that the interim final rule at issue here falls within that directive. That review is underway. The interim final rule is under close scrutiny by NHTSA, and the agency should be afforded a full opportunity to apply its expertise and to conduct the review and reevaluation directed by the President. Expediting this Court's review of

the interim final rule would interfere with the Executive Branch's prerogative to reconsider the "administrative record[]" and its "priorities in light of the philosophy of [the new] administration." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1034, 1043 (D.C. Cir. 2012) (quotation omitted). Expedited review would also potentially waste judicial resources, as petitioners' challenge could well prove unnecessary should NHTSA conclude after further review that the interim final rule should be rescinded or revised.

Petitioners' arguments in favor of expedition do not demonstrate the "good cause" necessary to expedite proceedings in this context. *See* 28 U.S.C. § 1657(a). Petitioners contend that expedition is necessary because they seek to clarify whether the penalty rate is $5.50 or $14 for model year 2019 vehicles, the first year the disputed penalty rate is at issue. But NHTSA has not yet assessed CAFE penalties even for model year 2018 vehicles, and it will likely be some time before NHTSA assesses CAFE penalties for model year 2019. *See* NHTSA, CAFE Public Information Center, *Summary of CAFE Civil Penalties Collected*, https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html (last updated Feb. 28, 2020). NHTSA imposed penalties on model year 2017 vehicles, for example, in October 2019. *See id.* Petitioners suggest that manufacturers will rely on the interim final rule and assume that the 2019 prevailing rate will be $5.50 in making present decisions. But to the extent there is any such concern, it is diminished by NHTSA's clear statement that it views the interim final rule as within the scope of the

President's Executive Order, and the agency's ongoing reconsideration of the interim final rule under that Executive Order.

In all events, petitioners' request for an expedited briefing schedule is premature in light of the procedural complexities of this case. Petitioners' requested briefing schedule, *see* Br. 16, does not account for the fact that several States have also petitioned for review of the interim final rule (*State of New York v. NHTSA*, No. 21-339 (2d Cir. docketed Feb. 17, 2021)), and two additional parties—Tesla, Inc. and the Alliance for Automotive Innovation—have moved to intervene. Tesla has recently filed its own petition in the Ninth Circuit, and has moved to transfer that case to this Circuit. *See* Mot. for Mandatory Transfer Pursuant to 28 U.S.C. § 2112(a)(5), *Tesla, Inc. v. NHTSA, et al.*, Case No. 21-70367 (9th Cir. Feb. 23, 2021). Those cases will need to be consolidated with this petition for review, and any briefing should proceed on a consolidated and coordinated basis.

III. Rather than expedite judicial review, this Court should hold this case in abeyance pursuant to Federal Rule of Appellate Procedure 28(a)(3)(B), thereby allowing NHTSA the opportunity to complete its review. Holding the proceedings in abeyance would also conserve the parties' and the Court's resources. Respect for the ongoing processes of a coordinate branch of government, as well as principles of judicial efficiency, counsel in favor of abeyance.

NHTSA's review of the interim final rule may lead to additional agency action that could well render the petition for review moot, and—if not—would require the

parties to address the agency's new action in their briefs. For that reason, expedited briefing is inappropriate. Moreover, petitioners and others have submitted comments to NHTSA, and the agency is considering those comments as part of its review of the interim final rule. This Court should allow that administrative process to conclude before determining whether it is even necessary to proceed to briefing and argument.

Abeyance is particularly warranted here because the Court should not require the parties to file briefs (and potentially even participate in oral argument) in the midst of the Administration's review and potential revision of the interim final rule. Neither government counsel nor petitioners can speculate as to the likely outcome of that process. But proceeding with briefing and oral argument—particularly in an expedited manner—would compel the government to take a position on the merits of the issues presented concerning the validity of the interim final rule that could in turn constrain the agency's ongoing review of that same rule. This Court should hold the case in abeyance to permit the Executive Branch an opportunity to complete its review.

For these reasons, the D.C. Circuit has recently granted abeyance in another challenge involving a rule within the scope of the President's Executive Order that is currently under review by the agency. *See Union of Concerned Scientists v. NHTSA*, No. 19-1230 (D.C. Cir. Feb. 8, 2021) (granting abeyance in case challenging "One National Program Action" rule identified in President's Executive Order). The same relief is warranted here.

NHTSA therefore respectfully requests that the Court hold this case in abeyance while it conducts its review of the Rule, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period. During the abeyance period, NHTSA is willing to provide regular status reports, and proposes to do so every 30 days.

Respectfully submitted,

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/s/ Courtney L. Dixon

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limits of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,471 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Courtney L. Dixon
Courtney L. Dixon

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2021, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Courtney L. Dixon
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