

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, 21-339, 21-593 (con.) Caption [use short title]

Motion for: Lifiting Abeyance

Set forth below precise, complete statement of relief sought:

Tesla, Inc. moves the Court to lift the abeyance in these consolidated cases and to proceed with granting Tesla's motion for summary vacatur

NRDC et al. v. NHTSA et al.

MOVING PARTY: Tesla, Inc. OPPOSING PARTY: See attached

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Gary S. Guzy OPPOSING ATTORNEY: See attached [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):

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/ Gary S. Guzy Date: 08/10/2021 Service by: CM/ECF Other [Attach proof of service]

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# 21-139, 21-339, 21-593

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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; PETE BUTTIGIEG, in his  
official capacity as Secretary of the United States Department of Transportation  
*Respondents.*

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

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## **MOTION TO END ABEYANCE AND GRANT MOTION FOR SUMMARY VACATUR**

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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.

August 10, 2021

/s/ Gary S. Guzy

Gary S. Guzy

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## INTRODUCTION

The National Highway Traffic Safety Administration (“NHTSA”) was required by statute to adopt a final rule, effective by August 1, 2016, adjusting for inflation the civil penalty for violating Corporate Average Fuel Economy (“CAFE”) standards. Notwithstanding that plain Congressional deadline and this Court’s consistent prior rulings rejecting NHTSA’s attempts to delay or evade that deadline, NHTSA on January 14, 2021, issued an Interim Final Rule purporting to exempt model years 2019-2021 from the inflation adjustment. Despite NHTSA’s promise to this Court to reconsider its Interim Final Rule, after this petition for review challenging NHTSA’s further delay was filed by Tesla and other Petitioners, NHTSA has failed to do so since March 15, 2021. Since that time, a proposed rule that had been submitted to the Office of Information and Regulatory Affairs (“OIRA”) has languished, with the agency taking no further public steps towards completing its promised reconsideration. Because this Court has a “virtually unflagging” obligation to exercise its jurisdiction where there is a live case or controversy, this Court should remove these cases from abeyance and consider and grant Petitioner Tesla’s motion to summarily vacate the Interim Final Rule.

The first challenge to the Interim Final rule was filed on January 25, 2021. The Government successfully moved on March 5, 2021, to place the case in abeyance, premised in part on the notion that “NHTSA is proceeding promptly” and

“expects to complete its review of the interim final rule by no later than six months from today, September 22, 2021 and likely well before that date.” ECF No. 66 at 2.

However, no tangible progress has been made since then, and the Government itself conceded in its latest status report that “[r]eview of the interim final rule is ongoing, but will not be completed within the six-month time frame that NHTSA estimated in March 2021,” without providing even an estimate of when reconsideration might be completed. Resps.’ Status Report (ECF 105) (filed Aug. 6, 2021). NHTSA’s proposed rule remains pending before OIRA, where it has remained in hibernation since March 15, 2021. NHTSA has provided no explanation for this delay nor any timetable for releasing even the proposed rule (much less proceeding to a final rule). Because the Government has proffered no new timetable for reconsideration, this abeyance is now entirely open-ended.

There was a strong basis for this Court to grant Tesla’s motion for summary vacatur when it was first filed in March. The need for prompt resolution of this action has only grown since Tesla’s initial motion. Each day these cases remain in abeyance generates further uncertainty and materially harms Tesla and the public. In light of these substantial harms and in light of the Government’s failure to make tangible progress or even establish a timeline for addressing the Interim Final Rule,

this Court should now dissolve the abeyance and grant Tesla's motion for summary vacatur.<sup>1</sup>

## BACKGROUND

This Court's previous opinions and Tesla's filings set out the long history of attempted regulatory delays underlying these consolidated cases. In 2016, pursuant to Congress's instruction, NHTSA adopted a final rule implementing the required inflation adjustment increase in the penalty rate under the CAFE program from \$5.50 to \$14. However, in 2017, NHTSA tried to suspend that 2016 Rule indefinitely. This Court reviewed and vacated that action and expressly reinstated the entirety of the 2016 Rule. *NRDC v. NHTSA*, 894 F.3d 95 (2d Cir. 2018) ("NRDC"). Then, in 2019, NHTSA again enacted a rule to attempt to circumvent the mandated inflation adjustment. This Court once again vacated NHTSA's action and reinstated the 2016 rule. *New York v. NHTSA*, 974 F.3d 87 (2d Cir. 2020) ("New York"). On January 14, 2021, for a third time, NHTSA attempted to circumvent Congress's instructions to increase the penalty rate, promulgating the Interim Final Rule at issue here without proper notice or opportunity for comment. Tesla promptly challenged the Interim Final Rule and moved for summary vacatur in light of the Interim Final Rule's clear

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<sup>1</sup> Counsel for Tesla has sought the positions of the other parties regarding this motion: the environmental and state Petitioners do not oppose this motion; the Respondents and Intervenor the Alliance for Automotive Innovation oppose this motion.

violation of multiple decisions of this Court, Congress's clear direction, and the procedures required by the APA and NEPA. Tesla Mot. for Summary Vacatur (ECF 43-3) (filed Mar. 4, 2021).

On February 22, 2021, the Government identified the Interim Final Rule for review pursuant to an executive order directing agency heads to scrutinize regulations potentially inconsistent with protecting public health and the environment. *See Implementation of Executive Order 13990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,"* Dep't of Transp. (Feb. 22, 2021). On April 6, 2021, this Court placed the above consolidated cases in abeyance in response to NHTSA's request, and pending NHTSA's reconsideration of its Interim Final Rule, without ruling on Tesla's motion for summary vacatur. Order (ECF 86) (2d Cir. Apr. 6, 2021).

While Tesla appreciates the Administration's review of the Interim Final Rule, the agency has not progressed to withdraw the challenged rule or proposed or finalized a replacement to address the ongoing illegal effects of its delay of the civil penalty inflation adjustment. Rather, since then, the Government has filed four status reports. Resps.' Status Report (ECF 93, 96, 102, 105) (filed May 6, 2021; June 9, 2021; July 7, 2021; August 6, 2021). All four open with the conclusory statement, "NHTSA continues to review the challenged rule pursuant to President Biden's January 20, 2021 Executive Order." *Id.* Each then notes that the

supplemental notice of proposed rulemaking NHTSA submitted to the Office of Information and Regulatory Affairs in March 2021, before these cases were held in abeyance, remains pending. *Id.* While the Government’s first three status reports concluded by stating that NHTSA “anticipates that it will continue to make progress in its review and evaluation of these matters,” *id.*, it conceded in its most recent status report that its review “will not be completed within” its original six-month projected time frame, Resps.’ Aug. 6 Report. Even still, that status report provided no firmer indication of when the agency’s review will be complete or otherwise clarifies a new review timeline.

On June 15, 2021, Tesla filed a letter with the Court, highlighting that the Government’s status reports did not reflect any further tangible progress towards repealing or revising the Interim Final Rule and requesting that this Court consider and grant Tesla’s motion for summary vacatur. Pet’r Letter (ECF 98) (filed June 15, 2021). In light of the Government’s continued inaction, Tesla now moves for an end to the abeyance and for this Court to consider and grant its motion for summary vacatur, which has now been pending for five months.

## ARGUMENT

### **I. This Court Should End the Abeyance Because the Government Continues to Indefinitely Delay the Adoption of the Statutorily Mandated Inflation Adjustment, Harming Tesla and Others.**

Courts have recognized their obligation to end an abeyance over the objection of parties, including over the objection of a government party, when appropriate. *See, e.g., Southeast Stormwater Ass'n Inc. v. EPA*, No. 4:15-cv-00579, ECF No. 62 (N.D. Fl. Feb. 4, 2019) (granting motions to lift abeyance over agency objections).<sup>2</sup> Where, like here, a case presents a concrete legal issue ripe for review, “prudential considerations militate in favor of a prompt judicial decision.” *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998). NHTSA should not be allowed to avoid timely judicial review simply by repeatedly pointing to an abstract intention to reconsider the Interim Final Rule. Indeed, this Court has observed that an agency does not have “authority ... giving it the power to prevent an Article III court from performing its duty to render a judgment in a live case or controversy .... [T]he federal courts have a virtually unflagging obligation ... to exercise the jurisdiction given them.” *Town of Deerfield, N.Y. v. FCC*, 992 F.2d 420, 429 (2d Cir. 1993) (citation omitted). And similarly, other courts have emphasized that agencies should

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<sup>2</sup> Similarly, this Court and other courts of appeals have not hesitated to deny abeyance motions when appropriate, including motions by government agencies. *See Goonewardena v. New York State Workers' Comp. Bd.*, 788 F. App'x 779, 783 (2d Cir. 2019) (summary order) (denying abeyance motion); *Am. Libr. Ass'n v. FCC*, No. 04-1037, 2004 WL 1179355, at \*1 (D.C. Cir. May 27, 2004) (denying FCC abeyance motion).

not permitted to “perpetually dodge” judicial review. *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (underscoring that its decision should not be read to say “an agency can stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way,” especially if there is no “definite end date” established for the rulemaking process). Here, ending the abeyance is essential due to NHTSA’s continued failure to demonstrate any tangible progress during nearly the past five months towards repealing or revising the Interim Final Rule with no end date in sight, especially in light of the material harms created by this continued delay on Tesla and the broader public.

**A. The Government Has Failed to Make Meaningful Further Progress Towards Repealing or Replacing the Unlawful Interim Final Rule.**

Since April, the Government has filed four nearly identical status reports, none of which identifies any new material steps taken to reconsider the Interim Final Rule. The only affirmative action referenced in *any* of these letters is one that predates abeyance: on March 15, nearly five months ago, a notice of proposed rulemaking related to the inflation-adjustment penalty increase was submitted the OIRA. That notice remains pending at OIRA, and no identifiable action has been taken on it since its submission.

None of the status reports establishes a deadline for reconsideration or even provides a targeted date for completion. Moreover, the only public indication of a



timeframe for NHTSA action, the agency's semiannual regulatory agenda, indicated that it planned to release a supplemental notice of proposed rulemaking in July 2021.<sup>3</sup> That did not happen. While the Government's reply in support of its motion to hold the cases in abeyance stated that its review would likely be completed "well before" September 22, 2021, ECF 66 at 2, it has since conceded that it will be unable to meet this deadline, yet has provided no alternative deadline for review, Resps.' Aug. Status Report at 2.

This open-ended abeyance and NHTSA's inaction is particularly problematic in light of the prior five years of delay in adopting the inflation penalty adjustment. As this Court has recognized, Congress's "core object[...]" in enacting the Federal Civil Penalties Inflation Adjustment Act Improvements Act was to end indefinite delay and expedite adjustments in civil penalties to more accurately track inflation rates. *NRDC*, 894 F.3d at 111. By failing to make tangible progress while these cases are held in abeyance and by failing to set any deadline for the completion of its review, the Government has as a practical matter extended the prior unjustified delays even further.

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<sup>3</sup> *See* <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2127-AM32>.

**B. This Continued Delay Materially Harms Tesla and the Public.**

Ending the abeyance in these cases is particularly warranted due to the harms the continued delay generates for Tesla and the public. Every day the Interim Final Rule remains in effect, Tesla suffers “immediate and significant” hardship. *API*, 683 F.3d at 389. As Tesla explained in its motion for summary vacatur, while the pre-inflation penalty rates apply to participants in the CAFE program, the consequences of noncompliance and, relatedly, the value of credits earned by over-performing companies like Tesla are significantly diminished. *See* Pet’r Mot. for Summary Vacatur, *NRDC*, No. 21-139 (ECF 43) at 17-22. In addition, the past five years of uncertainty over the penalty rates in the CAFE program has affected the program’s stability and, in turn, undermined the public’s interest in cleaner air, climate protection, and energy conservation. *See id.* NHTSA should not be permitted to indefinitely reconsider its Interim Final Rule while harming CAFE program participants and the public in the process.

**II. In Light of the Government’s Continued Inaction, This Court Should Grant Tesla’s Motion for Summary Vacatur.**

After five years of NHTSA’s unjustified delay in adopting the inflation penalty adjustments and in light of the Government’s continued inaction, this Court should now consider and grant Tesla’s motion for summary vacatur. As Tesla explained in its motion, summary vacatur is justified in situations like this, where “the position of one of the parties is clearly right as a matter of law” and 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).<sup>4</sup> This is the third occasion on which these legal issues have come before this Court, and this Court has twice before rejected NHTSA’s attempts at delay and twice before declared the entirety of the 2016 Rule to be in force. *See NRDC*, 894 F.3d at 116; *New York*, 974 F.3d at 101. While Tesla’s motion is extraordinary, so too are the circumstances of this case, where the status quo perpetuates defiance of this Court’s orders and the substantive issues have been previously addressed on multiple occasions. Tesla appreciates that deference to agency processes may have been appropriate as an initial matter to afford the new Administration an opportunity to assess the rulemaking landscape, but swift action is now necessary, as continued inaction materially harms the public interest and participants by delaying the effectiveness of the CAFE program.

In contrast to the ongoing delays reflected in the agency’s pro forma reports to the Court, since January 20, 2021, NHTSA has completed drafting an entire new proposed rule for updating the underlying performance standards aspect of the

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<sup>4</sup> Indeed, as Tesla explained in its April 5th letter to this Court, the Government itself recently moved for summary vacatur of a similar “midnight” rule promulgated without proper notice and comment. *See* Pet’r Rule 28(j) Letter (ECF 79) (filed Apr. 5, 2021) (citing Gov’t Mot. for Vacatur, *California v. EPA*, No. 21-1035, Doc. 1890321 (D.C. Cir. filed Mar. 17, 2021)).

CAFE regulation, submitted the proposal to OIRA on July 20, 2021, and had OIRA finalize its review of the regulation two weeks thereafter on August 4, 2021.<sup>5</sup> Such admirable administrative efficiency in concluding review of such a complex new regulatory proposal serves only to highlight the calcification of the agency's efforts to conclude its promised review of the Interim Final Rule.

Granting Tesla's motion for summary vacatur will not prevent NHTSA from taking further regulatory action in the future, if it decides such action is warranted. *See* Pet'r Summary Vacatur Reply (ECF 67) at 5. Summary vacatur would simply restore the inflation penalty adjustment to its state on January 13, 2021, freeing Tesla, other participants in the CAFE program, and the public from an unlawful regulation and its harmful effects.

Given the clear law on this issue, as set forth in this Court's two prior decisions, and the continued lack of progress towards replacing the Interim Final Rule, summary vacatur is warranted. This Court should now consider and grant Tesla's motion for summary vacatur.

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<sup>5</sup> *See* OIRA, OIRA Conclusion of EO 12866 Regulatory Review, DOT/NHTSA, Passenger Car and Light Truck Corporate Average Fuel Economy Standards, <https://www.reginfo.gov/public/do/eoDetails?rrid=186311>; *see also*, Executive Order 14037, Strengthening American Leadership in Clean Cars and Trucks (Aug. 5, 2021) <https://public-inspection.federalregister.gov/2021-17121.pdf>

## CONCLUSION

The Court should end the abeyance and summarily vacate the Interim Final Rule.

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,588 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.

August 10, 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 August 10, 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.

August 10, 2021

/s/ Gary S. Guzy

Gary S. Guzy