

NRDC

August 16, 2021

Via ECF

Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *NRDC v. NHTSA*, No. 21-139(L); *New York v. NHTSA*, No. 21-339; &
Tesla, Inc. v. NHTSA, No. 21-593

Dear Ms. Wolfe,

Petitioners Natural Resources Defense Council and Sierra Club join in Tesla's request that this Court take these petitions for review out of abeyance. Tesla Mot. to End Abey. and Grant Mot. for Summ. Vacatur, ECF No. 106. Whether by summary vacatur or expedited review, this Court's prompt intervention is necessary to ensure that automakers base their compliance decisions on the lawful penalty rate. NHTSA's delay has prevented this Court from reviewing an obviously unlawful agency action—which threatens to undermine the emissions-reducing goals of the CAFE standards.

1. In seeking an abeyance, NHTSA repeatedly told this Court that it expected to complete its review of its interim final rule within six months—that is, by September 22, 2021. *See* NHTSA Reply in Supp. of Cross-Mot. for Abey. 1, 2, 3, 5, ECF No. 66 (“NHTSA Reply”). On that schedule, NHTSA argued, an abeyance was warranted because this Court would be unlikely to adjudicate the petitions for review before NHTSA issued a new final rule. *Id.* at 1, 3. But NHTSA's estimate was wrong: without further explanation, it now says that its review “will not be completed within the six-month time frame that NHTSA estimated in March 2021.” Resp. Status Rept. at 2, ECF No. 105. NHTSA's representations and the abeyance granted in reliance on them have prevented this Court from reviewing a rule that is unlawful on its face. For more than four years, NHTSA has disregarded the plain instructions of Congress and the clear mandates of this Court; it should not be allowed to further evade judicial review or Congress's clear directive. *Cf. New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87, 101 (2d Cir. 2020) (“[W]e cannot here ‘read the Improvements Act to permit the very kind of indefinite delay that it was enacted to end.’” (quoting *NRDC v. NHTSA*, 894 F.3d 95, 111 (2d Cir. 2018))).

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2. NHTSA's delay will only continue to disrupt the operation of the CAFE program. As Petitioners explained previously, assessment of penalties follows a lengthy process, during which manufacturers may "anticipate potential compliance issues" and "plan compliance strategies," 77 Fed. Reg. 62,624, 63,125 (Oct. 15, 2012), including investing in fuel-efficiency improvements to earn credits in future years. *See* Pets.' Mot. for Expedited Rev. 11, ECF No. 31. The \$14 penalty rate incentivizes automakers to invest in efficient vehicles, while an unlawfully low \$5.50 penalty rewards noncompliance and increased emissions for future model years.

3. Finally, NHTSA needs no additional time to conclude its own review of the Exemption Rule. NHTSA's own rulemaking documents in another matter demonstrate that the agency recognizes that the \$14 penalty rate is "in force." *New York v. NHTSA*, 974 F.3d at 101; *see NRDC v. NHTSA*, 894 F.3d at 116 (same). On August 5, 2021, NHTSA released a notice of proposed rulemaking, proposing to revise the CAFE standards applicable to cars and light trucks in model years 2024-26.¹ In one supporting document, NHTSA notes that "[u]ntil recently," it assessed penalties "at \$5.50 per 0.1 mpg."² In another supporting document, NHTSA states that its model for assessing the potential consequences of the proposed increased standards now "applies the real dollar fine rate based on statute, accumulating costs of \$14 per 1/10-MPG under the standard."³ Thus, taking this case out of abeyance would merely require NHTSA to acknowledge in Court what it has already recognized in proposed rulemaking—the Exemption Rule's \$5.50 penalty rate is unlawful and the \$14 penalty rate is "in force."

¹ *See* Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, <https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-08/CAFE-NHTSA-2127-AM34-Preamble-Complete-web.pdf> (prepublication draft).

² NHTSA, Technical Support Document: Proposed Rulemaking for Model Years 2024-2026 Light-Duty Vehicle Corporate Average Fuel Economy Standards § 2.2.2.4 (August 2021), <https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-08/CAFE-NHTSA-2127-AM34-TSD-Complete-web.pdf>.

³ NHTSA, Preliminary Regulatory Impact Analysis: Proposed Rulemaking for Model Years 2024-2026 Light-Duty Vehicle Corporate Average Fuel Economy Standards § 3.3.3 (August 2021), <https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-08/CAFE-NHTSA-2127-AM34-PRIA-Complete-web-8-6-21.pdf>.

Accordingly, NRDC and Sierra Club join in Tesla's request that this Court take these cases out of abeyance, review the petitions, and set aside NHTSA's unlawful rule.

Thank you for your attention.

Respectfully submitted,

/s/ Gabriel Daly

Gabriel Daly
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
(212) 727-4671
gdaly@nrdc.org

*Counsel for Natural Resources
Defense Council*

Vera Pardee
726 Euclid Avenue
Berkeley, CA 94708
(858) 717-1448
pardeelaw@gmail.com

Counsel for Sierra Club

Cc: Counsel for all parties in Nos. 21-339 and 21-593 (via ECF)