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, PETE BUTTIGIEG, in his official capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, Respondents.	No. 21-139 21-339 21-593

RESPONDENTS' OPPOSITION TO TESLA, INC.'S MOTION TO END ABEYANCE AND FOR SUMMARY VACATUR

This Court granted the government's motion to hold these cases in abeyance pending the conclusion of the National Highway Traffic Safety Administration (NHTSA)'s review of the rule pursuant to President Biden's January 20, 2021 Executive Order. On August 7, 2021, Tesla, Inc. (Tesla) filed a motion requesting that this Court end the abeyance and grant summary vacatur. That request should be denied. NHTSA's review is ongoing, and the agency has taken substantive steps in its review process, including releasing a Supplemental Notice of Proposed Rulemaking (SNPRM) on August 16, 2021, which was published in the Federal Register on August 20, 2021. *See* SNPRM, *Civil Penalties*, 86 Fed. Reg. 46811 (Aug. 20, 2021). The

SNPRM explains that, after further review, NHTSA is "considering withdrawing the interim final rule and reverting to the December 2016 final rule" for model year 2019, and it provides a 30-day period for public comment. *Id.* at 46815-16. The abeyance should continue to remain in place in order to permit the agency to conclude the ongoing administrative process, and to prevent unnecessary litigation over the issues subject to ongoing agency review. Tesla's renewed request for summary vacatur should be denied. As respondents have previously explained, this Court has recognized that summary vacatur is not appropriate, and that extraordinary remedy would be particularly unwarranted in the circumstances here. Moreover, even with expedited briefing, this Court's review likely would not conclude before the culmination of ongoing administrative proceedings, which may well moot these consolidated cases.

I. Petitioners in these cases seek review of an 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.

As previously explained, *see* Abeyance Mot. 2-3, President Biden on January 20, 2021 signed Executive Order 13990, which directed federal agencies to "immediately

review" rules within its scope, *see* 86 Fed. Reg. 7037, 7037-38 (Jan. 20, 2021). The government determined that the interim final rule at issue here is within the scope of that directive. *See* Memorandum from John E. Putnam to Ann Carlson, *Implementation of Executive Order 13990* (Fed. 22, 2021).[1] In light of NHTSA's review of the rule pursuant to the Executive Order, the government moved to place these cases in abeyance pending the outcome of NHTSA's ongoing review, and this Court granted that request. *See* Apr. 6, 2021 Order. The government has provided status updates to the Court every 30 days.

II. NHTSA has taken substantial steps in its review process, including publishing an SNPRM in the Federal Register. *See* 86 Fed. Reg. 46811. The SNPRM explains that "NHTSA is reviewing and reconsidering the January 14, 2021 interim final rule," and "is considering withdrawing the interim final rule and reverting to the December 2016 final rule that would apply the inflation adjustment beginning with Model Year 2019." *Id.* at 46815-16. In particular, NHTSA explained that it was "of the view that it would be appropriate to revisit" aspects of the interim final rule in light of the comments it received following its promulgation, and that it "tentatively believes" the interim final rule "is in conflict" with the statute "and the Second Circuit's decisions," though NHTSA has "not yet reached any final determinations."

[1] https://www.transportation.gov/sites/dot.gov/files/2021-02/Memo-to-NHTSA.pdf.

Id. at 46816. To "aid the agency in its reexamination of the issues involved in the final rule," NHTSA is providing for a 30-day public comment period. *Id.*

The same reasons that supported the government's motion to place these cases in abeyance continue to justify abeyance while NHTSA's review remains ongoing. As the SNPRM demonstrates, NHTSA is actively reconsidering its interim final rule in light of public comments, the statute, and this Court's prior decisions. *See* 84 Fed. Reg. at 46815-16. Respect for the ongoing processes of a coordinate branch of government, as well as principles of judicial efficiency, counsel in favor of permitting the agency a full opportunity to apply its expertise and conduct the review and re-evaluation the President has directed. The Court should not require the parties to file briefs (and potentially present oral argument) in the midst of the Administration's review and potential revision of the interim final rule. Proceeding with briefing and oral argument would compel the government to take a position on the merits of issues concerning the interim final rule that the agency is presently evaluating, which could in turn constrain the agency's ongoing review of the rule. The abeyance period should continue in order to permit the Executive Branch an opportunity to complete its review.

Although NHTSA's review of the interim final rule will not be completed within the six-month time frame that the agency originally estimated in March 2021, *see* Resps.' Reply in Supp. of Cross-Motion for Abeyance 1, the agency is taking substantial steps towards the completion of its review, and the period for public

comment will conclude by the end of September. The agency will evaluate any public comments received during that period, as well as those received after the interim final rule was promulgated, and will work as expeditiously as possible to complete its review of the interim final rule. NHTSA expects that the outcome of its review will include new final agency action.

III. Tesla's motion to end abeyance and grant summary vacatur should be denied. Tesla's motion is premised on the inaccurate statement that "no tangible progress has been made since" the government announced that NHTSA is conducting a review of the interim final rule, based on the President's Executive Order. *See* Mot. 2. That characterization is unfounded. First, the government's internal review has been ongoing, and Tesla has no basis to contend otherwise. Second, as noted, NHTSA has recently finalized a Supplemental Notice of Proposed Rulemaking announcing that the agency is "considering withdrawing the interim final rule and reverting to the December 2016 final rule that would apply the inflation adjustment beginning with Model Year 2019." 86 Fed. Reg. at 46815. NHTSA is looking at specific concerns about the interim final rule, including NHTSA's previous characterization of the inflation adjustment beginning with Model Year 2019 as "retroactive," and the adequacy of the comment period provided in conjunction with the interim final rule. *See, e.g.*, *id.* at 46816; *id.* at 46817.

Contrary to Tesla's suggestion, therefore, NHTSA is not attempting to "perpetually dodge" judicial review. Mot. 7 (quoting *American Petroleum Inst. v. EPA*,

683 F.3d 382, 388-89 (D.C. Cir. 2012)). Rather, NHTSA is actively re-evaluating its prior conclusions and considering a "reversal of course" that, "if adopted, would necessitate substantively different legal analysis and would likely moot the analysis [the Court] could undertake if deciding the case now." *American Petroleum Inst.*, 683 F.3d at 388-89. And NHTSA is undertaking that review pursuant to an Executive Order issued by the President. *See* 86 Fed. Reg. at 7037-38. This Court should continue abeyance of these consolidated cases while the agency's review continues.

Tesla's motion again inappropriately seeks summary disposition of its petition for review. As previously explained, this Court has "not employed a procedure equivalent to a summary reversal," *Plante v. Dake*, 599 F. App'x 13, 14 (2d Cir. 2015), and even summary *affirmance* is rarely appropriate in this Court, *id.* ("In this Circuit, '[s]ummary affirmance of a district court's decision in place of full merits briefing . . . is, and should be treated as, a rare exception . . . ."). In other circuits, even where summary disposition is well established, summary reversal is rarely granted, and is reserved for circumstances in which "[t]here is nothing that could be brought before th[e] court" through "plenary briefing, oral argument, and the traditional collegiality of the decision process" that would affect the Court's decision. *Sills v. BOP*, 761 F.2d 792, 793-94 (D.C. Cir. 1985); *see also, e.g.*, *James A. Merritt & Sons v. Marsh*, 791 F.2d 328, 331 (4th Cir. 1986) ("Summary reversals are reserved for extraordinary cases.").

The extraordinary relief of summary vacatur would be particularly unwarranted here, where the Court is considering the interim final rule in the first instance on

petitions for review, and where NHTSA is taking substantial steps to review the interim final rule pursuant to President Biden's Executive Order.

Respondents urge the Court to deny Tesla's motion.

Respectfully submitted,

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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 1,430 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 August 20, 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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