21-0139 (L), 21-339, 21-593

United States Court of Appeals for the Second Circuit

NATURAL 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

RESPONSE OF INTERVENOR ALLIANCE FOR AUTOMOTIVE INNOVATION TO MOTION TO END ABEYANCE AND GRANT MOTION FOR SUMMARY VACATUR

Ashley C. Parrish
Andrew J. Chinsky
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 737-0500

Erika Z. Jones
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for the Alliance for Automotive Innovation

Rule 26.1 Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Alliance for Automotive Innovation states that it is a nonprofit trade association that is headquartered in Washington, D.C., with offices in Southfield, Michigan and Sacramento, California.

The Alliance for Automotive Innovation is not a publicly held corporation, has no parent companies, and no companies have a ten percent or greater ownership interest in the Alliance for Automotive Innovation.

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INTRODUCTION

Intervenor the Alliance for Automotive Innovation ("Auto Innovators") opposes the motion of Tesla, Inc. to End Abeyance and Grant Motion for Summary Vacatur.

This Court referred Tesla's earlier motion for summary vacatur to the merits panel and granted the request of the National Highway Traffic Safety Administration ("NHTSA") to hold this case in abeyance pending its reconsideration of the Interim Final Rule on the Corporate Average Fuel Economy ("CAFE") civil penalty rate. Tesla now contends that NHTSA has allowed its reconsideration to "languish[]" at the Office of Information And Regulatory Affairs ("OIRA"), Tesla Mot. at 1, but it provides no support for that assertion.

Like its earlier motion, Tesla's renewed motion seeks to short-circuit both the Administration's reconsideration of the legal and factual issues raised by the Interim Final Rule at issue in this case and this Court's consideration of the complex issues raised by that rule. Tesla has failed to provide a persuasive argument for prescinding the Administration's reconsideration of the Interim Final Rule, much less granting the extraordinary remedy of summary vacatur.

Tesla's motion should be denied, and the administrative process that is well under way should be allowed to proceed. There will be time and opportunity enough to consider any disputes about the Administration's reconsideration of the Interim Final Rule once it is completed.

BACKGROUND

The regulatory background and related litigation pertinent to this matter have been described at length in this Court's previous opinions, in the Federal Register notices issued by NHTSA, and in Auto Innovators' response to Tesla's earlier motion for summary vacatur. *See*, *e.g.*, *New York v. NHTSA*, 974 F.3d 87 (2d Cir. 2020); 86 Fed. Reg. 3016, 3017-3019 (Jan. 14, 2021) (preamble setting forth background to Interim Final Rule); Auto Innovators' Resp. to Mot. for Summ. Vacatur (Doc. # 54-1), at 3-12.

In the interest of brevity, the following is noted: On April 6, 2021 (Doc. # 86), this Court consolidated the three petitions for review challenging NHTSA's Interim Final Rule on the CAFE civil penalty rate (86 Fed. Reg. 3016 (Jan. 14, 2021)), denied motions to expedite the proceedings, granted Auto Innovators' motion to intervene, referred Tesla's motion for summary vacatur to the merits panel, and granted the respondents' cross-motion to hold the proceedings in abeyance.

Since then, the respondents have filed status reports, the most recent of which (Doc. # 105, filed August 6, 2021) stated:

> NHTSA continues to review the challenged rule pursuant to President Biden's January 20, 2021 Executive Order. As NHTSA has previously noted, it submitted a supplemental notice of proposed rulemaking to the Office of Information and Regulatory Affairs, which remains pending. Review of the interim final rule is ongoing, but will not be completed within the six-month time frame that NHTSA estimated in March 2021.

Id. at 1-2 (citation omitted).

On August 10, 2021, Tesla filed its motion to terminate the abeyance and grant its motion for summary vacatur (Doc. # 106).

On August 16, 2021, OIRA completed its review of NHTSA's supplemental notice of proposed rulemaking. *See* OIRA, Conclusion of EO 12866 Regulatory Review, RIN 2127-AM32, https://www.reginfo.gov/public/do/eoDetails?rrid=154261 (last visited Aug. 18, 2021). On August 18, 2021, NHTSA filed the supplemental notice at the Federal Register, where it was made available for public inspection, with a projected publication date of August 20, 2021. *See* https://www.federalregister.gov/public-inspection/current (last visited August 18, 2021); https://public-inspection.federalregister.gov/2021-

17842.pdf (notice posted for public inspection at the Federal Register) (last visited August 18, 2021).

ARGUMENT

I. THE COURT SHOULD ALLOW THE ADMINISTRATIVE PROCESS TO PROCEED AND NOT END THE ABEYANCE

1. Like its earlier motion for summary vacatur, Tesla's motion seeks to cut off the ongoing administrative proceedings to reconsider the Interim Final Rule and, even more problematically, to avoid this Court's full consideration of the issues raised by the petitions for review.

This Court granted the respondents' motion to hold the proceedings in abeyance because the Department of Transportation designated the Interim Final Rule as subject to review pursuant to Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). That Executive Order directs heads of agencies to scrutinize regulations that are potentially inconsistent with the protection of public health and the environment. *See* Resp'ts' Opp'n to Pet'rs' Mot. for Expedited Briefing and Cross-Mot. to Hold Pet. in Abeyance (Doc. # 42), at 2-3.[1]

[1] Because this Court granted NHTSA's cross-motion to hold the proceedings in abeyance, the cases cited by Tesla in footnote 2 of its Abeyance Motion—cases in which courts denied abeyance motions—are irrelevant.

As noted above (at 3-4), a supplemental notice of proposed rulemaking was under review at OIRA, has since been posted for public inspection at the Federal Register, and is scheduled to be published on August 20, 2021. That the administrative process has not proceeded as quickly as Tesla would like, or as NHTSA predicted, is hardly a reason to stop the process now, especially in light of recent developments that post-date Tesla's motion.

2. Tesla's arguments to the contrary are unavailing. Tesla repeatedly attempts to convey the impression that the administrative process has ground to a halt, asserting that the proposed rule "has "languished" at OIRA (Tesla Mot. at 1) and that since the rule was sent to OIRA, by NHTSA "no tangible progress has been made" (*id.* at 2). Similarly, Tesla asserts that the proposed rule "has remained in hibernation since March 15, 2021" (*id.*) and seeks to justify ending abeyance on the basis of "NHTSA's continued failure to demonstrate any tangible progress during nearly the past five months" and its failure to "make meaningful further progress towards repealing or replacing the unlawful interim final rule" (*id.* at 7).

Tesla failed to set forth any evidence in support of these characterizations of the ongoing administrative review of the proposed

rule, and events subsequent to the filing of its motion (*see supra* at 3-4) have proven Tesla's assertions that the administrative process had stalled to be pure conjecture. In any event, Tesla's speculative characterization of the administrative process would not have supported cutting off that process even if OIRA review were still ongoing.

Nor do the cases cited by Tesla in its motion. Thus, in the absence of evidence that NHTSA is merely "repeatedly pointing to an abstract intention to reconsider the Interim Final Rule" (Mot. at 6), Tesla's citation to this Court's decision in *Town of Deerfield, N.Y. v. FCC*, 922 F.2d 420, 429 (2d Cir. 1993), is irrelevant. Indeed, *Town of Deerfield* is doubly irrelevant because NHTSA is not asserting "authority" to "prevent an Article III court from performing its duty to render a judgment in a live case or controversy . . . ." *Id.* at 429, *quoted in* Mot. at 6.[2]

Nor is there any evidence that NHTSA is seeking to "perpetually dodge" judicial review. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388

[2] *Town of Deerfield* involved an FCC regulation that would have had the effect of rendering Article III courts' preemption decisions purely advisory. *See Town of Deerfield*, 922 F.3d at 429. There was no issue of abeyance in *Town of Deerfield*, and NHTSA is neither forcing this Court to do anything nor seeking to make any of this Court's decisions merely advisory.

(D.C. Cir. 2012), *quoted in* Mot. at 7. *American Petroleum Institute* does not apply.[3]

Tesla also claims that it and the public more generally are being harmed by the delay. (Mot. at 9.) In its opposition to Tesla's motion for summary vacatur, Auto Innovators responded to Tesla's claims that Tesla and the public were being injured by a delay in vacating the Interim Final Rule. There, Auto Innovators explained that the CAFE civil penalty rate has been adjusted to $14 per tenth of a mile per gallon and is having an immediate effect on the only conduct of vehicle manufacturers that can

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[3] Tesla also cites a Northern District of Florida order granting motions to lift abeyance. *See* Mot. at 6 (citing *Southeast Stormwater Ass'n, Inc. v. EPA*, No. 4:15-cv-00579, ECF No. 62 (N.D. Fl. Feb. 4, 2019)). That order does not set forth the rationale of the court's decision; it merely states that the motions to end the abeyance are granted. Subsequently, that court granted the government's request for a new abeyance of the case, over the plaintiffs' objection. *See Southeast Stormwater Ass'n*, ECF No. 88 (Joint Position Statement setting forth plaintiffs' request that court rule on merits issue); ECF 89 (order holding case in abeyance). The case remained in abeyance until administratively closed by the court almost a year later. *See id.*, ECF No. 104.

MCI Telecomms. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998), is also irrelevant. That case did not concern the propriety of abeyance. The issue there was whether the case should proceed to a decision on the merits when parties *other than the petitioners* had motions for agency reconsideration pending. The FCC and the petitioners agreed that the case was ripe for review, and "during oral argument, most counsel seemed to agree that prudential considerations militate in favor of a prompt judicial decision." *MCI Telecomms.*, 143 F.3d at 608.

meaningfully be deterred or incentivized by the adjusted CAFE civil penalty rate—their conduct in product planning for the upcoming model years. *See* Auto Innovators' Resp. to Mot. for Summ. Vacatur (Doc. # 54-1), at 12-13.[4]

Auto Innovators also pointed out that if NHTSA's Interim Final Rule is vacated, vehicle manufacturers would face a higher civil penalty for model years 2019 through 2021, and Tesla could sell its credits at higher prices. *Id.* at 24. As a result, Tesla does not face a risk of irreparable harm.

Moreover, environmental interests would not be affected either, because manufacturers would not be able to save their banked credits for future years. *See id*. Finally, because penalties for model year 2019 have not been assessed, neither Tesla nor the public faces any imminent threat of harm from the failure to revoke the Interim Final Rule. *See id.*; *see also* Supplemental Notice of Proposed Rulemaking at 29 ("Although Model

[4] Contrary to NRDC's argument in its letter in support of Tesla's motion (Doc. # 109, at 2), NHTSA's acknowledgement that the $14 civil penalty rate is in force does not eliminate the need for NHTSA's current administrative proceedings. As Auto Innovators pointed out in its response to Tesla' motion for summary vacatur, the fact that the CAFE civil penalty rate has been adjusted to $14 leaves open—as did this Court's prior decisions—the model years to which that adjustment is pertinent. *See* Doc. # 54-1, at 12-14, 17-19.

Years 2019 and 2020 are already completed, and Model Year 2021 is underway, the civil penalty assessment process is not yet complete for any of them.") (document posted for public inspection at the Federal Register; available at https://public-inspection.federalregister.gov/2021-17842.pdf).

Tesla also alleges that "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." Mot. at 9. It is unclear what this assertion amounts to, or what evidence supports it.

Tesla has offered no evidence that the stability of the CAFE program has been imperiled or that the public's environmental and energy conservation interests have been compromised by the Interim Final Rule. That *Tesla* might benefit from more certainty about the worth of the CAFE credits that it has amassed is hardly a reason to cut off an ongoing administrative process.

II. TESLA'S ARGUMENTS DO NOT SUPPORT SUMMARY VACATUR.

In our response to Tesla's motion for summary vacatur, Auto Innovators demonstrated why this Court should not grant summary vacatur of an agency decision (over the agency's objection). Nothing Tesla urges in its latest motion changes the arguments that Auto Innovators

made in its response to the motion for summary vacatur. Tesla's allegations about delay do not support the extraordinary remedy of summary vacatur. And, as was the case in its earlier motion for summary vacatur, Tesla's arguments about harms to it and the public more generally fail to buttress its arguments for summary vacatur.

Thus, even if the Court were to end the abeyance of these proceedings, full briefing on the merits should be allowed. Tesla has not shown why this Court's consideration of the issues should proceed without the benefit of full merits briefing.

CONCLUSION

Tesla's motion should be denied.

DATED August 20, 2021

Respectfully submitted,

/s/ *Ashley C. Parrish*
Ashley C. Parrish
Andrew J. Chinsky
KING & SPALDING LLP
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Telephone: (202) 737-0500
Email: aparrish@kslaw.com

/s/ *Erika Z. Jones*
Erika Z. Jones
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 263-3000
Email: ejones@mayerbrown.com

Counsel for the Alliance for Automotive Innovation

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 2,051 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) 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 using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: August 20, 2021 /s/ *Erika Z. Jones*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document with the Clerk of the Court using the appellate CM/ECF system on August 20, 2021, I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: August 20, 2021 /s/ *Erika Z. Jones*