21-139, 21-339, 21-593

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

REPLY IN SUPPORT OF MOTION TO END ABEYANCE AND GRANT MOTION FOR SUMMARY VACATUR

Joseph Mendelson III
Tesla, Inc.,
1333 H Street, NW, 11th Fl. West
Washington, DC 20005
jmendelson@tesla.com
(703) 244-1724

Gary S. Guzy
Thomas Brugato
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
gguzy@cov.com

Counsel for Tesla, Inc.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Tesla, Inc. (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 27, 2021

/s/ Gary S. Guzy
Gary S. Guzy

REPLY IN SUPPORT OF MOTION TO END ABEYANCE AND GRANT MOTION FOR SUMMARY VACATUR

Tesla's motion to end the abeyance in this case should be granted, notwithstanding the Government's opposition and NHTSA's belated release of a proposed rule simultaneous to its response to Tesla's motion. While Tesla appreciates that NHTSA has now issued a proposed rule to mitigate the extensive delay that it has attempted to perpetuate since 2017, there remains no issue about the lack of any legal justification for these delays or the need for imminent action to enforce this Court's repeated prior mandates. Summary vacatur would restore the status quo ante, give proper effect to this Court's prior opinions, and not preclude any further agency policy deliberations that NHTSA may then deem appropriate.

First, the Government has not offered even an estimate, much less a deadline, for when it will take action on the proposed rule, after the comment period concludes in late September. Thus, continued abeyance at this point would remain open-ended, with no deadline or even an estimated timeframe for agency action. As further informed by the past record of extensive delay, there is thus no end date in sight to the delay that would be caused by continued abeyance. This indefinite delay conflicts with this Court's prior holding that it "cannot here 'read the Improvements Act to permit the very kind of indefinite delay that it was enacted to end.'" *New York v. NHTSA*, 974 F.3d 87, 101 (2d Cir. 2020) (quoting *NRDC v. NHTSA*, 894 F.3d 95, 111 (2d Cir. 2018)). Indeed, NHTSA's prior representation of an expected

six months for reconsideration of its Interim Final Rule, upon which this Court's grant of abeyance was premised, plainly will not be fulfilled given NHTSA's initiation of another round of public comments.

Second, the Government has not explained why the proposed rule was under OMB review for more than five months, and only released *after* Tesla moved to lift the abeyance. Instead, the Government simply asserts that its "internal review has been ongoing," with no further explanation. Resps.' Opp. to Mot. to End Abeyance (ECF No. 116) (filed Aug. 20, 2021) at 5. With no explanation and no target date for completion of this rulemaking, there is no basis for anticipating that NHTSA's issuance of a final rule will be any swifter than its issuance of the proposal. The lengthy, unexplained delay is particularly perplexing given that there is nothing complex about the 10-page proposal, much of which simply recounts the lengthy history of the civil penalty inflation-adjustment rule, and any statutory interpretation issues are ones that have been definitively settled by this Court's prior opinions.

Third, the proposed rule expressly solicits comments on whether "the inflation adjustment should apply beginning with a model year later than Model Year 2019." 86 Fed. Reg. 46,811, 46,816 (Aug. 20, 2021). In doing so, NHTSA is inviting yet another round of litigation, and the unnecessary attendant delay and uncertainty, over an inflation adjustment rule that was required by statute to "take effect not later than August 1, 2016." *NRDC*, 894 F.3d at 108 (quoting the Federal Civil Penalties

Inflation Adjustment Act Improvements Act of 2015). Notably, the rulemaking docket contains a description of a meeting with an automobile manufacturer that "expressed its concerns about the CAFE civil penalty rate being increased to apply beginning in Model Year 2019" and "urged NHTSA not to reconsider the interim final rule that applies the increased rate beginning in Model Year 2022."[1] The uncertainty perpetuated by NHTSA's sluggish rulemaking pace is thus compounded by the likelihood of yet another round of litigation—which would certainly occur if NHTSA pursues the plainly illegal alternative of delaying the penalty increase, and appears likely to occur even if it rejects that approach, as indicated by the automaker's comment. Thus, in the absence of summary vacatur, uncertainty over the penalty rate, with its attendant negative impacts on the CAFE program, may linger for several more *years*, all due to a midnight interim final rule that flouts both the procedures required by the Administrative Procedure Act and the substantive inflation adjustment that this Court has twice held is required by the 2015 Act. Summary vacatur would appropriately end this long saga of unauthorized rules and subsequent litigation.

Fourth, far from counseling in favor of abeyance, the fact that Model Year 2019 penalties have not been assessed underscores that this delay harms the goals of

[1] "CAFE Civil Penalties - Docket Memo - Stellantis 12866," Doc. No. NHTSA-2021-0001-0026 (posted Aug. 17, 2021), *available at* https://www.regulations.gov/document/NHTSA-2021-0001-0026.

the CAFE program. In the absence of a final, definitive inflation-adjustment rule, regulated parties cannot make informed decisions regarding CAFE compliance, nor can NHTSA finalize penalty assessments. Elsewhere, NHTSA has acknowledged that this type of delay is problematic. For example, NHTSA's recent proposal regarding CAFE standards for Model Years 2024-2026 notes that a backlog of requests relating to Model Years 2018 and 2019 compliance calculations is "actively chilling the credit market," meaning that "manufacturers are uncertain about either how many credits they have available to trade or, conversely, how many credits are necessary for them to cover any shortfalls."[2] Precisely the same is true with respect to the penalty rate: manufacturers are uncertain about what it will be, and what implications the penalty rate has for compliance strategies (for example, whether to use or bank credits), resulting in a chilled credit market.

Further, as previously explained, and as now recognized by NHTSA itself, this shifting of credits to later periods results in perpetuating more carbon emissions and conventional tailpipe pollutants, even if the model years that have generated any credit deficiency have passed. *See* Pet'rs Natural Resources Defense Council and Sierra Club Letter (ECF No. 109) (filed Aug. 16, 2021) at 2; Pet'r Tesla Mot. for

[2] Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, Docket No. NHTSA-2021-0053 (Aug. 5, 2021) at 708, *available at* https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-08/CAFE-NHTSA-2127-AM34-Preamble-Complete-web-tag.pdf.

Summ. Vacatur (ECF No. 43-3) (filed Mar. 4, 2021) at 20-21, 26; 86 Fed. Reg. 46,811, 46,819 (Aug. 20, 2021) ("Overall, NHTSA anticipates that applying the adjustment beginning with Model Year 2019 may lead to the eventual application of more fuel-saving technology, resulting in fewer greenhouse gas emissions and reductions in many criteria and toxic air pollutants compared to applying the adjustment beginning in Model Year 2022."); Inst. for Policy Integrity, Comments on "Civil Penalties" 4-5 (Jan. 25, 2021).[3]

Lastly, summary vacatur is warranted here. Rather than repeat the arguments already set forth in the briefing on this issue, Tesla simply emphasizes that the illegality of the rule—especially the use of an interim final rule—is plain. Summary vacatur is appropriate to mitigate the stunning departure from Congress's directive that the inflation adjustment be in force no later than August 1, 2016, and two prior decisions of this Court, as well as the Interim Final Rule's complete disregard for appropriate public notice and comment procedures.

CONCLUSION

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

[3] *Available at* https://policyintegrity.org/documents/Comments_of_the_Institute_for_Policy_Integrity_1.pdf.

Respectfully submitted,

/s/ Gary S. Guzy
Gary S. Guzy
Thomas Brugato
COVINGTON & BURLING LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001-4956
(202) 662-5978
gguzy@cov.com
tbrugato@cov.com

Counsel for Tesla, Inc.

Joseph Mendelson III
Tesla, Inc.,
1333 H Street, NW, 11th Fl. West
Washington, DC 20005
jmendelson@tesla.com
(703) 244-1724

August 27, 2021

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 1,170 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 27, 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 27, 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 27, 2021

/s/ Gary S. Guzy

Gary S. Guzy