17-2780(L)

17-2806 (Con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, STATE OF CALIFORNIA, STATE OF MARYLAND, STATE OF NEW YORK, STATE OF PENNSYLVANIA, STATE OF VERMONT,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JACK DANIELSON, in his capacity as Acting Deputy Administrator of the National Highway Traffic Safety Administration, UNITED STATES DEPARTMENT OF TRANSPORTATION, ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,
Respondents,

(caption continued on inside cover)

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

OPENING BRIEF OF ENVIRONMENTAL PETITIONERS NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AND CENTER FOR BIOLOGICAL DIVERSITY

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CORPORATE DISCLOSURE STATEMENT

Petitioners Natural Resources Defense Council, Inc. (NRDC), Sierra Club, and Center for Biological Diversity are non-profit organizations with no parent corporations and no outstanding stock shares or other securities in the hands of the public. NRDC, Sierra Club, and Center for Biological Diversity do not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in NRDC, Sierra Club, or Center for Biological Diversity.

Dated: March 6, 2018

/s/ *Ian Fein*
Ian Fein

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INTRODUCTION

This case is straightforward and controlled by basic principles of administrative law. The Administrative Procedure Act (APA) requires, at a minimum, that an agency identify statutory authority for its actions; that it follow the procedures Congress requires; and that it explain the reasons for its decisions. The National Highway Traffic Safety Administration (the agency or NHTSA) did none of these when it indefinitely suspended, without notice and comment, a final rule that increased the civil penalties for violating fuel-economy standards. The Court should vacate the unlawful suspension because it contravenes these basic principles and this Court's clear precedent.

The fuel-economy program underlying this case prescribes the fuel efficiency of vehicles sold in the United States and is an important pillar of the country's energy conservation laws. The agency enforces the program with civil penalties that are intended to deter automakers from violating the fuel-economy standards. But as of 2015, the penalties had remained virtually unchanged for decades, and inflation had eroded their deterrent effect. Congress that same year required agencies to increase their penalties for inflation, and mandated that such increases take effect not later than August 2016. Consistent with this command,

the agency prescribed a final rule in 2016 that nearly tripled the fuel-economy penalties to account for some four decades of inflation.

After a change in administration, however, the agency in 2017 indefinitely suspended the penalty increase. The agency did so without identifying statutory authority for the suspension, without providing notice and an opportunity to comment, and without explaining why the suspension was warranted. Each of these omissions provides independent grounds to vacate the unlawful suspension.

This Court's decision in *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004), is dispositive. Like the present case, *Abraham* involved an agency's attempt, at the start of a new presidential administration, to suspend the effective date of an energy efficiency rule prescribed by the prior administration. *Id.* at 189-90. Applying "well-established" principles of administrative law, this Court rejected the agency's assertion, also made here, that such action was within its "inherent power," as well as its further claim that the imminent effective date of the rule provided "good cause" to suspend it without notice and comment. *Id.* at 202-06. This Court vacated the unlawful suspension and reinstated the energy efficiency rule as of its original effective date.

The same outcome is mandated here. The agency has done precisely what this Court forbade in *Abraham*. It did so shortly after the D.C. Circuit vacated another agency's attempt to suspend a final rule based on non-existent "inherent authority." *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). And other courts, in the months since, have issued an unbroken string of decisions rejecting agencies' similar attempts to suspend or delay final rules without statutory authority, without following required procedures, or without providing a reasoned justification for the suspension. *See Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017); *California v. BLM (California I)*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017); *Nat'l Venture Capital Ass'n v. Duke*, No. 17-cv-1912-JEB, 2017 WL 5990122 (D.D.C. Dec. 1, 2017); *Open Communities All. v. Carson*, No. 17-cv-2192-BAH, 2017 WL 6558502 (D.D.C. Dec. 23, 2017); *Sierra Club v. Pruitt*, 17-cv-06293-JSW, ECF 72 (N.D. Cal. Feb. 16, 2018); *California v. BLM* (*California II*), No. 17-cv-07186-WHO, 2018 WL 1014644 (N.D. Cal. Feb. 22, 2018).

As these and other cases demonstrate, a new administration's desire to reconsider its predecessor's actions does not give license to ignore fundamental principles of administrative law. Rather, "[t]he Administrative Procedure Act requires that the pivot from one

administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process." *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring) (striking down agency's suspension of final rule without adequate notice and comment). The agency flouted those basic requirements here. Its unlawful suspension should be vacated.

STATEMENT OF JURISDICTION

Petitioners Natural Resources Defense Council (NRDC), Sierra Club, and Center for Biological Diversity (collectively, Environmental Petitioners) challenge the agency's final rule that indefinitely suspended the increase to civil penalties for violating fuel-economy standards. JA77-78[1] [hereinafter Suspension Rule]. This Court has jurisdiction to review the Suspension Rule under the Energy Policy and Conservation Act of 1975 (Energy Conservation Act), 49 U.S.C. § 32909(a). *See Abraham*, 355 F.3d at 192-94 (court of appeals had jurisdiction to review agency's delays of a final rule under Energy Conservation Act).

[1] This brief cites materials in the Joint Appendix as JA__, and materials included in the Addendum at the end of this brief as Add__.

As explained in greater detail below (see *infra* § I.A), venue is proper in this Court because petitioner NRDC resides in this Circuit, 49 U.S.C. § 32909(a); Add26 (Trujillo Decl. ¶ 3), and the petition for review is timely because it was filed on September 7, 2017, JA84, which is "not later than 59 days after the [Suspension Rule was] prescribed," 49 U.S.C. § 32909(b); *see Abraham*, 355 F.3d at 196 & n.8 ("prescribe" is synonymous with "*publication* in the Federal Register" for purposes of filing a petition for review under the Energy Conservation Act).

Environmental Petitioners also have standing to challenge the Suspension Rule for the reasons explained below (see *infra* § I.B).

STATEMENT OF THE ISSUES PRESENTED

1. Did the agency exceed its statutory authority when it relied on purported "inherent authority" to indefinitely suspend the penalty increase and failed to abide by (or even acknowledge) the statutory deadlines that Congress mandated for prompt and recurring increases?

2. Did the agency violate the APA by failing to provide the public with advance notice and an opportunity to comment before it indefinitely suspended the penalty increase?

3. Is the Suspension Rule arbitrary and capricious where the agency provided no reasoned explanation to justify suspending the

penalty increase instead of leaving it in effect while the agency reconsiders it?

STATEMENT OF THE CASE

Environmental Petitioners ask this Court to review and set aside the Suspension Rule prescribed by the National Highway Traffic Safety Administration. 82 Fed. Reg. 32,139 (July 12, 2017); JA77-78. The Suspension Rule, which was signed by the agency's then-Acting Deputy Administrator, JA78, indefinitely suspended an important final rule that increased the penalties for violating fuel-economy standards.

Fuel-Economy Standards Reduce Vehicles' Energy Consumption

In 1975, Congress enacted the Energy Conservation Act. One purpose of the Act is to "provide for improved energy efficiency of motor vehicles." Pub. L. No. 94-163, sec. 2, 89 Stat. 871, 874 (1975) (codified at 42 U.S.C. § 6201(5)). The Act seeks to accomplish this goal by requiring that the Secretary of Transportation establish mandatory fuel-economy standards for cars and trucks. *Id.*, sec. 301, §§ 501-512, 89 Stat. at 901-16 (codified as amended at 49 U.S.C. §§ 32901-32919).

The corporate average fuel-economy standards—often referred to as CAFE standards—specify a "minimum level of average fuel economy" applicable to automakers' fleets for each model year. 49 U.S.C.

§ 32901(a)(6). The standards are measured in miles per gallon and set at the "maximum feasible" levels that "the Secretary decides the manufacturers can achieve in that model year." *Id.* § 32902(a). Automakers generally achieve the standards by implementing fuel-saving technology to improve the fuel economy of their vehicles. JA51. If an automaker exceeds the standards by improving fuel economy beyond the level prescribed for a given model year, it can earn credits that may be used to cover shortfalls in other model years. 49 U.S.C. § 32903.

Although Congress created the fuel-economy standards primarily to conserve the nation's energy supplies, automakers' compliance with the standards provides other significant public benefits as well. These include reducing emissions of air pollutants that harm human health and the environment, encouraging technology innovation, promoting the nation's energy security, and saving consumers money at the pump. *See* Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 62,631-34, 63,002-06, 63,055-62 (Oct. 15, 2012).

In 2007, Congress mandated an increase in the fuel-economy standards, requiring that the standards reach at least 35 miles per gallon by Model Year 2020. *See* Pub. L. No. 110-140, § 102(a)(2), 121 Stat. 1492, 1499 (2007) (codified at 49 U.S.C. § 32902(b)(2)(A)).

Civil Penalties Deter Violation of the Fuel-Economy Standards

Congress requires the Secretary of Transportation to enforce the fuel-economy standards by assessing civil penalties against automakers who do not comply with the standards. 49 U.S.C. § 32912. The Secretary has delegated these responsibilities to the agency. 49 C.F.R. § 1.95(a).

The express purpose of the penalties is to deter non-compliance and "encourage manufacturers to comply with the [fuel-economy] standards." JA52 (citing 49 C.F.R. § 578.2). However, as the agency recognizes, automakers "will pursue the strategy … that results in the lowest overall cost to the manufacturer." JA28. So when it is cheaper for automakers to pay the penalty than to comply with the fuel-economy standards by installing fuel-saving technology in their vehicles, some automakers will choose to forego the improvements and pay the penalty instead—as they have done in the past, *see* JA60-74 (identifying roughly $900 million in penalties collected as of May 2017).[2]

[2] The penalty amount is also important because it directly affects the price of credits that may be available to help cover shortfalls. JA33, 38. A higher penalty thus means that more automakers will implement fuel-saving technology to comply with the standards, rather than purchasing more expensive credits (or paying penalties) instead. *Id.*

In 1975, when Congress first created the fuel-economy penalties, it set the penalty rate at $5 per tenth of a mile per gallon. *See* Pub. L. No. 94-163, sec. 301, § 508(b)(1), 89 Stat. at 912 (codified as amended at 49 U.S.C. § 32912(b)). The formula for calculating an automaker's civil penalty is: (the penalty rate) times (the number of tenths of a mile per gallon by which a non-compliant fleet falls short of the applicable fuel-economy standard) times (the number of vehicles in the fleet). JA51. In 1997, the agency raised the $5 penalty rate slightly, to $5.50. *See* Civil Penalties, 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997).

Congress Directs the Agency to Increase the Outdated Penalties

In October 2015, petitioner Center for Biological Diversity requested that the agency promulgate regulations to further increase the fuel-economy penalties. JA13-14 [hereinafter Environmental Petition]. The Environmental Petition relied on the Government Accountability Office's earlier findings that the outdated $5.50 penalty rate "may not provide a strong enough incentive for manufacturers to comply" with the standards, and that "stricter penalties" could "improve compliance." JA13. The petition also noted that the original $5 penalty rate from 1975 would be roughly $22 in today's dollars, as adjusted for inflation. JA14. The Environmental Petition thus suggested that

increasing the civil penalties would properly "incentivize compliance" with the fuel-economy standards and thereby "promote the protection of public health, welfare, and the environment by reducing dangerous emissions and reducing our dependency on dirty fossil fuels." JA14.

In November 2015, while the agency was considering the Environmental Petition, JA79, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Improvements Act). Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015) (codified at 28 U.S.C. § 2461 note).[3] Congress recognized that civil penalties for violating federal laws "play[] an important role in deterring violations and furthering the policy goals embodied in such laws." 28 U.S.C. § 2461 note, sec. 2(a)(1). Congress also recognized that "inflation ha[d] weakened the deterrent effect of such penalties." *Id.*, sec. 2(a)(3).

The Improvements Act thus mandated that agencies "shall adjust" their civil penalties to account for inflation, with an initial catch-up increase in 2016, followed by mandatory further adjustments annually thereafter. *Id.*, sec. 4. And because these inflation adjustments were

[3] The full text of the Federal Civil Penalties Inflation Adjustment Act, as amended by the Improvements Act, 28 U.S.C. § 2461 note, is reproduced in the addendum at Add9-13.

long overdue, Congress required agencies to act promptly: It instructed that the initial increase "shall take effect no later than August 1, 2016," and that agencies make the subsequent annual adjustments "not later than January 15 of every year thereafter." *Id.*, sec. 4(a), (b)(1)(B).

In July 2016, the agency prescribed an interim final rule pursuant to the Improvements Act, updating the various civil penalties that it administers. JA25-30. The agency found, consistent with the Environmental Petition's earlier calculation, that the original fuel-economy penalty rate of $5 would be $22 in today's dollars. JA27. The agency therefore raised the outdated $5.50 penalty rate by the Improvement Act's statutory cap of 150 percent, *see* 28 U.S.C. § 2461 note, sec. 5(b)(2)(C), to $14 per tenth of a mile per gallon. JA27.

The interim final rule took effect one month later, in August 2016. JA25. The $14 penalty rate was codified in the Code of Federal Regulations. *See* 49 C.F.R. § 578.6(h)(2) (2016).

Two automaker industry associations—Alliance of Automobile Manufacturers and Association of Global Automakers, now Intervenors in this litigation—petitioned the agency for partial reconsideration of the fuel-economy penalty increase. JA31 [hereinafter Industry Petition]. The associations acknowledged that the Improvements Act "obligated"

the agency to increase the penalty rate. *Id.* But they requested that the agency not apply the updated $14 penalty rate to pre-Model Year 2019 vehicles. JA35-36. The Industry Petition asserted that, because of the time required to design and produce a fleet, automakers had already decided whether to comply with the fuel-economy standards for those earlier model years based on the $5.50 penalty rate. JA32, 35.

In December 2016, the agency prescribed a final rule addressing both the Industry and Environmental Petitions. JA51-54 [hereinafter Civil Penalties Rule]. The agency concluded that, because the purpose of the fuel-economy penalty is to "encourage manufacturers to comply with the [fuel-economy] standards," it would apply the updated $14 penalty rate only to Model Year 2019-and-after fleets so that automakers had time "to design and produce vehicles in response to the increased penalties." JA52-53.[4] The agency found that the Civil Penalties Rule "increases civil penalties starting with the model year that manufacturers … are reasonably able to design and produce

[4] In fact, because the agency acknowledged that the Improvements Act required it "to continue adjusting the civil penalty for inflation each year," it observed that the penalty rate applicable to Model Year 2019-and-after fleets would be $14 "*plus* any [annual] adjustment(s) for inflation that occur between now and then." JA53.

vehicles in response to the increased penalties." JA53. The agency also determined that the rule effectively addressed the Environmental Petition because "the increased penalty will accomplish [the] goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles in those future model years." *Id.* The Civil Penalties Rule had an effective date of January 27, 2017. JA51.

The Agency Unlawfully Suspends the Penalty Increase, Without Notice and Comment

On January 20, 2017, newly appointed White House Chief of Staff Reince Priebus sent a memorandum to agency heads requesting that they postpone for 60 days the effective date of final rules that had been published in the Federal Register but had not yet taken effect. JA55. The memo further suggested that, where appropriate and permitted by applicable law, agencies should consider "proposing for notice and comment" a rule to delay the effective date beyond that 60-day period. *Id.* The memo also instructed that agencies should not delay rules that were "subject to statutory … deadlines." *Id.*

Pursuant to this memorandum, the agency delayed the effective date of the Civil Penalties Rule for 60 days. JA56. The agency then temporarily delayed the rule two more times, resulting in a new

effective date of July 10, 2017. JA59, 75-76. Contrary to what the Priebus memo directed, however, the agency did not provide notice and an opportunity to comment on these delays, claiming instead that they were exempt from notice and comment as "rules of … procedure" under 5 U.S.C. § 553(b)(A). *Id.* Nor did the agency acknowledge the Improvements Act's statutory deadlines. *Id.*

On July 12, 2017, the agency prescribed a Suspension Rule that *indefinitely* suspended the Civil Penalties Rule. JA77-78. Once again, the agency did not provide the public with notice and an opportunity to comment. However, instead of claiming that the indefinite suspension was exempt from those requirements as some sort of rule of procedure, the agency maintained that it had "good cause" to suspend the Civil Penalties Rule without notice and comment because the (now thrice delayed) effective date of that rule was "imminent." JA78.

The agency further asserted that the indefinite suspension was "consistent with [its] statutory authority to administer the [fuel-economy] program and its inherent authority to do so efficiently." *Id.* However, the agency failed again to acknowledge the Improvement Act's statutory deadlines, much less explain how the indefinite suspension could be squared with those deadlines.

The agency simultaneously announced that it was *sua sponte* reconsidering the Civil Penalties Rule in a separate action. JA78-83. The agency provided no timeline for completing its reconsideration. And based on the Suspension Rule, the agency stated that "[d]uring reconsideration, the applicable civil penalty rate is $5.50." JA81.

SUMMARY OF THE ARGUMENT

The agency's Suspension Rule violates three basic principles of administrative law, each of which provides independent grounds for vacating the unlawful suspension.

First, the agency identified no lawful authority for the Suspension Rule. It is "well-established" that a federal agency has *only* those authorities conferred upon it by Congress. *Abraham*, 355 F.3d at 202. Thus, before an agency can suspend a final rule, it "must point to something in [the relevant statutes] that gives it authority" for the suspension. *Clean Air Council*, 862 F.3d at 9.

The agency here did no such thing. Instead, it invoked a non-existent "inherent authority" that both this Court and the D.C. Circuit have already rejected. *Id.*; *Abraham*, 355 F.3d at 202. The agency also cited its general authority to administer the fuel-economy program, but the Energy Conservation Act nowhere authorizes suspending a final

rule. And Congress separately instructed the agency here *not* to delay—much less suspend indefinitely—the long-overdue penalty increase, when it commanded that the increase "shall take effect not later than August 1, 2016," followed by annual inflation adjustments "not later than January 15 of every year thereafter." 28 U.S.C. § 2461 note, sec. 4(a), (b)(1)(B). The indefinite suspension is thus not only unauthorized, it is prohibited by these statutory deadlines.

Second, the agency violated the APA by failing to provide notice and an opportunity to comment on the suspension. An agency that issues a legislative rule is "bound by the rule until that rule is amended or revoked" and may not alter or suspend such a rule "without notice and comment." *Clean Air Council*, 862 F.3d at 9. Courts have repeatedly made clear that the "good cause" exception of the APA, 5 U.S.C. § 553(b)(B), "should be narrowly construed and only reluctantly countenanced." *Abraham*, 355 F.3d at 204; *see NRDC v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982); *N.C. Growers Ass'n*, 702 F.3d at 767. And the agency's reasons for invoking the "good cause" exception here are the same reasons this Court and others have already rejected. An agency's desire to reconsider a rule on the eve of its effective date does not

provide good cause to suspend it without notice and comment. *Abraham*, 355 F.3d at 205; *NRDC v. EPA*, 683 F.2d at 765-66.

Third, the Suspension Rule is arbitrary and capricious because the agency never provided a "reasoned explanation" to justify suspending the Civil Penalties Rule. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-27 (2016). The agency may have provided some reasons why it wished to *reconsider* the rule. But it never provided any reasoned explanation to justify the separate and distinct action of *suspending* the rule during the reconsideration. *See Pub. Citizen v. Steed*, 733 F.2d 93, 98-100 (D.C. Cir. 1984). The agency also failed to consider an important aspect of the problem because it ignored Congress's deadlines for the penalty increase, as well as the benefits of leaving the increase in place to deter fuel-economy violations during the reconsideration. The Suspension Rule thus "cannot carry the force of law." *Encino Motorcars*, 136 S. Ct. at 2125.

STANDARD OF REVIEW

Because 49 U.S.C. § 32909 does not specify a standard of review, the Court reviews the agency's action pursuant to the APA. *See N.Y. Pub. Interest Research Grp. v. Whitman (NYPIRG)*, 321 F.3d 316, 324 (2d Cir. 2003); *accord Ctr. for Biological Diversity v. NHTSA*, 538 F.3d

1172, 1193 (9th Cir. 2008). The Court must therefore "hold unlawful and set aside" the challenged suspension if it is either (1) "in excess of statutory … authority," (2) "without observance of procedure required by law," or (3) "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A), (C), (D).

ARGUMENT

I. The Court Has Authority to Vacate the Unlawful Suspension

A. The petition for review is timely and venue is proper

The petition for review is timely because it was filed on September 7, 2017, JA84-86, which is "not later than 59 days after the [challenged] regulation [wa]s prescribed," 49 U.S.C. § 32909(b). The Suspension Rule was published in the Federal Register on July 12, 2017. JA77-78. As this Court has previously recognized, the term "prescribe" means "*publication* in the Federal Register" for "purposes of filing a challenge in the court of appeals" under the Energy Conservation Act. *Abraham*, 355 F.3d at 196 & n.8 (interpreting 42 U.S.C. § 6306(b)(1)). It is a "basic [principle] of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). And this principle is all but conclusive where, as here, Congress used the terms in materially identical provisions of the

Act. *Compare* Pub. L. No. 94-163, § 336(b)(1), 89 Stat. at 931 (codified as amended at 42 U.S.C. § 6306(b)(1)), *with id.*, sec. 301, § 504(a), 89 Stat. at 908 (codified as amended at 49 U.S.C. § 32909(a)-(b)).

These and other relevant provisions make clear that Congress used the term "prescribe" in this context to describe the action of developing and finalizing a rule. *See, e.g.*, 49 U.S.C. §§ 32901(c)(1), 32902(a), 32912(c)(1) (the agency "shall prescribe by regulation" rules related to the fuel-economy program); *see also Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1287 (D.C. Cir. 2007) ("In ordinary English, … to 'prescribe' is to order or adopt something as a governing rule."). And "*publication* in the Federal Register" is the "culminating event in the rulemaking process." *Abraham*, 355 F.3d at 196; *see* 5 U.S.C. § 553(d) (referring to the "required publication … of a substantive rule"); 49 C.F.R. § 553.29 (requiring that final rules be "published in the Federal Register"). Accordingly, a deadline in the Energy Conservation Act that runs from the date a rule is "prescribed" begins on the date that the rulemaking process ended—i.e., the date the rule was "published in the Federal Register." *See Abraham*, 355 F.3d at 196 (where "Congress did not use the word 'publish' when setting a deadline …, it instead used the word 'prescribe,' … suggesting that the terms are interchangeable").

Indeed, subsequent enactments confirm that Congress used the terms "prescribed" and "published in the Federal Register" interchangeably in this context, and that the filing deadline in 49 U.S.C. § 32909(b) runs from the date of publication. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (referring to the "classic judicial task of reconciling many laws enacted over time" (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988))). The current text of 49 U.S.C. § 32909 reflects Congress's non-substantive consolidation of two earlier judicial review provisions regarding challenges to fuel-economy rules. The first of these earlier provisions (enacted in the Energy Conservation Act) ran the 59-day filing period from the date a rule was "prescribed." Pub. L. No. 94-163, sec. 301, § 504(a), 89 Stat. at 908 (originally codified at 15 U.S.C. § 2004). The second provision (enacted three years later) ran the same 59-day period from the date a rule increasing fuel-economy penalties was "published in the Federal Register." Pub. L. No., 95-619, sec. 402, 92 Stat. 3206, 3256 (1978) (originally codified at 15 U.S.C. § 2008(e)(2)-(3)).[5]

[5] These earlier provisions, originally codified at 15 U.S.C. §§ 2004, 2008(e)(2)-(3) (1988), are reproduced in the addendum at Add1-8.

Congress removed any doubt that it intended these terms to mean the same thing when it later consolidated the two judicial review provisions into 49 U.S.C. § 32909 as part of a non-substantive reorganization of its transportation statutes. *See* Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 1070 (1994); *see also* 49 U.S.C. § 32909(a)(1)-(2), (b). "It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed." *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957) (collecting cases). And here, Congress stated expressly that the relevant statutes were "revised, codified, and enacted … without substantive change," Pub. L. No. 103-272, § 1, 108 Stat. at 745, indicating that it understood "prescribed" and "published in the Federal Register" to have identical meanings. Interpreting "prescribed" in 49 U.S.C. § 32909(b) to mean anything other than "published in the Federal Register" would thus contravene Congress's express instruction that the consolidation and reorganization was non-substantive.

Accordingly, in 49 U.S.C. § 32909(b), as with most limitations periods regarding judicial review of agency rules, "the period of limitations for challenging [the] regulations begins accruing at the time of publication in the Federal Register." *United Airlines, Inc. v. Brien*,

588 F.3d 158, 167 (2d Cir. 2009). Moreover, the 59-day filing deadline is, also like most limitations periods, a "'quintessential claim-processing rule[]'" because Congress "provided no clear statement" indicating that it is the "rare statute of limitations that can deprive a court of jurisdiction." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). Thus, even if a petitioner missed the filing deadline in 49 U.S.C. § 32909(b) (which petitioners here clearly did not), that still would "not deprive [the] court of authority to hear [the] case." *Id.*

Venue is also proper in this Court because NRDC "resides" and has its "principal place of business" in this Circuit. 49 U.S.C. § 32909(a); *see Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010); Add26 (Trujillo Decl. ¶ 3). Courts have consistently held, in the analogous context of district court suits against federal agencies, that the "residency requirement" for venue is satisfied so long as "at least one plaintiff resides in the district in which the action has been brought." *Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336, 345-46 (6th Cir. 2005) (collecting cases and observing that this "broad interpretation" of the venue requirement "is not only the majority view—it is the only view adopted by the federal courts"). It is therefore irrelevant that NRDC's co-petitioners Center for

Biological Diversity and Sierra Club do not reside or have their principal place of business in this Circuit. *See Abraham*, 355 F.3d at 184 (resolving petition for review under Energy Conservation Act that involved several out-of-circuit petitioners); *Ctr. for Biological Diversity*, 538 F.3d at 1180 (same). Any contrary rule would "result in an unnecessary multiplicity of litigation" against the federal government by requiring petitioners wishing to join in one case to file separate petitions for review in different courts instead. *Sidney Coal*, 427 F.3d at 345 (quoting *Exxon Corp. v. FTC*, 588 F.2d 895, 898 (3d Cir. 1978)).

B. Environmental Petitioners have standing

An organization has standing to sue on behalf of its members when: (1) the interests at stake are germane to the organization's purpose; (2) the lawsuit does not require participation of individual members; and (3) the organization's members would have standing to sue in their own right. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Environmental Petitioners satisfy this test. Each organization is committed to curbing emissions of harmful air pollutants from, and promoting energy efficiency in, the transportation sector. *Id.*; Add17-18 (Tonachel Decl. ¶¶ 4-5); Add26 (Trujillo Decl. ¶ 5); Add27-29 (Siegel

Decl. ¶¶ 2-6); Add36-37 (Linhardt Decl. ¶¶ 3-5). Neither the claims asserted in this petition nor the relief requested require the participation of individual members. *Laidlaw*, 528 U.S. at 181. And as explained below, the organizations' members would have standing to challenge the Suspension Rule in their own right because they have demonstrated an "injury in fact" that is "fairly traceable" to the unlawful suspension and is "likely [to] be redressed by a favorable decision." *Id.* at 180-81.

Injury-in-Fact: Environmental Petitioners' members are harmed by the air pollution that results from automakers' non-compliance with fuel-economy standards. When fossil fuels are burned to power cars and trucks, they result in emissions of so-called "criteria" air pollutants that harm human health. *See* 77 Fed. Reg. at 62,901-07. These pollutants include fine particulate matter (which can cause asthma, heart disease, and premature death) and nitrogen oxide and volatile organic compounds (which combine to make ground-level ozone that can damage lung tissue and aggravate respiratory disease and infections).

Id. at 62,901-02.[6] These pollutants are also emitted during the upstream production and refining of the fuel consumed by cars and trucks. *Id.* at 62,901.

Environmental Petitioners' members are injured by these emissions because they live near busy highways and refineries and have "no choice but to breathe the air." *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (petitioner had standing where she lived close to source of air pollution); *accord NYPIRG*, 321 F.3d at 325 (same); *see* Add42-43 (Woodfield Decl. ¶¶ 2-5); Add47-49 (Munguia Decl. ¶¶ 2-8); Add54-57 (Dietzkamei Decl. ¶¶ 9-15); Add60 (Blomquist Decl. ¶¶ 6-7); Add63-64 (Hume Decl. ¶¶ 5-7). Air quality in these locations is "among the worst in the nation." Add54-55 (Dietzkamei Decl. ¶¶ 9-12); Add42 (Woodfield Decl. ¶ 3). Several members suffer, or have watched family members suffer, from respiratory problems associated with the relevant air pollutants. *See, e.g.*, Add43 (Woodfield Decl. ¶ 5); Add48-49 (Munguia Decl. ¶¶ 6-7); Add54-55 (Dietzkamei Decl. ¶¶ 9-12). As the agency acknowledges, people "who live … near major roads experience

[6] *See also* Fed. Highway Admin., *Transportation Air Quality: Selected Facts and Figures* 6-8 (2016), https://www.fhwa.dot.gov/environment/air_quality/publications/fact_book/factbook2016.pdf.

elevated exposure to a wide range of air pollutants, as well as higher risks for a number of adverse health effects." 77 Fed. Reg. at 62,907; *see Baur v. Veneman*, 352 F.3d 625, 637-40 (2d Cir. 2003) (government statements acknowledging risk of harm "weigh in favor of concluding that standing exists"). The agency also has found that emissions reductions from fuel-economy compliance would "result in significant declines in the adverse health effects that result from [this] exposure." 77 Fed. Reg. at 63,062. These members' "likely exposure to additional" air pollution from fuel-economy *non*-compliance is thus "certainly an 'injury-in-fact' sufficient to confer standing." *LaFleur*, 300 F.3d at 270.[7]

Causation and Redressability: Increased exposure to harmful air pollutants is fairly traceable to the unlawful suspension because the agency indefinitely suspended a final rule that was designed to improve automakers' compliance with the fuel-economy standards. JA52-53.

[7] These members were also procedurally injured when the agency failed to provide notice and an opportunity to comment on the indefinite suspension. Add45 (Woodfield Decl. ¶¶ 10-11); Add50-51 (Munguia Decl. ¶¶ 14-15); Add57 (Dietzkamei Decl. ¶ 16); Add61 (Blomquist Decl. ¶ 9); Add65-66 (Hume Decl. ¶¶ 9-10). And at least one member is injured for the additional reason that the suspension's effect on fuel-economy compliance will decrease the availability of fuel-efficient cars that she would like to purchase. Add49-50 (Munguia Decl. ¶¶ 8-13).

Automakers admit that they decide whether to comply with the fuel-economy standards based on the civil penalty amounts. JA33, 35. The agency's indefinite suspension of the $14 penalty increase will thus result in greater non-compliance with fuel-economy standards (and a concomitant increase in emissions of harmful air pollutants) because it reinstated an inadequate $5.50 penalty rate that does "not provide a strong enough incentive" for automakers to comply with the standards. JA13. Indeed, the agency has observed that "many manufacturers [fell] behind the standards for model year 2016 and … model year 2017," JA79; *see* JA57-58—years when automakers based their compliance decisions on the $5.50 rate, JA33, 35. Because the outdated $5.50 rate did not adequately deter violations of the fuel-economy standards in those model years, "[c]ommon sense and basic economics" suggest that it will not do so for upcoming model years either. *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (when "predicting … causal effects" for standing, "common sense can be a useful tool").

The increased exposure to harmful emissions would also likely be redressed by a favorable decision for essentially the same reasons. *See id.* at 6 n.1. Vacating the unlawful suspension and reinstating the $14 penalty rate would deter violations of fuel-economy standards (and thus

lessen harmful emissions) because—unlike with the inadequate $5.50 rate—the resulting penalties would be comparatively more expensive for automakers than the cost of achieving the fuel-economy standards. Add20-23 (Tonachel Decl. ¶¶ 11-15) (calculating automakers' marginal cost of compliance in Model Years 2019 and 2020 at roughly $10 to $12 per tenth of a mile per gallon); *see also Laidlaw*, 528 U.S. at 187 ("civil penalties provide sufficient deterrence to support redressability"). Indeed, automakers admit that "increased penalties have the effect of making the [fuel-economy] standard more stringent." JA42.

The agency itself also projects that "increasing the level of the [fuel-economy] penalty rate will lead to … increased compliance with [fuel-economy] standards, which would result in greater fuel savings and other benefits." JA80. And Congress mandated the penalty increase here in order to restore the "deterrent effect of civil monetary penalties and promote compliance with the law." 28 U.S.C. § 2461 note, sec. 2(b)(2); *see In re Idaho Conservation League*, 811 F.3d 502, 510-11 (D.C. Cir. 2016) (affirming an "incentives-based theory of standing" that was "supported by congressional and agency assessments"). Thus, vacating the unlawful Suspension Rule and reinstating the increased penalties would clearly have "a deterrent effect that ma[kes] it likely, as opposed

to merely speculative, that the penalties would redress [members'] injuries by … preventing future" violations of fuel-economy standards. *Laidlaw*, 528 U.S. at 187.

II. The Suspension Is Unlawful for at Least Three Reasons

The Suspension Rule violates three basic principles of administrative law, each of which provides independent grounds for setting it aside: (A) the agency identified no lawful authority for the suspension; (B) the agency violated the APA by failing to provide notice and an opportunity to comment before suspending the penalty increase; and (C) the suspension is arbitrary and capricious because the agency never justified why it suspended the penalty increase instead of leaving it in place to deter fuel-economy violations during the reconsideration.

A. The agency lacked authority for the suspension

It is "well-established" that "'an agency literally has no power to act … unless and until Congress confers power upon it.'" *Abraham*, 355 F.3d at 202 (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). That is because an agency, as a "creature of statute," has "*only* those authorities conferred upon it by Congress." *Id.* (quoting *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)). To suspend the effective date of a final rule, then, an agency "must point to something

in the [governing statutes] or the APA that gives it authority" to do so. *Clean Air Council*, 862 F.3d at 9.

The agency here identified no such authority. Instead, it invoked a purported "inherent authority" to suspend the Civil Penalties Rule and suggested that suspending the penalty increase was somehow "consistent with" its general statutory authority to administer the fuel-economy program. JA78. Neither of these cursory assertions can support the *ultra vires* suspension. *See Clean Air Council*, 862 F.3d at 9 ("'A reviewing court must judge the propriety of [the suspension] solely by the grounds invoked by the agency' when it acted." (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (internal alterations omitted)).

Citing this Court's decision in *Abraham*, the D.C. Circuit recently reaffirmed that an agency lacks "inherent authority to issue a brief stay of a final rule ... while it reconsiders it." *Id.* (internal quotation marks omitted). There, as here, the agency "cite[d] nothing for the proposition that it has such [inherent] authority, and for good reason: ... 'agencies may act only pursuant to authority delegated to them by Congress.'" *Id.* (quoting *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014)). Indeed, this Court in *Abraham* had already "reject[ed] the contention" that an agency has "'inherent power' to suspend a duly promulgated rule where

no statute conferred such authority." *Id.* (citing *Abraham*, 355 F.3d at 202). Applying "well-established principle[s]" of administrative law, this Court deemed the agency's assertion of inherent authority in *Abraham* to be "puzzling." 355 F.3d at 202. The agency's continued reliance on such non-existent "inherent authority" here, JA78, more than a decade after *Abraham*, directly contravenes this Court's precedent.

Nor does the agency's statutory authority to administer the fuel-economy program permit the indefinite suspension. The agency's authority to administer the program derives from the Energy Conservation Act, 49 U.S.C. §§ 32901-32919, which nowhere authorizes suspending a final rule. *See Abraham*, 355 F.3d at 202 (comparing Clean Air Act § 307(d)(7)(B), which permits staying a final rule for three months during reconsideration in limited circumstances, with Energy Conservation Act provisions that do not even provide for reconsideration, much less a stay). And an agency's general authority to administer a regulatory program cannot possibly provide the power to suspend final rules where, as here, Congress separately established deadlines for those rules to take effect. *See NRDC v. Reilly*, 976 F.2d 36, 40-41 (D.C. Cir. 1992) (rejecting agency's contention that its "general authority" to prescribe regulations "includes the power to stay

regulations already promulgated"); *Sierra Club v. Pruitt*, 17-cv-06293-JSW, ECF 72, slip op. at 10-11 (N.D. Cal. Feb. 16, 2018) (agency's delay of final rule exceeded its authority in light of statutory deadlines).[8]

In fact, Congress instructed the agency here *not* to delay—much less suspend indefinitely—the long-overdue increase to the fuel-economy penalty rate. Instead, the Improvements Act commanded that the penalty increase "*shall take effect* not later than August 1, 2016," followed by annual adjustments "not later than January 15 of *every year thereafter*." 28 U.S.C. § 2461 note, sec. 4(a), (b)(1)(B) (emphasis added). Congress mandated these increases to restore the deterrent effect of penalties that had been eroded by decades of inflation. *Id.*, sec. 2(a)(2)-(3), (b)(1)-(2).

Yet, despite this "clear statutory command" for an increase by August 2016 and recurring annual adjustments every January thereafter, *Reilly*, 976 F.2d at 41, the agency's indefinite suspension of the penalty increase has now extended well beyond January 2018

[8] *See also generally* Lisa Heinzerling, *The Legal Problems (So Far) of Trump's Deregulatory Binge*, Harv. L. & Pol'y Rev. (forthcoming) (manuscript at 7-14), https://ssrn.com/abstract=3049004 (explaining how agencies under the Trump administration have failed to identify legal authority for their delay or suspension of dozens of final rules).

without *any adjustment* to the outdated $5.50 penalty rate. The Court "cannot conclude" that an agency has "authority to stay regulations that were subject to [statutory] deadlines." *Id.* And because the suspension here is expressly "indefinite[]," JA77, it may result in the penalty *never* being adjusted for inflation. *See Steed*, 733 F.2d at 98 ("an 'indefinite suspension' does not differ from a revocation simply because the agency chooses to label it a suspension"). The indefinite suspension is thus not only unauthorized, it is prohibited by these statutory deadlines.

In short, the agency here did not identify statutory authority for its indefinite suspension. The Suspension Rule should therefore be "set aside" as "in excess of statutory … authority." 5 U.S.C. § 706(2)(C).

B. The agency violated the APA by suspending the final rule without notice and comment

Even if the agency had authority to suspend the penalty increase (which it did not), the Suspension Rule is still plainly unlawful because the agency failed to provide notice and comment and thus acted "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

Under the APA, an agency must provide the public with "[g]eneral notice of proposed rule making," as well as "an opportunity to participate in the rule making through submission of written data,

views, or arguments." *Id.* § 553(b)-(c). "The important purposes of this notice and comment procedure cannot be overstated." *N.C. Growers Ass'n*, 702 F.3d at 763. Notice and comment "serve the need for public participation in agency decisionmaking" and "ensure the agency has all pertinent information before it when making a decision." *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 168 (2d Cir. 2013) (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011)). They also help ensure "that the agency maintains a flexible and open-minded attitude towards its own rules." *N.C. Growers Ass'n*, 702 F.3d at 763 (quoting *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985)).

The notice-and-comment requirement (as well as its important purposes) applies with no less force when an agency seeks to suspend or delay a final rule. Suspending a final rule is "tantamount to amending or revoking a rule." *Clean Air Council*, 862 F.3d at 6; *see also Abraham*, 355 F.3d at 194; *Steed*, 733 F.2d at 98; *NRDC v. EPA*, 683 F.2d at 763 n.23. And because the APA specifically provides that amending or revoking a rule requires notice and comment, 5 U.S.C. §§ 551(5), 553(b)-(c), the "indefinite postponement of [a rule's] effective date" requires them too. *NRDC v. EPA*, 683 F.2d at 762; *id.* at 763 n.23 ("To allow the

indefinite postponement of a rule without compliance with the APA, when a repeal would require such compliance, would allow an agency to do indirectly what it cannot do directly.").

Thus, an agency that "issu[es] a legislative rule is itself bound by the rule until that rule is amended or revoked," and it may not alter—or suspend—such a rule "without notice and comment." *Clean Air Council*, 862 F.3d at 9 (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992)); *see Abraham*, 355 F.3d at 204-06 (agency violated APA by delaying effective date of final rule without notice and comment); *NRDC v. EPA*, 683 F.2d at 761-67 (same); *Nat'l Venture Capital Ass'n*, 2017 WL 5990122, at *7-11 (same).

The APA provides a limited exception to the notice-and-comment requirement where the agency for "good cause" finds that notice and comment is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). But this Court and others have repeatedly made clear that the exception "should be narrowly construed and only reluctantly countenanced." *Abraham*, 355 F.3d at 204 (quoting *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995)); *see also, e.g.*, *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

The APA also requires that an agency relying on this exception "incorporate[]" the good cause finding and a "statement of reasons therefor[e] in the rules issued." 5 U.S.C. § 553(b)(B). The requirement that an agency "articulate its basis for dispensing with normal notice and comment[] is not a procedural formality." *N.C. Growers Ass'n*, 702 F.3d at 766. A reviewing court must examine closely the "proffered reason for an agency's deviation from public notice and comment." *Id.* at 767. The exception is "not an 'escape clause'"; a "true and … supportable finding of necessity or emergency must be made and published." *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 385 (2d Cir. 1978).

Each of the justifications the agency offered for invoking the good-cause exception here has already been rejected by this and other courts.

First, the agency claimed that it had good cause to withhold notice and comment because the effective date of the Civil Penalties Rule was "imminent" and it needed "additional time" to reconsider the rule. JA78. But the APA does not permit an agency to suspend a final rule without notice and comment simply because the agency decides to revisit the rule on the eve of its effective date. This Court rejected precisely the same argument in *Abraham*, where the agency claimed that it "wished for more time to 'review and consider[]'" an energy efficiency rule that

had an "imminent" effective date. 355 F.3d at 205. The Court held that such imminence does not provide good cause to avoid notice and comment, especially where (as here) the agency itself had initially designated that effective date. *Id.* (the "imminence of [a] self-imposed deadline d[oes] not qualify as good cause to dispense with notice-and-comment" (citing *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983))).

The Third Circuit reached the same conclusion when another agency sought to suspend and reconsider a rule, without notice and comment, at the start of the Reagan administration. "[T]he imminence of a deadline … is not sufficient to constitute 'good cause' within the meaning of the APA," the court explained, because otherwise an agency "could simply wait until the eve of a … deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *NRDC v. EPA*, 683 F.2d at 765 & n.25. That is precisely "what happened in this case, and the agency's action therefore falls outside the scope of the good cause exception." *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (rejecting agency's assertion of good cause to avoid notice and comment when suspending a final rule on the eve of its effective date); *see also Nat'l Venture Capital Ass'n*, 2017 WL 5990122, at *7-11 (same).

Second, the agency attempted to justify its failure to provide notice and comment here because, after suspending the penalty increase, it "s[ought] out public comments" as part of the separate reconsideration process. JA78. But providing "notice and comment procedures *after* the postponement [of a final rule] does not cure the failure to provide them *before* the postponement." *NRDC v. EPA*, 683 F.2d at 768 (emphasis added). That is, inviting comment on the "separate" and "discrete action" of reconsidering a final rule, *California II*, 2018 WL 1014644, at *6, "cannot replace" the requirement to solicit comments on the different question of "whether the [rule] should [have] be[en] postponed in the first place," *NRDC v. EPA*, 683 F.2d at 768.

This Court in *Abraham* thus rejected as "without merit" the agency's similar argument that providing notice and comment on replacement efficiency standards either "cured or mooted the absence of notice and comment prior to the amendment of the original standards' effective date." 355 F.3d at 206 n.14. "It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005). Allowing comment on the reconsideration of a final rule therefore "does not cure the failure to give the public an opportunity to

weigh in with comments *before*[]" the rule is suspended, "as [is] required by the APA." *Becerra*, 276 F. Supp. 3d at 966 (emphasis added).

Third, and finally, the agency also suggested that there was no "concrete impact from the delay" because the Civil Penalties Rule would "not [have] affect[ed] the civil penalty amounts assessed against any manufacturer for violating a [fuel-economy] standard prior to the 2019 model year." JA78. But when the penalties would have been *assessed* provides no basis to withhold notice and comment, because the Civil Penalties Rule was designed to deter automakers from violating fuel-economy standards in their *current* compliance decisions. JA53; *see supra* at 12-13. The agency itself recognized that, because of the time required to design and produce a fleet, automakers' compliance decisions "are often fixed years in advance." JA52-53. Indeed, the very premise of Intervenors' Industry Petition in 2016 was that automakers had already designed their pre-Model Year 2019 fleets, and had decided whether to comply with the fuel-economy standards "based on … the existing civil penalty amounts." JA33. The agency's indefinite suspension of the Civil Penalties Rule in 2017 thus plainly had a "concrete impact" by reinstating the inadequate $5.50 penalty rate for the model years that automakers were presently designing. And once

those less efficient vehicles are designed and produced, the resulting emissions of harmful air pollutants will continue for their lifetime.

Moreover, even if there were no "concrete impact from the delay," as the agency erroneously suggested, JA78, that would undermine any basis for suspending the penalty increase in the first place—much less the asserted "good cause" to circumvent notice and comment. *See Abraham*, 355 F.3d at 205 (good cause exception applies only where notice-and-comment procedures would pose a "threat to the *public* interest" or do "real harm"); *Nat'l Nutritional Foods*, 572 F.2d at 385 (exception requires a "supportable finding of necessity or emergency"); *Mack Trucks*, 682 F.3d at 93 (exception "excuses notice and comment in emergency situations, or where delay could result in serious harm" (quoting *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004))).

"In short, there was no legitimate reason whatsoever for [the agency] to ignore the commands of the APA regarding notice and comment." *Envtl. Def. Fund*, 716 F.2d at 921. "[I]ndefinite postponement of the effective date of the [Civil Penalties Rule] required notice and comment," and the agency "did not have good cause for dispensing with the APA's requirements." *NRDC v. EPA*, 683 F.2d at 767. Because the Suspension Rule was "promulgated without complying

with the APA's notice-and-comment requirements" and "failed to meet any of the exceptions to those requirements," it is an "invalid rule" that must be vacated. *Abraham*, 355 F.3d at 206.

C. The suspension is arbitrary and capricious

Finally, even if the agency had authority to suspend the penalty increase (which it did not), and even if the agency followed the required procedures (which it did not), the Suspension Rule is still unlawful for yet another reason. One of the "basic … requirements" of administrative law is that an agency "must give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. The agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where, as here, an agency fails to provide that explanation, "its action is arbitrary and capricious" and "cannot carry the force of law." *Encino Motorcars*, 136 S. Ct. at 2125.

Consistent with these standards, when an agency wishes to deviate from a prior rule, it must provide a "reasoned explanation" for the change and "'show that there are good reasons'" for it. *Id.* at 2125-26 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The same basic requirement also applies when an agency suspends a

prior rule. *See Steed*, 733 F.2d at 98-99 (rejecting agency's indefinite suspension of final rule as arbitrary and capricious); *see also California II*, 2018 WL 1014644, at *6 ("Any suggestion … that the Suspension Rule should be reviewed with less rigor than any future revision has no merit."). Thus, an agency is "required to give a reasoned explanation" for suspending the final rule, *California II*, 2018 WL 1014644, at *13, and must "'cogently explain' why [the] suspension [i]s necessary," *Steed*, 733 F.2d at 105 (quoting *State Farm*, 463 U.S. at 48).

The Suspension Rule is arbitrary and capricious because the agency never provided any reasons—much less "good reasons," *Encino Motorcars*, 136 S. Ct. at 2126—to justify its indefinite suspension of the penalty increase. To be sure, the agency identified some reasons why it wished to *reconsider* the Civil Penalties Rule. JA80-81. But when it "came to explaining the 'good reasons'" for the *suspension*, the agency "gave almost no reasons at all." *Encino Motorcars*, 136 S. Ct. at 2127. That is, the agency never justified the "separate" and "discrete action" of suspending the rule's effective date during the reconsideration. *California II*, 2018 WL 1014644, at *6. The agency's failure to separately "justify the indefinite suspension" of the penalty increase

renders its Suspension Rule "arbitrary and capricious." *Steed*, 733 F.2d at 99-100.

The D.C. Circuit's decision in *Steed* is directly on point. There, the court held that an agency—indeed, the very same agency as here—could not suspend a tire safety rule merely because it wished to reconsider the rule. *Id.* at 100-03. The court held that the agency's suspension of the rule was arbitrary and capricious because "NHTSA did not explain why the existing [rule] could not have continued while the agency" developed alternatives to the rule. *Id.* at 102.

So too here. The agency never explained why it did not leave the Civil Penalties Rule in effect during the reconsideration. Instead, the agency simply asserted: "Because NHTSA is reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration." JA78; *see also* JA81. This cursory and circular assertion fails to meet the "basic … requirements" of reasoned decision-making. *Encino Motorcars*, 136 S. Ct. at 2125. An agency "cannot use" a possible "future revision, which has yet to be passed, as a justification for the Suspension Rule." *California II*, 2018 WL 1014644, at *6. Because the agency has "failed to provide the requisite reasoned analysis in support

of the Suspension Rule," it is "arbitrary and capricious within the meaning of the APA." *Id.* at *13.

Indeed, the agency also "failed to consider an important aspect of the problem" because it ignored Congress's deadlines for the penalty increase. *State Farm*, 463 U.S. at 43. An agency that wishes to change a prior rule must show that "the new position is consistent with the law." *Steed*, 733 F.2d at 99 (internal quotation marks omitted); *see Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 65-66 (D.C. Cir. 2017) (same). But the agency here never even *mentioned* the Improvement Act's "express statutory command" that the initial penalty increase take effect in August 2016, followed by annual adjustments every January thereafter. *Steed*, 733 F.2d at 105. Instead, "NHTSA's approach to fulfilling an undisputed statutory mandate [wa]s to withhold *any*" penalty increase —and to do so indefinitely—until it completed a reconsideration that had no end date. *Id.* "That is not what Congress commanded the agency to do, nor is it reasonable behavior by an agency." *Id.*

Finally, the Suspension Rule is also arbitrary and capricious because the agency "failed to consider the benefits" of leaving the Civil Penalties Rule in place to deter fuel-economy violations during the reconsideration. *California I*, 277 F. Supp. 3d at 1123. Congress

mandated a prompt penalty increase because decades of inflation had eroded the deterrent effect of the outdated $5.50 penalty. 28 U.S.C. § 2461 note, sec. 2(a)(3). And the agency previously recognized that the "increased penalty" in the Civil Penalties Rule "will accomplish [the] goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles." JA53. The Suspension Rule never acknowledges this important benefit of the $14 penalty, however, and instead reinstates the inadequate $5.50 penalty that does "not provide a strong enough incentive" for automakers to comply with the standards. JA13; *see supra* at 27; *Encino Motorcars*, 136 S. Ct. at 2126 (an agency's "unexplained inconsistency" is reason for finding an "arbitrary and capricious change" (internal quotation marks and alteration omitted)). The agency's "failure to consider the benefits" of leaving the penalty increase in effect thus rendered its suspension "arbitrary and capricious." *California I*, 277 F. Supp. 3d at 1123.

In short, because the agency "did not 'cogently explain' why suspension was necessary" when the penalty increase "could have been retained" during the reconsideration, "NHTSA's 'indefinite suspension'" is "arbitrary and capricious." *Steed*, 733 F.2d at 105.

CONCLUSION

For the foregoing reasons, the Court should vacate the unlawful Suspension Rule and reinstate the Civil Penalties Rule as of its prior effective date.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Opening Brief complies with the type-volume limitations of Second Circuit Rule 32.1(a)(4)(A) because it contains 9,332 words, excluding parts of the document exempted by Rule 32(f).

Dated: March 6, 2018

/s/ *Ian Fein*
Ian Fein

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 March 6, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Ian Fein*
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