17-2780 (L)

17-2806 (CON)

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,

ASSOCIATION OF GLOBAL AUTOMAKERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,
Intervenors.

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

BRIEF OF INTERVENOR ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.

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CORPORATE DISCLOSURE STATEMENT

The Alliance of Automobile Manufacturers, Inc., is a 501(c)(6) tax exempt corporation incorporated under the laws of the State of Delaware. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In this case, various State and organizational petitioners have petitioned for judicial review of a "[f]inal rule" (JA0077) prescribed by the National Highway Traffic Safety Administration ("NHTSA") temporarily deferring an adjustment of the civil penalty pertaining to the corporate average fuel-economy program. Intervenor the Alliance of Automobile Manufacturers, Inc. ("Alliance") will focus in this brief on the jurisdictional bars to the petitions for review, demonstrating that the Petitioners do not have standing, their petitions are untimely, and the time for filing petitions for review set forth in the statute invoked by Petitioners is jurisdictional. The Alliance understands that the Association of Global Automakers ("Global"), the other intervenor in support of the Respondents, will devote its brief to a discussion of the substantive defects in Petitioners' claims.

JURISDICTIONAL STATEMENT

This Court does not have jurisdiction because none of the Petitioners has Article III standing, and the petitions for review were untimely.

ISSUES PRESENTED FOR REVIEW

1. Do any of the Petitioners have standing?

2. Were the petitions for review, which were filed more than 59 days after the rule at issue in this case was "prescribed," untimely?

3. Is time limit for seeking judicial review set forth in 49 U.S.C. § 32909(b) jurisdictional?

STATEMENT OF THE CASE

Petitioners, consisting of States and non-governmental organizations ("Organizations"), seek judicial review of a temporary deferment of the civil penalty adjustment for the Corporate Average Fuel Economy ("CAFE") program. In this brief, which focuses on the threshold jurisdictional issues of timeliness and standing, the Alliance will provide an overview of the CAFE program and the regulatory actions giving rise to this case. We anticipate additional background information will be provided by Respondents and intervenor Global.

A. CAFE

In 1975, Congress, in Title III, Part A of the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871, 901, *et seq.*, enacted the CAFE program through amendments to the Motor Vehicle Information and Cost Savings Act ("Cost Savings Act"), which, at the time, was set forth at 15 U.S.C. §§ 1901 *et seq.* Included in the EPCA amendments to the Cost Savings Act was a judicial review provision that later was revised and codified without substantive change into 49 U.S.C. § 32909.

Under the CAFE program, the National Highway Traffic Safety Administration ("NHTSA") sets and enforces fleet average fuel economy standards, and assesses civil penalties against manufacturers that fail to meet the standards and "are unable to make up the shortfall with credits." JA0078. The amount of the civil penalty has been $5.50 per each tenth of a mile per gallon that a manufacturer's fleet average CAFE level falls short of the standard, multiplied by the number of vehicles in the fleet that has the shortfall. *Id.* There are several unique features of the CAFE program that bear upon the issues briefed below.

First, unlike nearly all civil penalty schemes, which establish maximum civil penalties and authorize the administering agency to impose a penalty that is lower than the maximum as circumstances warrant, the CAFE statute sharply curtails NHTSA's discretion to impose anything less than the applicable maximum penalty for shortfalls in meeting CAFE standards. JA0038-0039, 0079, 0080.

Second, unlike most federal regulatory programs, under which standards are established and all regulated parties are expected to comply, Congress established a very different scheme to regulate CAFE. Congress directed NHTSA to establish each year's CAFE standard at the "maximum feasible" level. In legislative history, Congress further directed

NHTSA to take "industrywide considerations into account" in setting the CAFE standards, and not to set the standard at the level that only the least capable manufacturers could achieve for all years. S. Rep. No. 94-516, at 154 (1975) (Conf. Rep.).

Thus, from the program's beginning, Congress acknowledged that not all manufacturers would be able to meet the CAFE standards in a given model year.

Consistent with the legislative history of the concept of "maximum feasible" standards quoted above—a concept that encompassed both "technological feasibility" and "economic practicability" (*id.*)—NHTSA has always interpreted the law as permitting manufacturers to elect to pay a civil penalty in lieu of achieving the numeric standards. Indeed, NHTSA itself has described the CAFE law as providing five separate "compliance flexibilities" to satisfy shortfalls with the CAFE standard for a given year: carryforward credits (which can be carried forward for five years after they are earned), carryback credits (which can be carried back for three years after they are projected to be earned), civil penalty payment, credits acquired in trade from other manufacturers and credit holders, and credits transferred within a manufacturer's own fleets of regulated vehicles.[1]

As a result of these various options, as well as widespread compliance with CAFE standards, "[t]o date, few manufacturers have actually paid civil penalties, and the amounts of CAFE penalties paid generally have been relatively low." JA0051. For a variety of reasons, NHTSA expects CAFE shortfalls to be more frequent in the future. JA0080.

B. NHTSA's Response to the Civil Penalties Adjustment Act

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act ("Civil Penalties Adjustment Act"), Pub. L. No. 114-74, Section 701, was signed into law. JA0025. As NHTSA has explained, the act's purpose

> is to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. [It] requires agencies to make an initial catch up adjustment to the civil monetary penalties they administer through an interim final rule and then to make subsequent annual adjustments for inflation. The amount of increase of any adjustment to a civil penalty pursuant to [the] Act is limited to 150 percent of the current penalty.

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[1] http://www.nhtsa.gov/CAFE_PIC/CAFE_PIC_home.htm, last accessed March 16, 2018. *See also* JA0051 (Federal Register notice referring to "flexibilities"). As NHTSA has explained, manufacturers may earn CAFE credits for overcompliance or purchase them from another manufacturer. JA0078.

JA0025-0026. On July 5, 2016, NHTSA issued an interim final rule adjusting various civil penalties it administers, including the CAFE penalty. NHTSA determined that, for the initial adjustment, the application of the multiplier set forth in guidance provided by the Director of the Office of Management and Budget for calculating the initial adjustment would yield an increase in excess of the statutory the 150% statutory limit. Accordingly, NHTSA set the adjusted limit at "$14 (Current penalty $5.50 x 2.5)." JA0027.

The Alliance and Global petitioned for reconsideration of the July 5, 2016 interim final rule. JA0031, *et seq*. Pointing to the unique nature of the CAFE program and penalties, the Alliance and Global noted that the interim final rule would retroactively apply to model years that already have been completed or for which a company's compliance plan has already been set. JA0032. The Alliance and Global also pointed to serious flaws in NHTSA's estimate of the economic impact of the civil penalty increase. JA0033. Using NHTSA's own CAFE Compliance and Effects Model ("the Volpe model"), the Alliance and Global estimated that the average annual cost increase associated with the $14 penalty would be "approximately $1 billion over the baseline." JA0037.[2]

On December 28, 2016, NHTSA responded to the requests for reconsideration of the July 2016 interim final rule. JA0051. To address the retroactivity problems raised in the Alliance/Global petition, NHTSA decided to apply the new $14 civil penalty beginning with the Model Year ("MY") 2019 vehicles. JA0052. NHTSA, however, utterly failed to address its more than $1 billion cost calculation error at that time.

Subsequently, on January 30, 2017, March, 28, 2017, and June 27, 2017, NHTSA issued final rules delaying the effective date of the civil penalty adjustment. *See* JA0056, 0059, 0075. None of these decisions was challenged. Then, on July 7, 2017, NHTSA filed two documents with the

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[2] In comments in the reconsideration proceeding initiated in July 2017, the Alliance and Global submitted revised estimates of the negative economic impact of a $14 civil penalty, which were based on the NHTSA Volpe model. The "Volpe model predicts ***a total cost increase of more than $3.5 billion per year*** if the CAFE penalty remains at $14.00. Even after taking into account the theoretical benefits from a higher penalty in the form of fuel savings and other benefits, the $14 value will cost society more than it will benefit from the increased penalty." Alliance & Global Comments in NHTSA-2017-0059, at 11. (These and other comments in the docket are available on Regulations.gov at https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=NHTSA-2017-0059). The net social costs of a $14 penalty for Model Years 2019-2032 at a 3% discount rate are $0.5 billion, and the net social costs at a 7% discount rate are $5.7 billion. *Id.* at 10.

Office of Federal Register. *See* JA0078, 0083 (showing filing dates). Those documents were immediately made available for Public Inspection at the Federal Register. *See* Federal Register, 07/07/2017 Public Inspection Issue, https://www.federalregister.gov/public-inspection/2017/07/07. They were published in the Federal Register on July 12, 2017. *See* JA0077, 0078.

The first document—the one under review here—was a final rule further delaying the effective date of the civil penalty adjustment "pending reconsideration." JA0078. The second document announced NHTSA's reconsideration of the civil penalty adjustment and sought comment on specific issues. *Id*. The reconsideration proceeding (docketed as NHTSA-2017-0059) is pending, and comments in it have been filed by or on behalf of Petitioners National Resources Defense Council ("NRDC"); Sierra Club; and Center for Biological Diversity; the Attorneys Generals of Petitioners California, Maryland, New York Pennsylvania, and Vermont; the Attorneys Generals of the District of Columbia, Iowa, Massachusetts, Oregon, and Washington; The American Council for an Energy-Efficient Economy; the California Air Resources Board; amicus Institute for Policy Integrity; the

Environmental Defense Fund; various academics; and the Union of Concerned Scientists; as well as the Alliance and Global, among others.[3]

STANDARD OF REVIEW

A party on direct review of an agency action bears the burden of proving the elements necessary to demonstrate standing through affidavits or other evidence setting forth specific facts in support of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (analogizing the petitioner on direct review of agency action to a plaintiff seeking summary judgment and holding that "therefore, the petitioner must either identify in [the agency] record evidence sufficient to support its standing to seek review or, if there is none . . . submit evidence to the court" that shows "a substantial probability that it has been injured, that the defendant caused its injury, and that the court could redress that injury") (internal quotation marks omitted).

With regard to timeliness, "[t]he burden is on a party seeking federal court review to demonstrate the existence of the statutory prerequisites to jurisdiction." Harry T. Edwards et al., *Federal Standards of Review* 30 (2d

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[3] *See* Regulations.gov docket, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=NHTSA-2017-0059.

ed. 2013). The timeliness issue briefed here turns on the interpretation of 49 U.S.C. § 32909(b) in light of undisputed facts about when the rule at issue was filed and made available for inspection at the Federal Register, when it was published in the Federal Register, and when Petitioners filed their petitions for review.

SUMMARY OF THE ARGUMENT

Petitioners do not have Article III standing. In assessing the Petitioners' standing, the focus of the inquiry should be on the standing of the petitioners who meet the venue requirements set forth in Section 32909(a). But in any event, none of the Petitioners has standing. The injuries they assert are speculative and conjectural, rather than actual, imminent, or certainly impending. Moreover, those injuries are not fairly traceable to the limited temporary deferment of the civil penalty adjustment at issue here. Finally, because of the complexities and regulatory flexibilities of the CAFE civil penalty scheme, and the substantial impact of independent decisions by third parties not before the Court on whether the Petitioners' claimed injuries ever would arise, there is no basis to contend that the relief sought by Petitioners is likely to redress their alleged injuries.

In addition, the petitions for review were untimely. Petitioners seek judicial review under 49 U.S.C. § 32909. Subsection (b) of Section 32909 provides that a petition for review must be filed no more than 59 days after the rule under review was "prescribed." Petitioners argue that the term "prescribe" means "publish in the Federal Register," but none of their arguments has merit. Instead, the term should be construed to refer to the date on which the public is deemed to be on public notice of the contents of the regulation—which, pursuant to 44 U.S.C. § 1507, is the date on which the document was filed at the Federal Register.

The temporary deferment at issue in this case not only was filed at the Federal Register on July 7, 2017, but was made available for public inspection that day, and was prominently announced in a NHTSA press release. Petitioners, however, did not file their petitions for review until September 7, 2017—62 days after the rule was prescribed. Their petitions are therefore untimely.

Section 32909(b)'s 59-day time limit for filing petitions for review is jurisdictional and, hence, non-waivable. When Section 32909 was originally promulgated as part of the EPCA amendments to the Cost Savings Act, the statutory time limit was included in the same paragraph as the provision granting courts of appeals jurisdiction to hear petitions for review. None of the subsequent changes in the wording or organization of the judicial review provision were intended to have substantive effect, and, therefore, the time limit was, and remains, jurisdictional.

Because Petitioners do not have standing, and their petitions were untimely, the Court does not have jurisdiction, and this case should be dismissed.

ARGUMENT

I. PETITIONERS DO NOT HAVE STANDING.

Standing is an element of the Article III limitation of the judicial power to "Cases" and "Controversies." *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). To establish standing:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (alterations, internal footnote, citations, and quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ***certainly*** impending." *Lujan*, 504 U.S. at 564 n.2 (internal quotation marks omitted)*, quoted in Clapper*, 568 U.S. at 409. "Thus, we have repeatedly reiterated that threatened injury must be ***certainly impending*** to constitute injury in fact, and that [a]llegations of ***possible*** future injury are not sufficient." *Clapper*, 568 U.S. at 409 (alteration in original and internal quotations marks omitted).

"[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 562 (internal quotation marks omitted); *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). "Where, as here, a litigant complaining of procedural or substantive injury is not the regulated party, the litigant must demonstrate that favorable action by the agency is likely to result in favorable action by the regulated party in addition to demonstrating a link between the procedural or substantive injury to the litigant and the adverse agency action." *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 229 (2d Cir. 2012); *see also id.* ("plaintiff injured by a regulated third party must demonstrate a likelihood that the third party would change action in the event that the defendant agency changes action, notwithstanding the fact that plaintiff has alleged a procedural injury"). "A plaintiff therefore lacks standing if his 'injury' stems from an indefinite risk of future harms inflicted by unknown third parties." *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011); *see also Clapper*, 568 U.S. at 413 (stating that the Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment").

The Petitioners' arguments about standing obscure the limited nature of the regulatory action at issue in this case. This case is not about whether the CAFE penalty should be $5.50 or $14. Nor is it about whether the CAFE standards themselves should be more stringent. It is about a temporary deferral of the CAFE civil penalty adjustment to permit NHTSA to reconsider its earlier conclusion that a $14 civil penalty amount is appropriate—a conclusion that ignored evidence about the more than $1 billion in costs resulting from a $14 civil penalty. *See* JA0077 ("The final rule did not address the other points raised in the Industry Petition."); *id.* ("NHTSA is now reconsidering the final rule because the final rule did not give adequate consideration to all of the relevant issues, including the potential economic consequences of increasing CAFE penalties by potentially

$1 billion per year, as estimated in the Industry Petition."). When viewed through the lens of what Petitioners are actually challenging in this case—a temporary deferment of a civil penalty adjustment in order to take comment upon and consider the proper amount of the penalty—as well as the unique features of the CAFE civil penalty scheme, Petitioners' standing arguments fade into insignificance.

The unique features of the CAFE civil penalty scheme discussed above (at 3-4, *supra*) enhance Petitioners' difficulties in establishing standing. Although petitioners' standing arguments focus on emissions, ***none*** of the five "compliance flexibilities" afforded by the program—carryforward credits (which can be carried forward for five years after they are earned), carryback credits (which can be carried back for three years after they are projected to be earned), civil penalty payment, credits acquired in trade from other manufacturers and credit holders, and credits transferred within a manufacturer's own fleets of regulated vehicles—reduces emissions in the shortfall fleet. The choice of which of these compliance flexibilities to employ to address a shortfall belongs to each manufacturer, who may choose different strategies in different model years. Petitioners do not know which strategies will be selected by which manufacturers in future model years, nor the effect of any given selection on fuel consumption by that manufacturer's fleet.

Petitioners also face a difficult burden because they predicate their alleged standing on the risk of future injuries. To support standing, an asserted future injury "must be certainly impending" or at least a "substantial risk." *Clapper*, 568 U.S. at 414 n.5 (internal quotation marks omitted); *see also id.* at 409.[4] Future injury based on "an extended chain of contingencies" cannot support standing. *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016). "When considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 900 (2016) (internal quotation marks omitted).

Moreover, the second prong of the standing inquiry requires a link between the actual or imminent injury and the conduct under challenge. *See, e.g.*, *Clapper*, 568 U.S. at 410-11, 412-13 (noting the respondents' failure to link their alleged injuries to the statutory provision under chal-

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[4] The Supreme Court has stated that this Circuit's "'objectively reasonable likelihood' standard is inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury in fact.'" *Clapper*, 568 at 410 (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)).

lenge). There is no standing "where the court 'would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct].'" *Role Models Am., Inc. v. Harvey*, 459 F. Supp. 2d 28, 35 (D.D.C. 2006), *aff'd on other grounds sub nom. Role Models Am., Inc. v. Geren*, 514 F.3d 1308 (D.C. Cir. 2008) (quoting *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980)).

There also must be a "substantial likelihood the requested relief will remedy the alleged injury in fact." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (internal quotation marks omitted).

A. The Organizations Do Not Have Standing.

When the Court set the briefing schedule in this case, it asked the parties to address whether certain of the Petitioners "'reside[]'" or have their "'principal place of business'" in this Circuit. Doc. # 128, at 2. The Organizations' brief indicates that NRDC is the only organizational petitioner that meets the venue requirements under 49 U.S.C. § 32909(a). This does not preclude non-resident Petitioners from joining NRDC as co-petitioners***, as long as NRDC*** satisfies the requirements for organizational standing. If it does not, then the Organizations' Petition for Review (17-2780) should be dismissed or transferred to a court in which it could properly have been brought. *Cf. Pub. Citizen, Inc. v. Mineta*, 343 F.3d 1159, 1170-71 (9th Cir. 2003) (transferring petitions filed by Washington, D.C. residents to the D.C. Circuit after concluding that the California petitioners did not file timely and, therefore, the Ninth Circuit "lack[s] jurisdiction to address the merits of their petition for judicial review"). The only declarants upon whose declarations the Organizations rely on for standing who are NRDC members are Faviola Munguia and Kathleen Woodfield.[5]

To establish standing, an association must, among other things, demonstrate that "at least one of its members would have standing to sue in his own right." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003). Despite submitting numerous declarations, the Organizations have not demonstrated at least one of their members has standing.

First, some of the declarations articulate generalized grievances or political views—for the most part, about air pollution generally. *See* Decl. of Faviola Munguia ¶¶ 7-14; Decl. of Kathleen Woodfield ¶¶ 6-10; Decl. of

[5] Contrary to the States' assertion, venue-related issues are properly before the Court. The Court raised the issue of venue when it issued its briefing order in this case (Doc. # 128), and, as set forth in the text above, the issue is intimately related to the standing issues. The Alliance disputes the propriety of venue in the Second Circuit only if none of the Petitioners who reside or have their principal place of business in this Circuit has standing.

Diana Hume ¶¶ 7-10; Decl. of James T. Blomquist ¶¶ 7-9. Such policy positions do not suffice for establishing concrete, personal injuries. *See*, *e.g.*, *Lujan*, 504 U.S. at 573-78.

A number of the declarants also discuss their "concerns" about health risks associated with air pollution. Munguia Decl. ¶ 7; Woodfield Decl. ¶ 5; Decl. of Janet DietzKamei ¶ 14. For standing purposes, however, an asserted future injury "must be certainly impending" or at least a "substantial risk." *Clapper*, 568 U.S. at 401, 414 n.5 (internal quotation marks omitted); *see also Welborn v. IRS*, 218 F. Supp. 3d 64, 77 (D.D.C. 2016) ("[G]eneral anxiety does not establish standing.").

The Organizations' declarants also fail to demonstrate the harm they complain of is "fairly traceable" to the agency action at issue. Instead, they speculate about health risks of air pollution generally, and assert that any reduction in air pollution would be beneficial. This not only expresses a general policy preference, but also fails to support standing because the putative link between the agency action complained of and actual or imminent injuries rests on a fundamental misunderstanding of the CAFE rubric and the compliance flexibilities (*see supra* at 3-4, 15-16) afforded by it.

Several declarants discuss their residence near oil refineries or other stationary sources of emissions. *E.g.*, Munguia Decl. ¶ 3; Woodfield Decl. ¶ 4. But they do not address the specific products the refineries produce or where they distribute their products, and they do not show that these refineries would close or reduce output, rather than shift production for overseas sales, if domestic demand for petroleum products were reduced as a result of civil penalties (assuming that such a reduction would even occur).

Some declarants take a shotgun approach to pollution. Thus, declarant Hume discusses a host of pollutants from numerous sources (including train tracks) (Decl. ¶¶ 5, 7), and speculates about causal relations between those pollutants and illnesses in her area (*id.* ¶¶ 5, 7-8), but she does not establish that she faces actual or imminent injury that is fairly traceable to the temporary deferment of the penalty adjustment. Similarly, declarant Blomquist states he has lived near highways and, because of pollution, wears a mask while working around his house. Blomquist Decl. ¶ 6. But it is unclear whether he has any basis for asserting that the pollution he complains about actually comes from vehicles and he merely speculates about whether the deferment of the civil penalty adjustment will aggravate his health issues.

Declarant Janet DietzKamei—a member of the Center for Biological Diversity—provides the most detailed claims about the alleged impact of pollutants on her health, but even she fails to establish that vehicle emissions from nearby highways, rather than the activities of nearby refineries, have affected her health. In fact, she suggests the refineries are the source of the problems that she describes: "I am aware that the pollutants that affect me so seriously are emitted by these refineries and by the big oil tankers that bring gasoline to the gas stations where I live, and I am worried about their effects on my health and mobility." DietzKamei Decl. ¶13. And she does not establish that the activities of the refineries or oil tankers are fairly traceable to the temporary deferment of the civil penalty adjustment or that the relief sought by the Petitioners would alter the refineries' activities.

NRDC member Ms. Munguia complains that the temporary deferment of the civil penalty adjustment "will decrease the availability of fuel-efficient cars that she would like to purchase." Org. Br. 26 n.7. But this is rank speculation on her part. She offers no basis for her prediction about the lack of availability of fuel-efficient vehicles and has not averred that she has not been able to find an electric vehicle because of the current penalty rate, much less because of the temporary deferment in the civil penalty adjustment. Munguia's assertion that she will "be on the market for a car again soon and I want it to be electric" (Munguia Decl. ¶ 11), is "insufficient to satisfy the requirement of imminent injury: Such some day intentions—without any description of concrete plans, or indeed even any specification of ***when*** the some day will be—do not support a finding of the actual or imminent injury that our cases require." *Summers*, 555 U.S. at 496 (quoting *Lujan*, 504 U.S. at 564).[6]

The other NRDC declarant, Ms. Woodfield, states (Decl. ¶ 4) that she lives near both highways and refineries. But she does not address the impact of the agency action under challenge upon emissions from the nearby highway. The Organizations' lawyers state that close proximity to high-

[6] Moreover, this case has nothing to do with the current or future availability of electric vehicles ("EV"). There are currently many models of all-electric vehicles offered for sale by various manufacturers, including BMW, Fiat, Ford, General Motors, Mercedes-Benz, Volkswagen, and others. *See* https://www.fueleconomy.gov/feg/evsbs.shtml. A host of manufacturers also offer plug-in hybrid and full hybrid models. With respect to future offerings, various manufacturers, including Ford, General Motors, Toyota, and Volkswagen, have recently announced plans to substantially increase the number of electrified vehicles that they will offer in upcoming model years. See, *e.g.*, Nick Carey & Joseph White, *Ford plans $11 billion investment, 40 electrified vehicles by 2022*, Reuters, Jan. 14, 2018, https://www.reuters.com/article/us-autoshow-detroit-ford-motor/ford-plans-11-billion-investment-40-electrified-vehicles-by-2022-idUSKBN1F30YZ.
All of today's EV product offerings exist under the current CAFE penalty regime.

ways increases exposure to a wide range of pollutants, and note that NHTSA has found that "emissions reductions from fuel-economy compliance would 'result in significant declines in the adverse health effects that result from [this] exposure.'" Org. Br. 26 (quoting 77 Fed. Reg. 62,624, 63,062 (Oct. 15, 2012)). In making this statement, however, NHTSA was not discussing the effects of the temporary deferment of the inflation-adjusted civil penalty. Nor was it even discussing the impact of civil penalties more generally. To the contrary, the statement was made in the context of a rule relating to a "coordinated National Program to improve fuel economy and reduce greenhouse gas emissions of light-duty vehicles for model years 2017-2025." *See* 77 Fed. Reg. at 62,627. That rule addressed fuel economy and emissions standards, not civil penalties, and NHTSA was not opining on whether a temporary deferment of a civil penalty adjustment would have an impact on emissions.[7]

[7] NRDC members Munguia and Woodfield are among the declarants who assert an alleged procedural injury resulting from NHTSA's failure to provide notice and comment on the deferment rule. But in the absence of a "concrete interest that is affected by the deprivation" of a procedural right, procedural injury cannot support standing. *Summers*, 555 U.S. at 496. Here, the declarants have failed to establish a "concrete interest"—an actual or imminent injury—sufficient to support their attempt to ground standing upon a procedural injury.

The inadequacies in the Organizations' declarations are not remedied by the citations (Org. Br. 25) to *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 325-26 (2d Cir. 2003) ("*NYPIRG*"), and *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002). Both cases deal with emissions from stationary sources, unlike the mobile source emissions (vehicles) at issue here. In both cases, the complaining parties established a clear likelihood of increased exposure to emissions as a result of the challenged government action (in light of their location near stationary sources of emissions). Thus, in *LaFleur*, the increased emissions were certain to occur, as was a petitioner's exposure to the increased emissions. *See* 300 F.3d at 270 (air where petitioners work "will undoubtedly contain increased levels of SO_2 whenever the wind blows the facility's emissions in the direction of Campbell Shopping Center Plaza"). Here, it is entirely speculative whether the temporary deferment of the civil penalty adjustment will increase emissions at all.

Moreover, stationary sources of emissions, like refineries, are neither regulated by NHTSA nor subject to the civil penalties at issue here. The effects of the temporary deferment of the penalty adjustment on emissions from refineries are even more speculative than are the effects on emissions from vehicles. Thus, unlike *LaFleur* and *NYPIRG*, this case does not present a scenario in which the "cessation of the injury-causing action . . . would have necessarily followed" from the desired agency action. *Town of Babylon*, 699 F.3d at 229 n.6 (explaining and distinguishing *NYPIRG*).

The Organizations argue the temporary deferment of the civil penalty adjustment will "[i]ncrease[] exposure to harmful air pollutants." Org. Br. 26 (citing JA0052-0053). It is not clear how the cited pages support the assertion for which the Organizations cite them, but in any event, the argument is predicated on a misunderstanding of the temporary civil penalty adjustment deferment, the CAFE civil penalties more generally, and the relationship of CAFE standards to the broader context of regulations of greenhouse gases and pollutants.

First, as previously noted, NHTSA is not proposing to alter fuel economy ***standards***. The agency action here is a temporary deferment of a civil penalty adjustment to address and consider serious calculation errors in the setting of the adjustment and to consider the societal effects associated with the adjustment, as contemplated by Congress.

In addition, there is no basis for the assertion that a change to the fuel economy penalty scheme, let alone a deferral of a decision on fuel economy penalties, would have any effect whatsoever on air quality. Emissions of criteria pollutants from motor vehicles are regulated separately by EPA; those regulations will continue to apply regardless of when the CAFE penalties are resolved or what they turn out to be. Mobile source emissions of greenhouse gases also will not go unregulated, because EPA has separate rules on that subject, as well. In the end, all that Petitioners can do is speculate that NHTSA's proper reconsideration of the CAFE penalty amounts ***might*** set in motion a chain of events that could somehow result in harm to their health—speculation that is inadequate to establish standing.

Thus, it is speculative whether the judicial remedies the Organizations (as well as the States) seek would redress the alleged injuries. Given the unusual structure of the CAFE law, there are, as noted, numerous ways a manufacturer can respond to the CAFE standard in a given model year, including transferring credits within its own fleet, acquiring credits from a manufacturer that has a surplus (there is a private trading market for these), carrying credits forward or backward from future or prior years, or just paying the penalty—all of which are contemplated by the statute and none of which reduces emissions.

Indeed, although an increase in the civil penalty amount likely would affect the price of CAFE credits in the marketplace, and, thereby, affect the transfer of wealth from credit users to credit surplus holders, it is speculative whether it would have any impact on emissions.

The decision whether to employ any of these strategies is entirely up to individual manufacturers. Thus, the ***actual*** environmental effects of the civil penalty adjustment rule (and the deferment of the adjustment) will be determined by the independent actions of "third part[ies]." *See, e.g.*, *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Because of the complexities and intended flexibility of the CAFE program, it is speculative how these actions will be affected (if they are affected at all) by the civil penalty adjustment rule. In addition, manufacturers' decisions concerning future model production are influenced by a host of factors, including anticipated consumer demand for varying kinds of vehicles. Thus, notwithstanding Petitioners' predictions that temporary deferment of the civil penalty adjustment will have dire consequences, many manufacturers are proceeding with plans to expand their electric fleets.[8]

The manufacturers are not the only third parties whose independent actions would determine whether the Petitioners' proposed relief would redress their alleged injuries. The decisions of the motoring public also could play a role in determining the impact of Petitioners' desired increase

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[8] *See* note 6, *supra*.

on CAFE penalties. If increased penalties resulted in increases in the cost of new vehicles, consumers might delay purchasing newer, more fuel efficient vehicles, resulting in larger numbers of older, less fuel efficient, higher-emitting vehicles remaining on the roads longer, which could lead to more, rather than fewer, emissions.

Because the independent choices of third parties—including non-regulated third parties—can profoundly affect the outcome of any policy change with regard to civil penalties, it is speculative, rather than likely, that the remedy Petitioners seek would redress the harms they allege.

There are yet other considerations that add to the uncertainties of predictions about the effect of a change in penalty rates—which, as noted, is not yet even at issue here, as this case concerns only a temporary deferment of a civil penalty adjustment. For one thing, the emissions of criteria pollutants from automobiles, which the Organizations discuss (Org. Br. 24), are regulated by separate EPA regulations under the Clean Air Act, not by NHTSA's CAFE regulations. *See*, *e.g.*, Decl. of Andrew R. Lindhardt ¶ 10. As discussed in further detail below, there is a dual regulatory scheme governing greenhouse gases, as well.

As to the Organizations' contention that NHTSA "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" (Org. Br. 28 (quoting JA 0080)), that was not a NHTSA finding or conclusion, but a mere statement of a tentative expectation that introduced a series of questions, a number of which were designed to test that very expectation. *See* JA0080.

The Organizations also cite the Declaration of Luke Tonachel, NRDC's Director of the Clean Vehicles and Fuels Project to support the proposition that "unlike with the inadequate $5.50 rate," a $14 civil penalty rate "would be comparatively more expensive for automakers than the cost of achieving the fuel-economy standards." Org. Br. 28 (citing Tonachel Decl. ¶¶ 11-15). In supplemental comments submitted by the Alliance on December 1, 2017 in NHTSA Docket 2017-0059 (relating to the reconsideration of the civil penalty adjustment), the Alliance noted significant methodological flaws in an NRDC analysis of the Volpe model that is substantially similar to Tonachel's analysis. *See* NHTSA Docket No. 2017-0059-0018, at 2-3 (https://www.regulations.gov/document?D=NHTSA-2017-0059-0018).

The Alliance pointed out that the NRDC analysis appears not to have updated fuel costs, did not include additional taxes, insurance, and financing in the summary of costs, and assumed that all manufacturers would choose to pay the CAFE penalty when it would cost less than the technology required to meet the standard. NHTSA Docket No. 2017-0059-0018, at 2. In particular, and as especially relevant here, the Alliance stated:

> The assumption that all manufacturers would completely stop adding fuel economy technologies when their costs exceed the CAFE penalty ignores the fact that, for many years, manufacturers have added fuel economy technology that costs more than the CAFE penalty. Moreover, NHTSA has found that many manufacturers have over-complied with the CAFE standards in recent years. The argument that the penalty would improve manufacturer compliance, advanced by NRDC, the Attorneys General and the Institute for Policy Integrity is not consistent with historical reality for many manufacturers.

Id. at 3 (internal footnotes omitted). In light of the serious flaws in the modeling upon which he relies, Tonachel's declaration is inadequate to support the Organizations' standing.

As to Congress' reasons for mandating the civil penalty increases (*see* Org. Br. 28), Congress had no specific intent with regard to CAFE penalties, and for the reasons explained above, the CAFE penalty scheme works differently from other civil penalty provisions. In light of those differences, and the increase in the actual CAFE standards, it is far from clear that a civil penalty increase is even needed to "restore the 'deterrent effect of civil monetary penalties and promote compliance with the law'" (Org. Br. 28, quoting 28 U.S.C. § 2461, note, sec. 2(b)(2)).

* * *

For the foregoing reasons, the Organizations do not have standing to pursue their challenge to the civil penalty deferral.

B. The States Do Not Have Standing.

The States argue they have standing because the civil penalty adjustment deferment will lead to increased greenhouse gas emissions, which, in turn, will lead to climate change that will injure the States' property and require additional expenditures of State funds. States Br. 23-25. In addition, they argue "[c]limate change also injures the States' *parens patriae* interests in the health and welfare of their residents and environments." *Id.* at 25. Further, they assert there will be an increase in "conventional pollution" (*id.* at 26) and particulate matter (*id.* at 27), which will cause "health impacts" that "harm the States' fiscal interests by increasing their health care costs, including Medicaid costs" and, in addition, "make it more difficult for the States to comply with the federal National Ambient Air Quality Standards for $PM_{2.5}$." *Id.* at 26-27. They also argue California's interests as a "*concurrent regulator of automobile emissions*" will be harmed, which will impact "California's distinct sovereign interest in its own emissions reduction program and its participation as a co-regulator of vehicle emissions with NHTSA and EPA." *Id.* at 28.

The States further contend that reduced civil penalties will affect future compliance with CAFE standards and that the "production decisions made by manufacturers well in advance of a model year are . . . directly influenced by the civil penalty amount in effect for those years." States Br. 30 (citing JA0032, 0035, 0052-0053), noting that NHTSA has stated that civil penalties encourage manufacturers to comply with CAFE standards and that a higher penalty will lead to increased compliance. *Id.* at 30-31. Citing the dubious Tonachel analysis (*id.* at 31 n.8), they argue manufacturers are basing their future design decisions on the $5.50 penalty currently in place, which will "likely reduce compliance with the CAFE standards for those years and increase climate change and air pollution impacts." *Id.* at 32. They conclude by baldly asserting that "[v]acating the suspension and restoring the $14 penalty will redress those impacts." *Id.*

The States' standing arguments are insufficient. Although States receive "special solicitude in [the] standing analysis" (*Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)), nothing in *Mass. v. EPA* suggests it is sufficient for States merely to refer to global warming or rely on conclusory and conjectural assertions about possible future harm to establish their standing.

1. *Congress did not intend the general EPCA definition of the term "person" to apply to Section 32909.*

Before turning to the States' specific standing claims, we address an issue raised by the Court in its order setting the briefing schedule. The Court asked "whether the term 'person' in § 32909(a) includes states." Doc # 128, at 2.

The relevance of the issue to *parens patriae* standing is clear. To have *parens patriae* standing, "the State must assert an injury to what has been characterized as a 'quasi-sovereign' interest." *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 601 (1982).[9] Generally, absent express Congressional authorization, a State does not have *parens patriae* stand-

[9] The Court in *Alfred L. Snapp & Son* explained that quasi-sovereign interests "are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. . . . A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." 458 U.S. at 602. Such interests "fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Id.* at 607.

ing to bring claims against the Federal government. *See*, *e.g.*, *id.* at 610 n.16; *Iowa ex. rel. Miller v. Block*, 771 F.2d 347, 354-55 (8th Cir. 1985).[10]

Here, the States invoke a significant number of interests that they clearly regard as quasi-sovereign. For instance, the States, refer to their "*parens patriae*" interests in asserting that the deferment of the civil penalty adjustment is "likely to decrease dairy production in New York and Vermont; lower crop yield in California; reduce native tree species in Pennsylvania; increase heat-related illnesses and deaths in the Northeast (which includes all Petitioner States except California); reduce coastal land in Maryland; and cause droughts in California, New York, and all of New England." States Br. 25-26.

In responding to the Court's inquiry, the States refer (States Br. 44) to a definition of "person" in Section 3(2) of EPCA. Pub. L. No. 94-163, § 3(2), 89 Stat. 874. That definition provided, "As used in this Act: . . . (2) The term 'person' includes . . . (C) the government and any agency of the

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[10] The States argue (at 25 n.6) that States are barred only in suing the federal government as *parens patriae* when resisting the application of a federal statute, but not when a state brings an action to prevent a federal agency from violating a federal statute. The difficulty with this distinction is that almost any suit challenging agency action could be characterized as one that seeks to prevent the violation of federal law, so the exception to the broad prohibition against suing the federal government as *parens patriae* threatens to swallow the rule.

United States or any State or political subdivision." *Id*. That provision was subsequently included in 42 U.S.C. § 6202(2). There, however, the word "Act" was changed to "Chapter." The States argue (States Br. 45) that the substitution of "Chapter" for "Act" was merely a change by Law Revision Counsel, and had no substantive effect. Hence, according to the States, whenever the word "person" is used in EPCA, including in the provision later codified at 49 U.S.C. § 32909, the term includes States. But there are several problems with this argument.

First, the judicial review provision that later became Section 32909 was enacted in Title III, Part A of EPCA, which consisted of amendments to a pre-existing act, the Cost Savings Act. *See* Pub. L. No. 94-163, tit. III, Part A, §§ 301, 89 Stat. 901 (1975), *et seq*. The EPCA House report stated that the definitions set out in Section 3 of EPCA were "to be applied throughout the draft bill ***except in those sections which amend other laws.***" H.R. Rep. No. 94-340, at 11 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1762, 1773 (emphasis added). And as noted, Section 301 of EPCA, which contained the provision that later became Section 32909, was an amendment of another law—the Cost Savings Act.[11]

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[11] The pertinent definition, including the phrase "As used in this Act," in H.R. 7014—the bill discussed in the House Report—is identical to the def-

In addition, the fact that the provision at issue was in an amendment of another Act creates an ambiguity with regard to the meaning of "Act" in EPCA Section 3: Does "this Act" in the general definitions section refer to EPCA amendments of other Acts?

Moreover, although the Title 49 positive law codification (Pub. L. No. 103-272, 108 Stat. 745 (1994)) was not intended to make substantive changes to preexisting law, Pub. L. No. 103-272 included a section (Section 7, 108 Stat. 1379) that repealed preexisting laws, ***including*** Section 301 of EPCA (except for one provision). *See* 108 Stat. 1388. At the very least, this creates uncertainty about whether the definition of "person" in EPCA Section 3(2) actually was carried forward into 49 U.S.C. § 32909 (if it was ever there in the first place), especially because that definition was never expressly incorporated into Title 49 or the previous Title in which the Cost Savings Act provisions were housed (Title 15).

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inition enacted in the EPCA. A Senate bill was passed in lieu of the House Bill, but that bill substituted much of the text of the House bill. *See* 1975 U.S.C.C.A.N. 1762. The EPCA conference reports (H.R. Rep. No. 94-700 (1975) (Conf. Rep.) and S. Rep. No. 94-516 (1975) (Conf. Rep.)) do not discuss or reflect any change in intent with regard to the limited scope of the definitions in EPCA Section 3.

Thus, although the issue is certainly disputable, the weight of evidence supports the conclusion that Congress did ***not*** intend the general EPCA definition of "person" to apply to what later became Section 32909.

2. *Even if the States are "persons" under Section 32909, they lack Article III standing.*

Even if the Court were to conclude that the States are "persons" statutorily permitted to petition for review under Section 32909, and are not subject to the general principle precluding States from asserting claims against the Federal government under the doctrine of *parens patriae*, the States' petition would be subject to dismissal for want of Article III standing.

First, many of the States' injury claims are expressly attributed to "climate change." States Br. 23-26. Such claims reflect the same fundamental confusions about the NHTSA action being challenged as do the Organizations' arguments. NHTSA is not proposing to alter fuel economy ***standards***. The agency action here is a deferment of a civil penalty adjustment to rectify serious calculation errors in the setting of the adjustment and to consider the societal effects associated with the adjustment. In addition, as also noted above, the effects of the agency action under review depend on the actions of independent third parties not before the

Court, including consumers, refiners, and other vehicle manufacturers, and it is impossible to predict with any accuracy what those effects will be.

Moreover, as the States themselves argue, climate change concerns are linked to greenhouse gas levels (States Br. 22), but the States' own declarant, Joshua M. Cunningham, concedes that there are greenhouse gas regulations that address the threat of climate change. This fact leaves him only able to speculate about what automakers "may" do in response to agency action concerning the CAFE civil penalties. *See* Cunningham Decl. ¶ 19 ("If the CAFE fines are reduced to levels that may be less expensive than complying through technology, some automakers ***may*** choose this path for CAFE compliance, ***though they would still need to comply with the U.S. EPA and California GHG regulations.*** However, given that the GHG regulations have flexibility for banking of emissions credits, a ***potential outcome*** would be a reduced pace of technology introduction as automakers use banked GHG credits and under-comply with CAFE.") (emphasis added).

Of course, no decision ***has*** been made to reduce fines. The level of the civil penalties is currently under reconsideration. But more importantly, Mr. Cunningham's analysis is carefully (and, refreshingly, honestly) couched in qualifiers that reflect the conjectural nature of his consideration of alternatives. He certainly is not predicting a ***likely*** outcome. But that he does not—and cannot—do so shows that there is no actual, imminent, or certainly impending injury, and that it is not "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

The States fare no better in arguing that increased emissions could have "health impacts [that] would harm the States' fiscal interests by increasing their health care costs, including Medicaid costs." States Br. 26. In support of their claim that this argument supports standing, they cite *Clinton v. City of New York*, 524 U.S. 417, 430-31 (1998). *Id.*

Clinton is not on point. That case involved a line item veto that cancelled a statutory elimination of a multibillion dollar contingent liability. *Clinton*, 524 U.S. at 430. The line item veto caused an "immediate, concrete injury the moment that the President used the Line Item Veto." *Id.* (internal quotation marks omitted). At stake was a several billion-dollar liability that would have been cancelled by the statutory provision that was the subject of the line item veto. *Id.* at 422. The case does not stand for the broad proposition that potential harms to "States' fiscal interests by increasing health care costs" (States Br. 26) confer State standing.

The link between the fiscal injury the States predict and the temporary deferment of the civil penalty rule is insufficient to establish standing. *Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985), is instructive on this point. There, the State of Iowa alleged an injury resulting from the U.S. Agriculture Secretary's failure to implement three agricultural disaster relief programs during a devastating draught. Iowa contended that, "but for the Secretary's implementation of these disaster relief programs, agricultural production will suffer, which will dislocate agriculturally-based industries, forcing unemployment up and state tax revenues down. As a result, the State will face increased responsibility for the welfare and support of its affected citizens while its available tax revenues are declining." *Id.* at 353.

The Eighth Circuit characterized Iowa's claims as "generalized grievances" about the conduct of government and concluded that the "State's alleged injury is insufficiently proximate to the actions at issue." *Id.* at 353-54.

So too, here, the argument that the agency action complained of—a temporary deferment of a civil penalty adjustment—will lead to "health impacts [that] would harm the States' fiscal interests by increasing . . . Medicaid costs" (States Br. 26) "relies on a highly attenuated chain of possibilities" and "mere speculation" (*see Clapper*, 568 U.S. at 410), reflective of a mere generalized grievance that is insufficient for standing.[12]

The States' arguments about "conventional pollution" (Br. 26-27) fare no better in this regard. Although the CAFE fuel economy ***standards***—which are not at issue in this case—impact emissions of various pollutants from fuel production and distribution, the link between ***the deferment of the adjustment of the civil penalty*** and the levels of such pollutants is entirely speculative and, again, depends on the independent actions of third parties not before the Court.

Citing *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004), the States argue that they have standing because an increase in motor vehicle emissions will make it more difficult to comply with the Federal National Ambient Air Quality Standards for $PM_{2.5}$, necessitating "additional measures to meet those standards." States Br. 27. In *West Virginia*, however, the regulatory scheme at issue directed each state to revise its state implementation plan ("SIP") in accordance with "EPA's NOx emissions budget for the state. The lower the emissions budget, the more difficult and onerous is the states' task of devising an adequate SIP. Thus, lower

[12] The court also refused to permit Iowa to sue as *parens patriae*, invoking "the most recent and well-reasoned" decisions barring States from suing the federal government as *parens patriae*. *Block*, 771 F.2d at 354-55.

growth factors leading to lower emissions budgets causes injury to the states as states." 362 F.3d at 868.

In *West Virginia*, the States were the direct targets of the regulatory scheme at issue, and there was little room for conjecture about the increased burden being placed on the States under the federal scheme. Here, by contrast, the States are not directly regulated by the agency action at issue, and it is entirely speculative whether the temporary deferment of the civil penalty adjustment will have any impact on the States' ability to comply with the national standards, especially in light of the fact that CAFE is far from the only regulatory scheme impacting $PM_{2.5.}$

The States also argue that California's "distinct sovereign interests" as a "*concurrent regulator of automobile emissions*" will be harmed by the temporary deferral. States Br. 28. It is difficult to unpack this argument, and the cited portions of Mr. Cunningham's declaration (¶¶ 3, 6, 7, 18-19, 21) shed no discernible light on this alleged harm. Indeed, it remains utterly unclear from Mr. Cunningham's declaration that California actually would be injured at all, much less in particular. To the contrary, he states that

> [i]f the CAFE fines are reduced . . . some automakers may choose this path for CAFE compliance, ***though they would still need to comply with***

> ***the U.S. EPA and California GHG regulations.*** However, given that the GHG regulations have flexibility for banking of emissions credits, a ***potential outcome*** would be a reduced pace of technology introduction as automakers use banked GHG credits and under-comply with CAFE. This has detrimental effects on California ***and other states.***

Cunningham Decl. ¶ 19 (emphasis added). He then refers to the "weakening of the National Program," (*id.* ¶ 21), but again fails to explain how California sovereign interests in particular would be harmed. Moreover, it is questionable at best whether a State could base standing on a claim that Federal policy frustrates the State's regulatory policy. *Cf. Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 973 (9th Cir. 2009) ("Oregon cannot claim injury simply on the basis that federal subsidies to private parties do not compliment Oregon's policies."). In any event, the States have not explained how the temporary deferment of the civil penalty adjustment harms California in particular as a "concurrent regulator" and, if anything, their evidence shows that this assertion is meritless.[13]

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[13] The States conclude that argument by pointing out that "only one party need have standing to satisfy Article III." States Br. 29. If, however, the only State with standing in this case is California, the Court should dismiss the case, because California clearly does not reside or have its principal place of business in the Second Circuit, as required by Section 32909(a). As we argued above, questions about whether venue is proper here have not been waived, and this Court is no more precluded from dis-

In short, the States do not have standing either, and the petitions for review must accordingly be dismissed.

II. THE PETITIONS FOR REVIEW ARE UNTIMELY.

The statutory provision generally governing judicial review of NHTSA fuel economy regulations provides that petitions for review "must be filed not later than 59 days after the regulation is prescribed." 49 U.S.C. § 32909(b).

Here, although the temporary deferment of the civil penalty adjustment was *published* in the Federal Register on July 12, 2017, it was *filed* and made available for public inspection at the Federal Register on *July 7, 2017*. *See* 82 Fed. Reg. 32,139, 32,140 (July 12, 2017), https://www.federalregister.gov/public-inspection/2017/07/07. That day, NHTSA also issued a press release headlined "U.S. Department of Transportation to reexamine civil penalty rate for Corporate Average Fuel Economy [CAFE] standards."[14] Below the headline was italicized text stating, "*National Highway Traffic Safety Administration opens period for*

missing the case on venue grounds than it was in raising the venue question in its briefing schedule order.

[14] NHTSA, Press Release, U.S. Department of Transportation to reexamine civil penalty rate for Corporate Average Fuel Economy standards (July 7, 2017), https://www.nhtsa.gov/press-releases/us-department-transportation-reexamine-civil-penalty-rate-corporate-average-fuel.

comment; publishes notice delaying effective date of CAFE penalties rule." The press release also stated, "NHTSA is publishing two notices in the Federal Register (docket numbers NHTSA-2016-0136 and NHTSA-2017-0059). The first notice indicates that NHTSA is reconsidering the December 28, 2016, final rule, and seeks comment on the appropriate inflationary adjustment. The second notice delays the effective date of this rule during NHTSA's reconsideration period." The press release provided a link to the Federal Register daily inspection list.

44 U.S.C. § 1507 provides, "Unless otherwise specifically provided by statute, filing of a document [at the Office of the Federal Register] . . . is sufficient to give notice of the contents of the document to a person subject to or affected by it." Thus, the public—including Petitioners—had, at a minimum, constructive notice of the rule under challenge on July 7, 2017.

Petitioners, however, did not file their petitions for review until September 7, 2017—62 days after the regulation was filed at the Federal Register. If the date of constructive notice (July 7, 2017) started the 59-day clock for petitioning for review under 49 U.S.C. § 32909(b), the petitions for review were untimely.

The Court has directed the parties to address whether "under principles of statutory construction," the temporary deferment was "'prescribed' when it was filed with the Office of the Federal Register, when it was published in the Federal Register, or on some other date for purposes of 49 U.S.C. § 32909(b)" and "whether the 59-day deadline in § 32909(b) is a jurisdictional rule." Doc. # 128, at 2.

The Petitioners appear to believe there can be no genuine dispute that "prescribed" in Section 32909(b) means "published"—indeed, means "published in the Federal Register"—and that, in any event, the 59-day limit for seeking judicial review is a mere claims-processing rule, rather than a rule limiting the Court's jurisdiction. As we show below, however, the meaning of "prescribed" in Section 32909(b) is far from clear. None of Petitioners' contentions about this issue actually establishes the conclusion they urge about the meaning of "prescribed." To the contrary, a careful analysis of Section 32909(b) "under principles of statutory construction" (Doc. # 128, at 2) suggests the term "prescribed" was ***not*** intended to refer to publication in the Federal Register. In light of that conclusion, the date the rule was made available for public inspection at the Federal Register (and NHTSA issued a press release about it), which is the date that the public is deemed to have notice of the rule, is a more logical date for the starting of the 59-day clock than is the date it was published in the

Federal Register. As we also show below, Congress clearly intended the 59-day deadline to be jurisdictional.

A. The Rule Was "Prescribed" On The Day It Was Filed At The Federal Register.

The word "prescribe" does not ordinarily mean "publish." Thus, the fifth edition of Black's Law Dictionary (published in 1979, four years after the judicial provision at issue here was enacted in the EPCA's amendments to the Cost Savings Act), "prescribe" is defined as "To lay down authoritatively as a guide, direction, or rule; to impose as a preemptory order; to dictate; to point, to direct; to give as a guide, direction, or rule of action; to give law. To direct; define; mark out." Black's Law Dictionary, at 1064 (5th ed. 1979).

And in Burton's Legal Thesaurus (2d ed. 1992), "publish" does not appear in the lengthy list of synonyms for "prescribe." Instead, the synonyms are "administer, advocate, bid, charge, command, conduct, control, decide, decree, demand, designate, dictate, direct, enjoin, exact, exercise authority, give a directive, give a mandate, give an order, give directions, guide, impose, instruct, issue an order, lay out, lead, mandate, mark out, ordain, order, pilot, *praescribere*, prevail over, proclaim, regulate, require, set, steer, superintend, write a prescription." Burton's at 402.

Petitioners, however, argue that, in *NRDC v. Abraham*, 355 F.3d 179, 196 & n.8 (2d Cir. 2004), this Court decided that "prescribe" means "publish" in EPCA. *See* Org. Br. 18-19; States Br. 47.

The portion of *Abraham* upon which Petitioners rely is dicta and sets forth an assumption the Court made in order to address an issue altogether different than the one presented here: specifically, when, for purposes of an anti-backsliding provision, the Secretary of Energy was precluded from prescribing less stringent amended energy use standards. Petitioners in *Abraham* argued that, once amended standards were ***published*** in the Federal Register, the Secretary was prohibited from reconsidering them and promulgating less stringent standards. The Department of Energy, on the other hand, argued that less stringent standards could be promulgated at any time before the effective date of the standards—years *after* publication in the Federal Register.

The Court was not considering whether, for purposes of judicial review, a rule was deemed to be "prescribed" before it was published in the Federal Register. In addressing the problem that *was* presented in *Abraham*, the Court addressed the litigants' competing contentions, which boiled down to a choice between defining "prescribe" to mean publication date or effective date. In addressing the arguments, the Court noted that the relevant portion of EPCA repeatedly referred to publication as the time when restrictions on the Department's conduct were triggered. In passing—that is, as dicta—the Court also noted that the judicial review provision governing challenges to the standards addressed in the case uses the word "prescribe" and that one of the standard-setting provisions unaccountably also uses the word "prescribe' rather than "publish." *Abraham*, 355 F.3d at 196 & n.8.

The conclusion the Court drew from these observations was ***not*** that, in EPCA, "prescribe" is synonymous with "publish"—the court was not construing the word "prescribe" and was not called onto decide whether "prescribe" is synonymous with "publish." Rather, the court confronted the choice put before it by the litigants: Is the anti-backsliding rule triggered on the publication date or the effective date? Confronted with ***that*** choice, the court rightly concluded that the fact that the statutory provisions at issue set operative dates by reference to publication or, occasionally, by reference to when a rule is "prescribed" supports the conclusion that the publication date of standards—rather than the much later effective date—is the operative date for the anti-backsliding provision. That "prescribe" supports such a conclusion is clear because, whatever "prescribe" means, it does not mean the "effective date" of an earlier-issued rule.

Thus, *Abraham* does not support the Petitioners' contentions. Neither do the cases cited by the States on page 48 of their brief. None of those cases actually says the publication date, rather than the date a document is filed at the Federal Register, is the trigger for limitations on the time for filing petitions for review.

The States' best case, *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997), is readily distinguishable. First, it was an APA action, and, as the court there noted, the statute of limitations for APA actions generally runs from the date of publication in the Federal Register. Second, no one in the case argued that the cause of action might have accrued before publication. Moreover, the court cited the very statute we have cited—44 U.S.C. § 1507—which states that filing at the Federal Register is sufficient to give notice. So, if anything, it is likely that, if the court in *Dunn-McCampbell* had been presented with the argument we are making, the court would have accepted it.

United Airlines, Inc. v. Brien, 588 F.3d 158, 167 (2d Cir. 2009), which both the States (Br. 48) and Organizations (Br. 21-22) cite, also does not support their argument. In the portion of *Brien* (588 F.3d at 167) cited by Petitioners, the Court did not conclude the statute of limitations ran from the date of publication. Rather, the court was merely summarizing the district court's reasoning.

The States' citation (Br. 48) to *Polanco v. DEA*, 158 F.3d 647, 652-53 (2d Cir. 1998), is misleading. There, the Court was not deciding ***when*** the limitations period for petitioning for review of a regulation begins, but rather whether the claim at issue in the case was a challenge to agency action subject to the catch-all 6-year statute of limitations for federal claims against the United States.

The States' citation (Br. 48) to *United States v. Benson*, 548 F.2d 42, 44 (2d Cir. 1977), does not support their argument, either. That case does not discuss time limits for bringing claims, and merely states that a bizarre interpretation of a statute will be rejected unless there is "clear language in the statute" (*id.* at 44) that Congress intended such a bizarre interpretation.

The States (at 49) and Organizations (at 19) also note that regulations that are not published are not final rules. But that contention is irrelevant because the rule here was published.[15] Moreover, the case the

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[15] The States' observation that, in EPCA, the word "'prescribe' is used to denote the decisional process that culminates in a final, published regulation" (States Br. 50) does not support the argument that "prescribe" ***means*** "publish." The regulation at issue here ***was*** published. The issue

States cite for this proposition, *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995), does not say anything about when the period for seeking judicial review begins to run. The issue in *Zhang* was whether the rule had become binding. The court noted that the effective date was not filled in when the document was sent to the Federal Register. Here, by contrast, the effective date was clear in the document available for public inspection. *See* https://www.federalregister.gov/public-inspection/2017/07/07 ("**DATES:** As of July 7, 2017, the effective date of the final rule published in the **Federal Register** on December 28, 2016, at 81 FR 95489, is delayed indefinitely pending reconsideration."). Moreover, the concurrently-published press release reveals NHTSA's clear intent to publish and the immediate effectiveness of the action, and in fact describes publication in the present tense.

Relying on *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947), the States (at 49) also argue that publication provides the public notice of a rule without which the rule cannot have adverse effects on a

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is: when was it "prescribed" for purposes of starting the time for seeking judicial review? We submit that it was "prescribed" when the public was given notice of it—which, under 44 U.S.C. § 1507 is the date it was filed at the Federal Register, which also happens to be the day that it was made available for inspection at the Federal Register, and NHTSA put out a press release trumpeting it.

regulated party. The timeliness of a claim, however, was not at issue in *Merrill*. Rather, the issue there was whether petitioners would be deemed to have had notice of a legal requirement that ***had been*** published in the Federal Register. The case merely addressed an application of the maxim that ignorance of the law is no excuse.

5 U.S.C. § 552(a)(1), also cited by the States (at 49-50), merely requires publication of substantive rules in the Federal Register and states that persons cannot be adversely affected or otherwise required to comply with rules that should have been so published, but were not. This rule does not address the timing for judicial review.

The States (at 51-52) and Organizations (at 20-21) also argue that, when various judicial review provisions were combined into 49 U.S.C. § 32909 as part of the positive law codification that merged various transportation laws into U.S. Code Title 49, Congress changed the word "published" in Section 402(e)(3)(A) of Pub. L. No. 95-619, 92 Stat. 3206, 3256, to "prescribed" in what became Section 32909(a)(2) and (b). This, however, does not establish that Congress thought the word "prescribed" means "published," much less "publish in the Federal Register."

To the contrary, Congress clearly distinguished between "published" and "prescribed" in Section 402(e)(2) of Pub. L. No. 95-619, a provision directly adjacent and closely related to Section 402(e)(3)(A). Section 402(e)(2) stated, "If any final rule is prescribed by the Secretary after such public comment period under subsection (d) of this section, it shall be published in the Federal Register, together with each of the findings required by subsection (d) of this section." Thus, in Section 402(e)(2), publication occurs *after* prescription.

In the Title 49 codification that merged Section 402(e)(3)(A) of the Pub. L. No. 95-619 into Section 32909, the codifiers papered over that distinction, but almost certainly did so because the change simply did not matter in the context of the largely stylistic changes being made in connection with the codification. As noted, the wording change trumpeted by Petitioners relates to Section 402(e)(3)(A). To our knowledge, there never has been a petition for judicial review filed under that provision. Thus, the logical explanation for the codifiers' conversion of "published" to "prescribed" in the Title 49 codification is that the codifiers made a change to a little- (perhaps, never-) used provision, and the change, as Congress itself noted, was made for stylistic reasons and "for consistency in the revised title and with other titles of the United States Code." H. Rep. No. 103-180, at 240. There is no basis for inferring that the use of "prescribed" in a provision that might never be invoked by a petitioner meant that Congress thought "prescribed" meant "published in the Federal Register" wherever the word is used.

The States also argue that the legislative history of the positive law codification "shows several other instances where Congress used 'prescribed' interchangeably with 'published' or 'promulgated.'" States Br. 52 (citing H.R. Rep. No. 103-180, at 79, 169, 46 (1993)).

None of the States' examples supports their argument. In the first example (actually on page 80 of the report), the Committee stated that the word "prescribe" was substituted for "take such action as may be necessary to develop and publish." H.R. Rep. No. 103-180, at 80 (internal quotation marks omitted). If anything, this merely shows that Congress thought that "prescribe" meant ***the action necessary*** *to* develop and then publish a rule—that is, "prescribe" describes the activities ***before*** actual publication.

The other two cited instances—at pages 46 and 169 of H.R. Rep. No. 103-180—discuss substitutions of the word "prescribe" for "promulgate." It is not clear why petitioners believe these substitutions support their argument that "prescribe" means "publish," much less that it means "publish in the Federal Register."

Finally, the States assert that NHTSA's regulations "designate publication—not filing with OFR—as the terminal rulemaking act." States Br. 52 n.16 (citing 49 C.F.R. § 553.29 and *Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1095 (D.C. Cir. 1997)); *see also* Org. Br. 19 (making similar argument).

Section 553.29, however, merely states that a rule is published if it is "adopted" by the Administrator. If anything, the regulation suggests that adoption, rather than publication, is the significant event. Moreover, this provision says nothing about time limits for seeking judicial review. In addition, 49 C.F.R. § 553.39, which addresses the effect of petitions for administrative reconsideration on the time for seeking judicial review, states that the "period for seeking judicial review will commence at the time the agency takes final action upon the petition for reconsideration." It says nothing about "publication."

Horsehead does not support Petitioners' contentions either. That case concerned the meaning of the word "promulgate," not "prescribe." The agency whose regulations were at issue there—EPA—had a regulation defining final action as the date of publication in the Federal Register, 130 F.3d at 1093 n.3, 1095. And because no one raised it, the court did not consider whether a press release and the document's filing at the Federal

Register should be viewed as the date of the promulgation, consistent with 44 U.S.C. § 1507's constructive notice provision.

* * *

Petitioners' arguments that "prescribed" means "publication in the Federal Register" are all unavailing. The logical date for the starting of the clock for seeking judicial review is the date the public is deemed to have received notice of the civil penalty deferment. That date was July 7, 2017, when the rule was filed and made available for inspection at the Federal Register (which also was the day NHTSA issued a press release about it). It is clearly both reasonable and fair to conclude the temporary deferment was "prescribed" on July 7, 2017. Because Petitioners did not file their petitions for review until September 7, 2017—62 days later—their petitions for review were untimely.

B. The Time Limit In Section 32909(b) Is Jurisdictional.

Petitioners assert that the time limit in Section 32909(b), like many other rules governing the time for initiating actions, is merely a claims-processing rule that may be equitably tolled. Org. Br. 22; States Br. 53-54. They are incorrect.

The ultimate touchstone for determining whether a time limit is jurisdictional is Congressional intent. *See*, *e.g.*, *Hamer v. Neighborhood*

Hous. Servs. of Chicago, 138 S. Ct. 13, 20 n.9 (2017); *Henderson v. Shinseki*, 562 U.S. 428, 438-39 (2011). Generally, there must be a clear statement or indication of Congressional intent that a time limitation is jurisdictional. *See*, *e.g.*, *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-54 (2013); *Gonzales v. Thaler*, 565 U.S. 134, 141-42 (2012).

In *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), which both the States (at 54) and Organizations (at 22) cite as their principal support for their assertions that the Section 32909 time limits are not jurisdictional, the Court emphasized that the time bar at issue there did "not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 1633 (internal quotation marks omitted). The Court further noted that a particularly important factor in determining whether a statutory time limit is jurisdictional is whether the time limit appears in the same provision as other jurisdictional requirements. *Id.* ("This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional.").

Here, when the Section 32909 judicial review provision was first enacted as part of the EPCA's amendments of the Cost Savings Act, the time limits ***were*** set forth in the jurisdiction-creating provision and did not admit of any congressionally-authorized exceptions. As originally enacted, the judicial review provision provided, in pertinent part, as follows:

> Any person who may be adversely affected by any rule prescribed under section 501, 502, 503, or 506 may, at any time prior to 60 days after such rule is prescribed . . . file a petition in the United States Court of Appeals for the District of Columbia, or for any circuit wherein such person resides or has his principal place of business, for judicial review of such rule. A copy of the petition shall be forthwith transmitted by the clerk of such court to the officer who prescribed the rule. Such officer shall thereupon cause to be filed in such court the written submissions and other materials in the proceeding upon which such rule was based. Upon the filing of ***such petition, the court shall have jurisdiction*** to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief as provided in such chapter.

EPCA, tit. III, § 301, 89 Stat. 908 (adding new Section 504(a) to Cost Savings Act) (emphasis added).

In the EPCA provision, the time limit for petitioning for review is not only in the same provision but also in the very same paragraph as the provision expressly conferring jurisdiction, and the reference to "such petition" clearly refers to a petition filed in the proper court within the designated time frame. Thus, by its terms, the statute conferred "jurisdiction" to consider only petitions for review that were filed "prior to 60 days after such rule is prescribed." A petition filed outside those time limits would not be "such" a petition as to confer jurisdiction.

When the provision was later codified and revised for inclusion in Title 49, some of the jurisdictional language was omitted. Specifically, the fourth sentence of the section (the sentence beginning "Upon the filing of such petition") was removed in the positive law codification. *See* Pub. L. No. 103-272(e), 108 Stat. 1070 (adding Section 32909(b)).

As Petitioners themselves note, however, the revisions made in conjunction with the Title 49 positive law codification were *not* intended to be substantive. *See* States Br. 51; Org. Br. 32. They are correct in this respect. As enacted, the time limits were clearly intended to be jurisdictional, and they remain so today.

Thus, if the time for filing the petitions for review in this case started when the rule was filed at the Federal Register—the date when, statutorily (see 44 U.S.C. § 1507), the public is deemed to have notice of the content of the rule—the case ***must*** be dismissed.

CONCLUSION

Petitioners do not have standing, and the petitions for review were untimely. The petitions for review should therefore be dismissed.

Dated: March 27, 2018

Respectfully submitted,
/s/ *Erika Z. Jones*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Intervenor Alliance of Automobile Manufacturers, Inc. certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,054 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 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: March 27, 2018 /s/ *Erika Z. Jones*

CERTIFICATE OF SERVICE

I hereby certify that that on March 27, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: March 27, 2018 /s/ *Erika Z. Jones*