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*)

OPENING BRIEF OF INTERVENOR THE ASSOCIATION OF GLOBAL AUTOMAKERS

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

On Petition for Review from the National Highway Traffic Safety Administration, NHTSA-2016-0136

CORPORATE DISCLOSURE STATEMENT OF THE ASSOCIATION OF GLOBAL AUTOMAKERS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Association of Global Automakers ("Global Automakers") states that it is a nonprofit trade association based in Washington, D.C., charged with promoting the interests of its members in the United States. Global Automakers is not a publicly held corporation, has no parent companies, and no companies have a ten percent or greater ownership interest in Global Automakers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' arguments rely on the theory that an agency has no authority to delay the effective date of a final rule — even when the agency has come to recognize that reconsideration may be required because the rule is invalid and procedurally defaulted. That theory subverts the settled principle that courts will not interfere with the reasonable procedural choices that an agency makes when carrying out its administrative functions. It inverts the procedural safeguards of the Administrative Procedure Act ("APA") — which are meant to ensure that an agency complies with due process and promulgates only valid rules — transforming them into a tool for compelling unlawful agency action. And it turns administrative law into a wasteful, litigation-churning exercise, forcing an agency to implement an invalid, procedurally defaulted rule that is doomed to vacatur and remand once challenged on appeal. Petitioners do not identify any principle in law or logic that justifies this unwarranted judicial intrusion into the administrative process.

In July 2016, the National Highway Traffic Safety Administration ("NHTSA") issued an interim final rule imposing a new, $14 per 1/10th per mile per gallon civil penalty on vehicle manufacturers whose fleets fail to company with the Corporate Average Fuel Economy ("CAFE") standards. That substantial increase was the result of applying the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("2015 Act"), which requires updating civil penalty amounts in most statutes according to a set formula. But an essential part of the 2015 Act was Congress's recognition that a one-size-fits-all formula would not be appropriate in all circumstances. The statute vests agencies, like NHTSA, with responsibility to consider the costs of any civil penalty increase and discretionary authority to adopt a lesser penalty if the formula adjustment would have serious negative economic consequences or if the social costs would outweigh the benefits.

The Association of Global Automakers ("Global Automakers"), along with Intervenor the Alliance of Automobile Manufacturers ("Alliance"), petitioned NHTSA to reconsider its rule and adopt a lesser increase. They showed that NHTSA had unreasonably underestimated the annual cost of the civil penalty increase, which based on the agency's own approved economic cost model would be upwards of $1 billion annually. (More recent estimates show that, in light of continuing changes in the market, the cost would likely be more than $3 billion each year. *See* Joint Comment, NHTSA Docket 2017-0059-0005 (Oct. 10, 2017).) Global Automakers also showed that this substantial increase — nearly three times the current civil penalty amount — would disrupt the market for CAFE compliance credits, which are a central feature of Congress's carefully designed CAFE program. Global Automakers' petition thus requested that NHTSA either adjust the "baseline" year from which the increase was calculated, or exercise its discretion to limit the civil penalty increase in order to avoid serious economic consequences and regulatory disruption.

NHTSA failed to address these substantial and relevant comments, mischaracterizing them in its rush to push out the rule before the next administration took office. As a result, NHTSA promulgated a rule that was procedurally defaulted, having failed to satisfy the fundamental APA requirement that an agency act only after meaningfully considering and reasonably responding to substantive comments. If left uncorrected, that serious APA violation would have grave consequences for the economy, subverting Congress's intent that agencies calibrate any increase in civil penalties to avoid imposing unnecessary social costs.

Later, to its credit, NHTSA recognized that it had not adequately considered Global Automakers' comments or the severe consequences of disrupting the carefully designed scheme of "compliance flexibility" that is central to CAFE. The agency therefore took the responsible step of delaying the rule's effective date while seeking comment on whether it should impose a civil penalty amount less than the full increase.[1] Abundant case law demonstrates that agencies may delay the effective date of a rule to decide whether to grant reconsideration, so long as the agency has a valid reason and does not act arbitrarily.

Here, NHTSA had a valid reason to act — the need to avoid disrupting a carefully designed regulatory scheme by promulgating an invalid and procedurally defaulted rule — and adequately articulated

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[1] At 4:00 p.m. on the day of filing, NHTSA released a Notice of Proposed Rulemaking relating to reconsideration of the final rule. *See* NHTSA, Notice of Proposed Rulemaking (Mar. 27, 2018), available at https://www.nhtsa.gov/press-releases/nhtsa-proposes-retain-corporate-average-fuel-economy-penalty-rate. Because this brief had already been finalized at the time of the Notice's release, Global Automakers has not had an opportunity to determine what, if any, effect the Notice may have on the issues in this case.

that reason. NHTSA's delay of the final rule's effective date was not arbitrary and capricious, and there was no requirement that the agency provide notice and seek comment before taking that modest step. Instead, NHTSA's action was consistent with the requirements of due process and reasoned decisionmaking, and was necessary to preserve the careful balance of fuel conservation and economic growth that Congress intended the CAFE program to serve.

The Court should reject petitioners' attempt to lock in a contested regulatory outcome and disrupt the CAFE compliance flexibility scheme that Congress designed. The Court should dismiss the petitions for review.

JURISDICTIONAL STATEMENT

Global Automakers joins the arguments presented by the United States and the Alliance regarding petitioners' lack of standing. If petitioners have standing, there is a serious question as to whether this Court lacks subject-matter jurisdiction over the petitions, because 49 U.S.C. § 32909(a) — the direct-review statutory provision petitioners rely on, *see* NRDC Br. 4; States Br. 5 — does not apply here.

BACKGROUND

A. Statutory Background

Petitioners' arguments rely on a greatly oversimplified description of the statutory requirements, ignoring the provisions that Congress included to balance the tradeoffs that must be considered when regulating nationwide fuel economy. They urge the Court to transform the complex CAFE program into a rigid environmental statute that serves only one supposed purpose — to protect the environment by forcing short-term improvements in technology. In fact, the CAFE program serves a variety of important, competing policy goals, which is why Congress required NHTSA to consider the economic and social impact of rules governing fuel economy requirements.

1. The Energy Policy Conservation Act and the CAFE Program

Congress enacted the Energy Policy Conservation Act ("EPCA"), Pub. L. No. 94–163, 89 Stat. 871 (1975), as a comprehensive response to the energy crisis of 1973, in part by tightening fuel economy standards for motor vehicles. Congress observed that "[t]he fundamental reality is that this nation has entered a new era in which energy resources previously abundant, will remain in short supply, retarding our economic growth and necessitating an alteration in our life's habits and expectations." *Id.* at 1763. EPCA's stated goals are to "decrease dependence on foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." S. Rep. No. 94–516 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1956, 1957.

"In furtherance of the goal of energy conservation, Title V of the EPCA establishes automobile fuel economy standards." *Ctr. for Biological Diversity v. NHTSA*, 508 F.3d 508, 514 (9th Cir. 2007), *opinion vacated and superseded on denial of reh'g*, 538 F.3d 1172 (9th Cir. 2008); *see also Gen. Motors Corp. v. NHTSA*, 898 F.2d 165, 167 (D.C. Cir. 1990) (Congress mandated corporate average fuel economy standards to "bring about improved motor vehicle fuel efficiency"). Under the CAFE program, NHTSA sets a "minimum level of average fuel economy" applicable to automakers' fleets for each model year. 49 U.S.C. § 32901(a)(6). This level is expressed in fuel economy performance standards that reflect "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year." 49 U.S.C. § 32902(a).

EPCA balances fuel economy and economic goals. Petitioners acknowledge that "Congress created the fuel-economy standards primarily to conserve the nation's energy supplies," NRDC Br. 7, but emphasize that the program is also designed to seek environmental benefits by reducing fuel use and thus tailpipe emissions. This is true but incomplete. EPCA has several recognized purposes. Congress directed NHTSA to take a balanced approach that takes into account economic practicability and costs when deciding how to further the statute's fuel conservation goals so as to protect jobs and consumer choice and to avoid disruptions to the economy. *See* 49 U.S.C. § 32902(f). Congress "carefully drafted" the CAFE program to require fuel economy restrictions that do not have the effect of either "imposing impossible burdens or unduly limiting consumer choice as to capacity and performance of motor vehicles." H. Rep. No. 94-340, at 87 (1975). To prevent sudden shocks to manufacturers and consumers, NHTSA also applies tighter new standards no sooner than eighteen months before the beginning of a model year, in order to give manufacturers time to adjust fleet mixes and implement technologies. *Id.* (citing 49 U.S.C. § 32902(a)). This "lead time" is critical, since fuel economy standards under CAFE are not static, and have become substantially more stringent over time.

Civil penalties under CAFE reflect EPCA's balance of goals. Civil penalties for failure to comply with fuel economy standards are the chief tool of CAFE enforcement. But the statutory grounding of these penalties reflect EPCA's dual purposes — fuel conservation *and* economic practicability — and CAFE civil penalties thus differ in fundamental ways from more traditional, action-forcing civil penalty schemes.

CAFE's civil penalties are calculated by multiplying the prescribed monetary penalty amount by each 1/10th of a mile per gallon (mpg) that a manufacturer falls below the prescribed standards. 49 U.S.C. § 32912(b). That number is then multiplied by the number of CAFE-regulated vehicles manufactured in a fleet that year. *Id.* Civil penalties under CAFE have real bite; unlike most civil penalty schemes, they cannot be remitted or compromised except in cases where the remission is "necessary to prevent the insolvency or bankruptcy of the manufacturer," or on two other very narrow grounds. 49 U.S.C. § 32913(a).

But even the CAFE civil penalty scheme reflects EPCA's focus on balancing fuel economy goals with economic growth. The initial civil penalty amount for CAFE was set by statute at $5 per 1/10th mpg per vehicle. 49 U.S.C. § 32912(b). That civil penalty could be increased by regulation, in an amount not to exceed $10 per 1/10th per mpg, only if the Secretary found that the increase would improve fuel economy and would not "have a substantial deleterious impact on the economy of the United States, a State, or a region of a State." *Id.* § 32912(c)(1)(A). In making the determination whether an increase would have a deleterious economic impact, the Secretary must consider whether it was likely the civil penalty increase would "(i) cause a significant increase in unemployment in a State or a region of a State; (ii) adversely affect competition; or (iii) cause a significant increase in automobile imports." *Id.* § 32912(c)(1)(C). In 2007, Congress passed the Energy Independence and Security Act ("EISA"), Pub. L. No. 110-140 (2007), which amended Section 32912 and ratified the current $5.50 per 1/10th mpg per vehicle penalty while changing the uses to which penalties could be directed. *See* EISA § 112.

Civil penalties are part of CAFE's credit-based scheme of "compliance flexibility." Petitioners complain that some manufacturers chose other means to comply with EPCA besides immediately developing and installing new fuel economy technologies in vehicles. *See, e.g.*, NRDC Br. 26–27; States Br. 31–32. But there is nothing surprising or inappropriate about that. Congress understood that developing new technologies is a longer-term, difficult, and time-consuming process. It would not serve EPCA's goals of balancing fuel conservation with economic growth and preserving consumer choice if manufacturers had no way to comply besides adopting short-term stop-gap measures, such as curtailing production or product offerings, to address the challenges posed by increasingly stringent standards.

The CAFE program thus contemplates a robust system of compliance flexibility. *See* NHTSA, CAFE Overview, *available at* https://one.nhtsa.gov/cafe_pic/CAFE_PIC_home.htm; *see also Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011*, 74 Fed. Reg. 14,196, 14,218 (Mar. 30, 2009) (noting the credit-based scheme of "compliance flexibility" in CAFE); *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and*

Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 63,125 (Oct. 15, 2012) (noting the goal of "maximizing compliance flexibility" and stating that "NHTSA believes Congress balanced the energy-saving purposes of [EPCA] against the benefits of certain flexibilities and incentives."). This flexibility is built on a system of compliance credits: a manufacturer whose fleet over-complies with an applicable standard can bank credits equal to the exceedance that can be "spent" on past or future shortfalls, carrying them forward over five model years or carrying them back three model years. 49 U.S.C. § 32903(a). Credits can also be traded, transferred between a manufacturer's vehicle and light truck fleets, and purchased to cover shortfalls. *Id.* at § 32903(g). Simply put, compliance flexibility is not a way of cheating the CAFE program; it is a central feature of the statute that Congress designed.

Because there are several ways to "comply" under EPCA, the statute is explicit that compliance is measured only after taking compliance flexibilities into account. *See* 49 U.S.C. § 32911(b) ("Compliance is determined after considering credits available to the manufacturer.") A manufacturer may "comply" with the CAFE standards by meeting the standards, or by failing to "meet the fuel economy standard for that category, but . . . proffer[ing] a sufficient number of valid credits, adjusted for total oil savings, to cover the gap between the average fuel economy of the vehicles in that category and the required average fuel economy." 49 C.F.R. § 536.3. Or, "[i]f there are no (or not enough) credits available," the manufacturer may seek NHTSA's approval of a "carry-back plan," describing "what the manufacturer plans to do in the following three model years to earn enough credits to make up for the deficit." 74 Fed. Reg. at 14,218. Manufacturers may also pay civil penalties when this "is deemed more cost-effective than applying additional fuel economy-improving technology, or when adding fuel economy-improving technology would fundamentally change the characteristics of the vehicle in ways that the manufacturer believes its target consumers would not accept." 77 Fed. Reg. at 63,130.

Importantly, under EPCA these compliance flexibilities are *not* taken into account when setting new standards, which means that fuel economy standards are deliberately less stringent than they could be if the agency took into account all existing credits and forced their use.

See 49 U.S.C. § 32902(h); *see also* 77 Fed. Reg. at 63,019 ("If the agency were instead to assume manufacturer use of those flexibilities in setting new standards, that assumption would result in higher standards and thus tend to require manufacturers to use those flexibilities."). The point is simply that under EPCA, manufacturers are not meant to be forced into any particular *mode of compliance* — whether actual compliance, using previously earned credits, buying credits, earning future credits to carry back, or paying penalties. Instead, NHTSA has always understood compliance flexibility to be an important feature of CAFE, seeking to *maximize* compliance flexibility to allow manufacturers to develop longer-term technological solutions while managing the short-term costs of meeting increasingly stringent fuel economy standards. JA64 (noting the increasing stringency of the fuel economy standards); *see* also JA52–53, 79. The system of standards, penalties, and credits is thus far more nuanced than petitioners describe, and it reflects the balance of purposes that is central to the CAFE program.

2. The 2015 Inflation Adjustment Act

In 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74 ("2015 Act"), which amended the Federal Civil Penalties Inflation Adjustment Act of 1990. *See* 28 U.S.C. § 2461 note § 5(C) (codified version). This amendment required most federal agencies that administer civil penalties programs (1) to promulgate an interim rule setting an initial "catch-up" increase to account for inflation, and (2) to make subsequent annual adjustments using the "catch-up" year as a baseline. 2015 Act § 4(b). The catch-up increase is determined by applying a standard cost-of-living adjustment supplied by the Office of Management and Budget to the maximum civil penalty in effect when the penalty was "most recently established or adjusted under a provision of law other" than the 1990 Act. *Id.* § 5(b)(2)(B). Under the statute, the date that a civil penalty was "established or adjusted" has a substantial impact on the size of the initial catch-up increase. Because of natural compounding, applying a fixed cost-of-living adjustment to a recent "baseline year" yields a much smaller civil penalty increase than if the baseline year is set far in the past.

For most statutes, applying the 2015 Inflation Adjustment Act involved a simple ministerial act. But Congress recognized that a one-size-fits-all approach might not be appropriate in every setting. Accordingly, it directed agencies to consider whether applying the statutory formula would yield a civil penalty that was too costly or economically damaging, and gave them discretion to adjust the catch-up increase. With the concurrence of the Office of Management and Budget, agencies may impose a lower catch-up amount when they determine that increasing the maximum civil penalty "will have a negative economic impact" or the "social costs . . . outweigh the benefits." 2015 Act § 4(c). Because the initial increase may dictate the course of future increases, it is important that agencies set the initial increase at an appropriate level.

B. The Interim Rule, Global Automakers' Petition, and NHTSA's Response

On July 5, 2016, without employing notice-and-comment procedures, NHTSA issued an interim rule setting the catch-up increase applicable to all programs under its supervision, including the CAFE program. *See* JA25 (81 Fed. Reg. 43,524 (July 5, 2016)). The agency set 1975 as the baseline, because that was the year the CAFE program and

Section 32912, the civil penalties provision, were first codified. JA27. Applying the cost-of-living adjustment to the 1975 baseline year, NHTSA set the catch-up increase at $14 per 1/10th mpg per vehicle, nearly triple the current $5.50 maximum. JA27. The adjustment's effective date made it applicable to the 2014–15 model years, which were completed but for which compliance files were not closed, and the then-current 2016–17 model years.

Based on a simple extrapolation from the average annual amount of civil penalties collected in recent years, NHTSA estimated that "increasing the current civil penalty amount by 150 percent would not result in an annual effect on the economy of $100 million or more," the threshold for significance under Executive Order 12866. JA28. That initial estimate was unreasonable and inaccurate. NHTSA did not account for the increasing stringency of CAFE standards over time; for the impact of the proposed increase on the cost of compliance credits; or for falling gas prices that have caused consumers to choose less fuel-efficient vehicles, making the standards more difficult to meet.

Global Automakers and the Alliance petition for reconsideration. Global Automakers, together with the Alliance, timely filed a petition for partial reconsideration. The petition advanced three arguments supporting reconsideration.

First, retroactively applying the increase to the 2014–17 model years, long after it was feasible to make design changes, would impermissibly disturb manufacturers' settled expectations and was inconsistent with the structure of the CAFE program. JA35–36.

Second, NHTSA had applied the wrong baseline year. In 2007, Congress passed the Energy Independence and Security Act ("EISA"), amending Section 32912 and ratifying the current $5.50 per 1/10th mpg per vehicle penalty while changing the uses to which penalties could be directed. Accordingly, 2007 was the most recent year in which Congress "established or adjusted" the CAFE civil penalty and, therefore, 2007 is the proper baseline year to which the cost-of-living adjustment should apply. JA34–35. Global Automakers later supplemented its petition, noting that the Federal Aviation Administration had corrected its initial catch-up increase under the 2015 Act for violations of its hazardous substances rules, switching the baseline year from 2005 to 2012 based on comments showing that the maximum penalty for violations of functionally identical regulations had been adjusted by another statute in 2012. JA48.

Third, Global Automakers argued that NHTSA's assessment of the rule's economic impact was vastly understated because the nearly three-fold increase in civil penalties — just a decade after Congress ratified the current $5.50 civil penalty by statute in the EISA — would result in an "average annual cost increase of approximately $1 billion over the baseline." JA37. The agency made a fundamental error in extrapolating from the civil penalty amounts collected in recent years, without accounting for the increasing stringency of the CAFE standards over time and how that might affect manufacturers' ability to meet the standards (especially in light of falling gas prices and changes in consumer buying habits). JA39–40. Moreover, the agency failed to account for the proposal's "dramatic[] impact [on] the credit trading market, including the price of credits." JA38. The Environmental Protection Agency had acknowledged that the sale and trading of credits had become a primary means of compliance with CAFE standards, and "as the CAFE standards rapidly increase over the next few years" and the number of available credits dropped, "the price of credits will increase substantially . . . a factor the agency should have incorporated into its analysis of the economic impact of the proposed increase." JA38.

Taking these critical factors into account, Global Automakers and the Alliance submitted an alternative to NHTSA's extrapolative economic impact analysis. Their alternative analysis input the two civil penalty amounts ($14.00 and current $5.50 per 1/10th mpg per vehicle) into the "Volpe Model," the mathematical model that NHTSA relies on to set CAFE standards, and accounted for the expected increase in the standards' stringency. JA37*; see also* 74 Fed. Reg. at 14,235 (the Volpe Model is the "primary tool the agency has used in conducting a 'compliance analysis' of various CAFE stringencies"). The model results indicated that increasing the civil penalty amount to $14 per 1/10th mpg would cost more than $1 billion per year over the baseline amount — an amount that far exceeded the threshold for "economic significance" under Executive Order 12866 and that was not included in the economic impact analysis. JA37–38; *see also* Joint Comment, NHTSA Docket 2017-0059-0005 (revised estimate showing more than $3.5 billion in annual costs from $14 civil penalty amount). Reviewing these findings, the petition argued that NHTSA had not used "the correct methodology for making a determination regarding the economic significance of the penalty increase." JA38.

The petition requested that the agency confine implementation of the civil penalty increase to future model years to avoid problems of retroactive application. JA41–42. In addition, Global Automakers and the Alliance requested alternative relief to address the substantial economic costs of the new civil penalty amount. Specifically, they requested that the agency either (1) issue a new interim rule that "applies the inflation adjustment to the base year of 2007," or (2) "[i]f NHTSA does not concur that 2007 is the proper baseline year," to exercise the agency's Section 4(c) "discretion with respect to the CAFE penalties," taking into account all the economic costs that the agency had overlooked in its analysis. JA41. If it opted for the latter alternative, "NHTSA should seek public comment on whether the increase dictated by the [2015 Act] would have other cascading effects on the assumptions underlying NHTSA's CAFE analysis, such as whether the higher penalties would alter the conclusions about the economic practicability of the Model Year 2017-2021 standards and how the increased civil penalty amount is affecting the market price of tradeable CAFE credits." JA41. These forms of relief were thus alternatives *to each other*, and not alternatives to petitioners' separate, stand-alone request that the civil penalty increase should not be applied retroactively.

NHTSA mischaracterizes the petition and does not respond to Global Automakers' comments. Just days before the outgoing administration left office, NHTSA granted the reconsideration petition as to the retroactive application of the catch-up increase, delaying implementation of the rule until model year 2019. *See* JA51 (81 Fed. Reg. 95,489, 95,491 (Dec. 28, 2016)). NHTSA did not respond, however, to the separate, alternative request for relief: that the agency should either set 2007 as the baseline year or use its Section 4(c) authority to reduce the catch-up increase. Instead, the rule mischaracterized the petition and its request for relief: It stated that Global Automakers and the Alliance had requested that the increase not be applied retroactively, or that "[i]n the alternative, . . . if NHTSA decided to apply the penalty increase to MYs 2014-2018," it should use "2007 as the 'base year.'" JA51–52. Then, NHTSA continued, the petitioners requested "*as another alternative*" to applying the increase retroactively, that the agency exercise its adjustment discretion under Section 4(c) of the 2015 Act. JA52 (emphasis added). In a footnote, NHTSA concluded that because it was addressing the petition's comment on retroactivity, it "need not address" the petition's purportedly "alternative requests" regarding the baseline year *or* Section 4(c). JA52 n.7. In its haste, NHTSA never acknowledged the $1 billion cost estimate of the civil penalty amount based on application of the agency's own Volpe Model or discussed the impact of increased civil penalties would have on the credit market.

NHTSA's revision to the interim rule was initially scheduled to take effect January 25, 2017, but the effective date was delayed several times. *See* JA56, 59, 75. NHTSA's delay of the rule's effective date, its decision to grant reconsideration before it became effective, and the pendency of the unanswered aspects of the petition for reconsideration obviated the need for manufacturers to challenge the revised final rule.

C. NHTSA Delays The Effective Date of the Rule.

On July 7, 2017, NHTSA delayed the revised rule's effective date pending reconsideration after it concluded that "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." JA77 (82 Fed. Reg. 32,139 (July 12, 2017)). NHTSA corrected its earlier mischaracterization of Global Automakers' arguments, noting that the petition for reconsideration had

> argued that NHTSA used the wrong base year to calculate the inflationary adjustment to the CAFE civil penalty *and* raised concerns about applying the adjusted civil penalty retroactively. The Industry Petition also argued that in the event that NHTSA chose not to adopt the base year suggested in the petition, NHTSA should seek comment on whether NHTSA should adopt a lower penalty level than the one in the interim final rule based on "negative economic impacts[.]"

JA77 (emphasis added). NHTSA admitted that while it responded to the comments about retroactivity, the agency "did not address the other points raised in" the petition — namely, the alternative requests for relief, to either use 2007 as the baseline year or to exercise Section 4(c) discretion to reduce the catch-up increase. JA78.

In a separate notice inviting public comment, NHTSA acknowledged that the "interim final rule did not provide an opportunity for interested parties to provide input fully" on issues related to the baseline year and economic costs. JA78 (82 Fed. Reg. 32,140, 32,142 (July 12, 2017)). These issues, the agency noted, were important, since falling fuel prices were causing consumers to make "purchasing decisions based on factors other than fuel economy," and the agency's "data indicates that many automakers are projected to fall behind the standards for model years 2016 and 2017," raising the likelihood of increased penalties. JA80.

Moreover, the statute gave NHTSA "no leeway to compromise or remit penalties" absent imminent bankruptcy. JA80. "The consequences of this decision [to increase penalties], therefore, are considerable and fairly permanent." JA80. Given the importance of this decision, NHTSA determined to seek "information concerning the costs and benefits of increased penalties" as well as whether to use 2007 as the baseline. JA80. Among the questions on which NHTSA invited comment were the effect of an increased civil penalty on average vehicle sales prices; effect on fuel consumption rates; environmental benefits; and how to determine what constitutes a "negative economic impact" or a "social benefit" that would justify setting a lower catch-up increase. JA80–81. Comments were accepted through October 10, 2017. JA78.

Petitioners filed suit on September 8, 2017 and moved for summary reversal on October 24, 2017. Global Automakers and the Alliance moved to intervene. On January 29, 2018, the Court granted the intervention motions. The motions for summary reversal were denied on February 16, 2018. The Court directed the parties to address certain questions in their briefs, including issues of standing and venue arising from 49 U.S.C. § 32909.

STANDARD OF REVIEW

The Administrative Procedure Act provides that a reviewing court shall set aside agency action, findings, and conclusions only when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "Agency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83, 95 (2d Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*

Ins. Co., 463 U.S. 29, 43 (1983)). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Agencies have broad discretion to choose the appropriate procedures to achieve their statutory missions. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-45 (1978).

ARGUMENT

Assuming *arguendo* that petitioners have standing, NHTSA's action in delaying the revised rule's effective date pending reconsideration should be upheld. NHTSA acted properly, exercising its discretion to delay the final rule's effective date, because the final rule was invalid: It was issued without adhering to the fundamental, due process-derived requirement that an agency give meaningful consideration to, and respond to, substantive comments. That responsibility is heightened here, where the statute describes the factors the agency must apply in determining whether to exercise its discretion to adjust the catch-up increase, and the agency has failed to consider substantial comments that specifically address those factors

The petition by Global Automakers and the Alliance made a strong case that the agency had overlooked substantial economic consequences to applying a rote cost-of-living adjustment to CAFE's complex regulatory scheme. NHTSA ignored these comments and even mischaracterized them in a rush to complete rulemaking. The agency's later decision to delay the final rule before it became effective was the responsible response of an agency that properly recognized that it had failed to comply with its statutory obligations. It was justified under the APA, which gives agencies broad latitude to delay the effective dates of rules — even indefinitely — so long as they have a valid reason for doing so and do not act arbitrarily.

Petitioners seek to convince this Court to take the extraordinary step of interfering with the administrative process, prevent NHTSA from delaying the effective date of the revised rule, and ultimately prevent NHTSA from complying with its obligations under the statute. But because an agency's decision to reconsider its decision is committed to its discretion and is not reviewable, petitioners' challenge is properly limited to NHTSA's decision to delay the effective date of the rule; their substantive complaints regarding the effects of a particular civil penalty amount are premature and not properly before the Court.

Petitioners' arguments for reversal also fail. They cite no precedent holding that an agency must implement an invalid rule that fails to meet the requirements of due process and the APA. Petitioners have not demonstrated that NHTSA lacked a reasonable basis for delaying the effective date of the rule; that the agency acted arbitrarily in failing to promulgate a rule before the statutory deadline; or that it was required to go through notice and comments procedures before delaying the final rule's effective date. Petitioners ignore the substantial economic harm that will be caused by immediate implementation of the final rule, and overstate the environmental effects of failing to implement the rule immediately.

I. NHTSA Acted Lawfully In Staying the Revised Final Rule Pending Reconsideration.

NHTSA's action in delaying the rule pending reconsideration was a lawful exercise of its authority to correct errors in rules before they take effect. Contrary to petitioners' arguments, there is no *per se* rule against delay, but only a rule prohibiting arbitrary delay. NHTSA did not act arbitrarily here, because the final rule was invalid due to the agency's failure to meaningfully consider and respond to substantial comments directly relevant to statutory factors that Congress identified as important in guiding the exercise of the agency's discretion. The fact that NHTSA missed a statutory deadline under the 2015 Act, or failed to take comment on the delay, does not make the delay arbitrary. NHTSA had good cause to act expeditiously to delay the effect of an invalid final rule that would have substantial, immediate negative economic consequences by disrupting CAFE's compliance flexibility program.

A. In Promulgating the Final Rule, NHTSA Defaulted On Its Duty to Give Meaningful Consideration to Global Automakers' Comments.

Every agency has a duty to act lawfully; that is, in a manner that conforms to the requirements of the APA and due process. Central to that duty is the requirement under 5 U.S.C. § 553(e) that an agency meaningfully consider and respond to substantial comments that address "important aspect[s] of the problem" before promulgating a rule. *State Farm*, 463 U.S. at 43. NHTSA's revised final rule was arbitrary and capricious and contrary to law because it failed to satisfy this duty.

The duty to evaluate and respond to record evidence goes to the heart of the requirement of reasoned agency decisionmaking. "[A]n agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48. As part of that obligation, agencies must consider and "respond to all significant comments, for 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.'" *Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979)). An agency's "failure to acknowledge . . . record evidence directly contradicting its conclusion is arbitrary and capricious." *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 102 (2d Cir. 2006) (citing *State Farm*, 463 U.S. at 43).

Requiring agencies to address substantive comments also ensures the efficacy of judicial review: unaddressed comments "leave a reviewing court unable to say that the agency has considered all relevant factors." *Alabama Power*, 636 F.2d at 385. And it is a critical component of the due process right encapsulated by the APA's requirement that "interested person[s]" be afforded "the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e)*; see also Melrose Credit Union v. City of N.Y.*, 247 F. Supp. 3d 356, 375 (S.D.N.Y. 2017) ("[T]he opportunity to be heard remains the Constitution's 'root requirement.'") (quoting *Boddie v. Conn.*, 401 U.S. 371, 378–79 (1971)). "Agencies which listen and respond to public comment enhance their legitimacy and accountability, both of critical importance when decision making is delegated to a nonrepresentative, politically insulated body." Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 Admin. L. Rev. 113, 116-17 (1984).

Here, when it issued the final rule, the agency defaulted on this duty. In the 2015 Act, Congress directed agencies to choose a baseline year and identified the factors they should consider when determining whether to reduce the catch-up increase to a civil penalty. Significantly, Congress left it to the agencies to determine whether particular programs required something less than the automatic adjustment, based on consideration of whether increasing the civil penalty by the full amount "will have a negative economic impact" or the "social costs . . . outweigh the benefits." 2015 Act § 4(c).

Global Automakers' petition for reconsideration made a strong argument that, under the statute's plain language, the agency had chosen the wrong baseline year, because the Energy Independence and Security Act "adjusted" the CAFE civil penalty amount in 2007. And if NHTSA "[did] not concur" that 2007 is the proper baseline year," JA41, the petition employed NHTSA's own model to demonstrate that using a 1975 baseline and nearly tripling the maximum civil penalty for a CAFE violation would cause serious negative economic consequences. The increase would upset CAFE's careful design, by eliminating the compliance flexibilities that are central to achieving the congressionally mandated balance between economic growth and fuel conservation. JA38.

NHTSA was free to disagree with these comments and evidence, and have its response and explanation for implementing the initial $14 catch-up amount judged on the merits. But it acted arbitrarily when it ignored these comments, since by doing so the agency "entirely failed to consider an important aspect of the problem" identified by Congress. *State Farm*, 463 U.S. at 48.

That failure is particularly noteworthy because Global Automakers' petition went to the heart of both the structure and purpose of the CAFE program and the factors Congress identified as critical in Section 4(c). This heightens the agency's duty to give meaningful consideration to these comments, since Congress has prescribed the manner in which the agency is to undertake its statutory duties and identified the factors that are to guide its discretion. *See, e.g.*, *Verizon Tel. Co. v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) (agency's decision was arbitrary and capricious because it failed to provide "a reasoned explanation for denying forbearance according to the statutory requirements").

The State petitioners dismiss the agency's Section 4(c) authority as "narrow," and emphasize that the government indicated that its exercise should be rare. States Br. 9–10. (The NRDC Brief ignores this statutory provision altogether.) But the fact that the discretion afforded an agency by Congress is narrow, or not to be exercised profligately, does not mean that it should not be exercised in appropriate circumstances. Global Automakers made a strong case that the exercise of the agency's discretion was warranted, and NHTSA was duty-bound to explain why it disagreed (if it did).

Moreover, NHTSA's stated excuse for ignoring Global Automakers' comment — that it was an "alternative request for relief" that was mooted by NHTSA's decision to apply the catch-up increase starting in model year 2019 — was wrong. JA52. The petition's arguments on retroactivity were independent of its arguments about the baseline year and the cost of the catch-up increase; the latter are plainly not a request for relief in the alternative, but are a separate grounds for relief, supported by competent and compelling evidence that the statutory factors for an adjustment to the initial catch-up amount are met. Agency action is arbitrary and capricious when it ignores and refuses to respond to compelling and substantive evidence; it is even more so when the agency proceeds by mischaracterizing the arguments before it.

Because Global Automakers' comments regarding the baseline year and the cost of compliance, "if true, raise points relevant to the agency's decision [that] if adopted, would require a change" to the final rule, the agency could not just mischaracterize them in attempt to sidestep their import. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).

B. There Is No *Per Se* Rule Preventing An Agency From Delaying the Effective Date of A Final Rule In Order to Reconsider.

Petitioners do not dispute that NHTSA did not respond to substantial comments by Global Automakers and others before issuing the final rule. Nor can they dispute that the APA and due process require agencies to consider and respond to substantive comments, especially those that go directly to statutory factors guiding the exercise of an agency's discretion. Petitioners instead argue that NHTSA had no authority to delay a "duly promulgated" rule (sidestepping the question of whether a rule can be "duly promulgated" if it is invalid). They are wrong. There is no *per se* prohibition against delaying the effective date of a final rule pending reconsideration, as NHTSA did here.

1. An Agency Has Power To Delay The Effective Date of a Final Rule.

There is nothing unlawful with an agency reconsidering its own rule, and the decision to do so is not reviewable. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011) (noting that review is available only "if reconsideration is *denied*" (emphasis added)). Nor is delaying the effective date of a final rule, as NHTSA did here, *per se* improper. Indeed, NHTSA's own regulations permit the Administrator to stay the effective date of a rule upon receipt of a petition for reconsideration. *See* 49 C.F.R. § 553.35(d). This is not a NHTSA-specific power. "In an appropriate case, an agency may defer the effective date of a regulation just as a court may defer the effective date of a decree enjoining a nuisance, provided there is justification." *ASG Indus., Inc. v. Consumer Prod. Safety Comm'n*, 593 F.2d 1323, 1335 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 864 (1979); *see also Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S.*, 85 F. Supp. 3d 387, 426 (D.D.C. 2015) (agency's decision to delay effective date of rule to conduct analysis required by regulation was "'justif[ied]' and reasonable").

This power to delay the effective date of a final rule pending reconsideration derives from 5 U.S.C. § 553(d), which requires that (absent emergency circumstances) a substantive rule must be published "not less than 30 days before its effective date." 5 U.S.C. § 553(d). The purpose of this 30-day lag is to give regulated parties a chance to conform their conduct to a new rule, but *also* to give the agency a chance to correct errors and oversights in the new rule. *See Sannon v.*

United States, 460 F. Supp. 458, 467 n.11 467 (S.D. Fla. 1978)*; see also Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) ("We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time."). But this 30-day period is simply a *minimum*, and "there may be cases in which good administration . . . reasonably require[s] a longer period." *Administrative Procedure Act—Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 201, 260 (1946). Nothing in either the plain language of Section 553(d) or the legislative history of the APA prohibit the agency from delaying the time between promulgation and effectiveness, provided that there is good reason to do so and the agency does not act arbitrarily.

Agencies regularly delay the effective date of new rules, sometimes indefinitely, and without controversy. *See, e.g.*, *Clarification of When Products Made or Derived From Tobacco Are Regulated as Drugs, Devices, or Combination Products; Proposed Partial Delay of Effective Date*, 83 Fed. Reg. 2092, 2094 (Jan. 16, 2018) (delaying "until further notice" FDA's "amendments to the existing medical product 'intended use' regulations"); *Examinations of Working Places in Metal* *and Nonmetal Mines*, 82 Fed. Reg. 46,411, 46,413 (Oct. 5, 2017) (delaying for eight months the effective date of a final rule "amending the [Mine Safety and Health Administration] standards for the examination of working places in metal and nonmetal (MNM) mines"). So common is this regulatory action that the Office of the Federal Register's *Document Drafting Handbook*, which was issued in 1991 pursuant to regulation, *see* 1 C.F.R. § 15.10, has an entire section on delays, which it defines as "the equivalent of 'Postpone.'" Office of the Fed. Reg., Document Drafting Handbook at 3–10 (2017), *available at* https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf. The *Handbook* permits an agency to delay the effective date of a final rule indefinitely, the only requirement being that the delay notice "state that [the agency] will furnish the [effective] date in a future Federal Register document." *Id.* at 3–11.

This agency power to delay the effective date of a final rule is consistent with an agency's well-recognized power to request a voluntary remand of a rule when a rule is challenged in court. Remand for "reconsideration [is] typically permit[ted]" so that an agency can "cure its own potential mistake rather than needlessly wasting the

Court's and the parties' resources." *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 25 (D.D.C. 2008) (citing *Ethyl Corp. v. Browner*, 989 F.2d 522, 523-24 & n. 3 (D.C. Cir. 1993)); *see also Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) ("[A]dministrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion."). Rules are frequently remanded so that the agency can respond to substantive comments. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 341 (D.D.C. 2016) (remanding rule to the agency to "respond to significant comments made" by petitioner).

Courts have recognized that where the agency has a valid reason, "voluntary remand is appropriate even without a change in the law or new evidence." *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004). Indeed, even "without [the agency] confessing error," remand is appropriate where the agency "wishe[s] to consider further the governing statute, or the procedures that were followed," or simply because "it ha[s] doubts about the correctness of its decision or that decision's relationship to the agency's other policies." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

Substantively, there is no difference between an agency seeking remand of a final rule to reconsider *after* litigation, or delaying the effective date of a final rule for reconsideration *before* litigation commences. Indeed, it would be absurd to force the agency to implement a legally flawed rule that is immediately vulnerable to challenge — a challenge that in this case would succeed, given the agency's acknowledged failure to consider and respond to substantial comments. Remand would put the parties in the same position they occupy now: waiting as NHTSA takes comment on whether to use a different baseline year or to adjust the formula-derived catch-up increase, while wasting time and judicial and agency resources. There is no principled or logical reason to require the agency to wait to be sued before reconsidering a final rule that is invalid and does not comply with the agency's statutory obligations. Judicial review of agency action is not meant to be "a ping-pong game," *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006), and the Court should not create uncertainty and disruption in the market by forcing the agency to implement a final rule that is plainly flawed and doomed to be remanded after litigation.

A simply hypothetical illustrates the profound problem with petitioners' view. Imagine that a rogue NHTSA Administrator, acting without notice and comment, issued a direct final rule setting the civil penalty at $0. To do so would certainly violate both EPCA and the 2015 Act, and just as certainly would violate the APA. Formally speaking, this rule would be "duly promulgated"; the NHTSA Administrator has the power to issue direct final rules in certain circumstances. But the rule would be invalid and indefensible. Under petitioners' reading of the APA, the Secretary would have no power to delay the rule's effective date before reconsideration; she would be forced to wait to be sued before confessing error and requesting a voluntary remand of the rule.

This hypothetical helps highlight a fundamental principle embedded in the APA and rules of judicial review: A delay is unlawful only if the delay is arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (when an agency changes course, "it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one").

Recognizing that the Court should examine an agency's delay of the effective date of a final rule for arbitrariness does not, as petitioners would have it, establish a *per se* rule that delays are unlawful. To the contrary, an agency has ample authority to delay the effective date of a final rule if it has a valid reason for doing so. *See ASG Indus.*, 593 F.2d at 1335.

2. *Abraham* and *Clean Air Council* Do Not Prohibit An Agency From Delaying the Effective Date of a Rule In All Circumstances.

Petitioners rely principally on *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004), and *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) ("*CAC*"). *See* NRDC Br. 29–31; States Br. 34–36. Neither case mandates reversal of NHTSA's decision to delay the effective date of the revised final rule. These cases merely highlight the critical point: an agency can delay the effective date of a final rule, so long as it provides a valid reason for the delay and does not act arbitrarily.

In *Abraham*, the statutory provision that was "at the heart of the[] proceedings," 355 F.3d at 187, prohibited the agency from revising appliance standards downward to make them less energy efficient. *See*

42 U.S.C. § 6295(o)(1) ("The Secretary may not prescribe any amended standard which . . . decreases the minimum required energy efficiency, of a covered product."). In light of the statutory mandate, this Court determined that publication of the final rule was the date on which standards were locked in and that the statute's "anti-backsliding" provision prevented the agency from granting reconsideration. *Abraham*, 355 F.3d at 195–97. By contrast, the 2015 Act describes certain conditions that give the agency discretion to reduce the catch-up increase, and Global Automakers made a substantial showing that those conditions are satisfied. As NHTSA has correctly recognized, it must consider that showing before its final rule can lawfully take effect.

More fundamentally, in both *Abraham* and *CAC*, the agencies seeking to stay implementation had fully considered the objections that later became the grounds for reconsideration; there was no failure to consider and respond to substantive comments as required by the APA. In *Abraham*, this Court noted that the agency had "invited . . . public comment" on its proposed rule "and set a date for a public hearing." 355 F.3d at 189. The agency received "extensive submissions of public comment, and as the result of the[se] processes . . . promulgated a final rule." *Id.* Likewise, in *CAC*, the industry groups that eventually sought reconsideration filed comments, and EPA "[r]espond[ed] to these comments in the final rule." *CAC*, 862 F.3d at 11. The D.C. Circuit noted that "[t]he final rule thus responded directly to comments and information" received from regulated parties, *id.*, and "[t]he administrative record . . . makes clear that industry groups had ample opportunity to comment on all . . . issues . . . and . . . the agency incorporated those comments directly into the final rule," *id.* at 14. In fact, the petitioner's argument for jurisdiction rested on its acknowledgement that "all of the issues [the agency] identified [as reasons for staying implementation] could have been, *and actually were*, raised (and *extensively deliberated*) during the comment period." *Id.* at 6 (second emphasis added).

In *Abraham* and *CAC*, the agencies stayed a final rule to re-weigh a record that was complete and accounted for all "important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. These cases thus reflect the general principle that an "agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion."

Citizens Against Pellissippi Parkway Extension, 375 F.3d at 417–18 (quoting *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002)).

NHTSA's decision here to delay the effective date of the final rule, far from being arbitrary, was *required*. NHTSA has admitted that it failed to consider Global Automakers' comments regarding the baseline year and the cost of compliance when it revised its interim rule. JA77–79. This failure renders the underlying rule fatally flawed and unsupportable. Petitioners' reliance on *Abraham* and *CAC* is inapt, since in both cases, the agency was staying and reconsidering a rule that was procedurally valid — as opposed to plainly invalid.

C. NHTSA Did Not Act Arbitrarily In Delaying the Effective Date of the Revised Final Rule.

Because NHTSA has authority to delay the effective date of a final rule pending reconsideration as long as it has a valid reason, the question remains: Did it have a valid reason? It did. NHTSA was justified in delaying the final rule because of its earlier failure to give meaningful consideration to Global Automakers' comments regarding the economic consequences of the proposed catch-up increase. It adequately explained those reasons in the Federal Register. Contrary to petitioners' suggestions, the agency's decision to delay the effective date of the final rule is not rendered arbitrary and capricious because it missed a statutory deadline, or because it failed to take comment on the delay.

1. NHTSA Adequately Explained That It Delayed the Effective Date of the Final Rule to Correct Its Earlier Procedural Default.

NHTSA's clearly stated that its reason for delaying the revised final rule was the need to correct its earlier procedural default in failing to give meaningful consideration to Global Automakers' comments. JA77–79. Petitioners refuse to confront the actual reasons NHTSA gave for delaying the final rule and granting reconsideration in its Federal Register notices, preferring to hint at supposed political ones. But the agency's stated reasons are pellucid, and entirely consistent with the requirements of reasoned decisionmaking under the APA.

NHTSA frankly acknowledged that "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," and "did not address" the Global Automakers' alternative request for relief, to either use 2007 as the baseline year or to exercise Section 4(c) discretion to reduce the catch-up increase. JA77. NHTSA also acknowledged that the "interim final rule did not provide an opportunity for interested parties to provide input fully" on issues related to the baseline year and economic costs, and invited comment on what factors the agency should consider. JA78. This explanation, several times repeated, is neither "cursory" nor "circular," as the NRDC contends. NRDC Br. 41; *see also* States Br. 36 n.9. It is clearly identifies why the agency did what it did.

In fact, the agency's consideration of these issues in the rush to close out rulemaking before the change in administrations in January 2017 was not just *inadequate*; it was *non-existent*. NHTSA never acknowledged that application of its own Volpe Model showed more than $1 billion in annual cost increases resulting from the civil penalty increase, and flatly mischaracterized Global Automakers' alternative request for relief to either change the baseline year or exercise Section 4(c) discretion. JA51–53. That is directly in conflict with Congress's direction to consider whether to adjust the initial catch-up where it was shown that implementing the maximum penalty would have negative economic consequences. Using NHTSA's own Volpe Model, Global

Automakers' petition demonstrated that the initial catch-up amount would impose more than $1 billion in annual economic consequences.

NHTSA not only did not respond meaningfully to these comments and this evidence; it flatly mischaracterized them. Now, before its effective date, NHTSA has moved to forestall the implementation of a plainly invalid final rule and to promulgate a valid one. Because that action compliance with the requirements of the APA and due process, no further explanation is required.

2. The 2015 Act's Statutory Deadline Is Not Cause To Issue an Invalid Rule.

Petitioners also argue that NHTSA acted arbitrarily in delaying the effective date of the final rule because the statutory deadline to adjust civil penalties has run. NRDC Br. 32–33; States Br. 15. But petitioners cite no authority for the proposition that a statutory deadline requires the agency to issue a final rule that short-circuits the APA's meaningful-consideration and adequate-explanation requirements. Statutory deadlines are not an excuse to act arbitrarily. *Cf. Ams. for Clean Energy v. EPA*, 864 F.3d 691, 719 (D.C. Cir. 2017) (even when an agency misses a statutory deadline, it remains "bound by our precedents (not to mention basic principles of due process) . . . [to]

reasonably balance its statutory duties with the rights of the entities it regulates”).

Petitioners have made no showing of “egregious[ly]” unreasonable delay that courts have generally required when asked to compel agency action, even in cases of a missed statutory deadline. *See TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984); *see also* 5 U.S.C. § 555(b). Nor could they. NHTSA has stated that it will act after appropriate notice-and-comment procedures to adjust civil penalty amounts consistent with the 2015 Act, and the comment period closed on October 10, 2017. *See TRAC*, 750 F.2d at 80 (declining to compel agency action where agency was “moving expeditiously” to complete proceedings).

In any event, the Court’s power to compel withheld action extends only that far — to compel the agency to act, not to impose a particular substantive outcome. *See McHugh v. Rubin*, 220 F.3d 53, 61 (2d Cir. 2000). Yet here, petitioners demand that the Court order the agency to implement an invalid rule (locking in a contested regulatory outcome in petitioners’ favor) simply to meet a statutory deadline. “The Constitution does not permit [the Government] to prioritize any policy goal over the Due Process Clause.” *Gordon v. Holder*, 721 F.3d 638, 653

(D.C. Cir. 2013). NHTSA has a duty not to implement just *any* rule, but to implement a *valid* rule that comports with the requirements of the APA and due process. The final rule did not.

3. Notice And Comment Was Not Required Before Delaying the Effective Date of the Rule.

Petitioners argue that regardless of whether NHTSA had authority to delay the effective date of the final rule, it had no authority to do so without first providing notice and then seeking comment. NRDC Br. 33–41; States Br. 38–44. This argument fails; the agency was fully justified under the APA's "good cause" exception, 5 U.S.C. § 553(b)(B), to dispense with notice and comment procedures.

An agency need not engage in notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Here, the agency noted that implementing the delay without notice and comment was appropriate "in these circumstances," citing the imminent effective date of the final rule. JA78. Petitioners argue that case law establishes that the imminence of a deadline does not support dispensing with notice and comment procedures. But this misstates the rule; courts have held that "[t]he only rule" is that "'an agency's perception of urgency' *alone* is not sufficient to satisfy § 553(b)(B)'s good cause exception." *United States v. Reynolds*, 710 F.3d 498, 512 (3d Cir. 2013) (emphasis in original). Dispensing with notice and comment procedures is justified where delay "could result in serious harm." *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006). Where the agency is able to identify "circumstances arising from a specific situation," that will suffice to justify proceeding without notice and comment, keeping in mind that the "degree of specificity required is not great." *Reynolds*, 710 F.3d at 513; *see also United States v. Cain*, 583 F.3d 408, 422 (6th Cir. 2009) (no good cause where Attorney General "gave no specific evidence of actual harm").

Here, there is more than just perception; NHTSA is able to point to circumstances arising from this specific situation that establish the need for quick action to delay implementing the revised final rule. As demonstrated above and as NHTSA repeatedly acknowledged, the final rule was invalid because it failed to meaningfully consider and respond to substantive comments showing that implementation of the rule would cause serious economic consequences. But the dangers of implementing the final rule went further than the affront to due process inherent in promulgating a rule that failed to give meaningful consideration to substantive comments. As the agency noted, it has no ability under the statute to remit or compromise civil penalty amounts, which makes "the consequences of this decision . . . considerable and fairly permanent." JA80.

Moreover, NHTSA was justified in delaying the effective date of the rule to prevent the substantial economic harm that could well occur if the new civil penalty amount was to take effect and begin driving changes to vehicle to the market for credits and, potentially, changes to some design and fleet mix. As petitioners acknowledge, "[t]he production decisions made by manufacturers well in advance of a model year are thus directly influenced by the civil penalty amount in effect for those years." States Br. 30. Petitioners argue that this action-forcing mechanism requires immediate implementation of the revised final rule in order to achieve environmental benefits. States Br. 29–32; NRDC Br. 39–40.

This focus on immediate effects is a double-edged sword, because immediate implementation of the final rule would also cause immediate *economic* consequences — and those consequences cannot be undone once model years are finalized and move towards production. Throughout their briefs, petitioners ignore that EPCA is not solely attentive to fuel conservation goals and attendant environmental benefits, and does not seek to achieve those goals at all costs. *See Henson v. Santander Consumer USA Inc.,* 137 S. Ct. 1718, 1725 (2017) ("Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose [ ] at all costs.'") (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)). Rather, the statute balances energy conservation with economic practicability in setting standards and penalties. *See* 49 U.S.C. § 32902(f). This is a "carefully drafted" program, that seeks to avoid "imposing impossible burdens or unduly limiting consumer choice as to capacity and performance of motor vehicles." H. Rep. No. 94-340 at 87. And a central element of this careful balance is the credit-driven system of compliance flexibility, which gives manufacturers the opportunity to comply with the standards by using credits while developing technologies that eventually make compliance without using credits possible.

Global Automakers' petition focused extensively on the threat to the credit market posed by nearly tripling the civil penalty amount, JA31–43, and petitioners are admirably frank in stating their desire to disrupt this market and force manufacturers away from complying by using credits. *See, e.g.*, NRDC Br. 8 n.2. But that is not the way Congress designed this system to work; credit use is not a bug but a feature of the CAFE program. The final rule ignored this complicated and delicate issue, which goes to the heart of Congress's intent in designing the CAFE program. Permitting the final rule to become effective could have begun to have market-distorting economic consequences almost immediately. Given that fact, NHTSA was more than justified in not waiting for the public comment process to exhaust itself while the final rule began to have the "considerable and fairly permanent" market-distorting effects that petitioners cheer. JA80.

Petitioners' arguments about environmental damage from emissions are makeweight. Petitioners insist that the result of delaying the effective date of the final rule will be an "increase in emissions of harmful air pollutants." NRDC Br. 27; *see also* State Br. 29. That ignores that the Environmental Protection Agency has authority under

Section 211 of the Clean Air Act, 42 U.S. Code § 7545, to regulate fuels used in and emissions from motor vehicles. EPA exercised that authority to establish tiered — and progressively more stringent — emissions standards for motor vehicles to address air pollution that may reasonably be anticipated to endanger public health, including volatile organic compounds, nitrogen oxides or NOx, particulate matter, and greenhouse gases. 77 Fed. Reg. at 62,627. It simply is not the case, as petitioners suggest, that vehicle emissions will go unregulated as a result of NHTSA's decision to delay an invalid final rule and consider a more balanced approach.

Given the certainty that manufacturers face increasingly stringent CAFE standards and the disruption an onerous increase in civil penalty amounts will cause to the system of compliance flexibility that is central to CAFE, the agency was justified in acting expeditiously to delay the effective date of an invalid rule.

II. If Petitioners Have Standing, They Have Sued In The Wrong Court.

In its order setting a briefing schedule, the Court asked the parties to address certain issues relating to the application of the EPCA judicial review provision, 49 U.S.C. § 32909, to this case. Global

Automakers notes that the Alliance has addressed those questions in its brief. Here, Global Automakers addresses another issue related to that provision: whether this action must be brought in the first instance in federal district court for review on the agency record.

Appellate courts are "creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them." *Bath Cty. v. Amy*, 80 U.S. (13 Wall.) 244, 247–48 (1871). Unless a federal appellate court has "a specific grant of statutory authority" to hear a petition for review, "subject matter jurisdiction regarding review of agency rulemaking falls to the district courts under federal question jurisdiction." *Abraham*, 355 F.3d at 192-93. Where a direct review provision "plainly does not apply to the agency action that [petitioner] challenges, [the appeals court] lack[s] appellate jurisdiction." *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012); *see also NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013) ("An appellate court's jurisdiction under a direct review statute is strictly limited to the agency action(s) included therein.").

The EPCA direct review provision, 49 U.S.C. § 32909(a), permits direct review in the appropriate circuit court of "a regulation prescribed in carrying out any of sections 32901–32904 or 32908 of this title" or "a regulation prescribed under section 32912(c)(1) of this title." Only Section 32912(c)(1) is even potentially relevant here, as it is the only provision dealing with civil penalties. Subsection (c)(1) permits the Secretary "to prescribe by regulation a higher amount [than the statutorily prescribed $5 penalty] for each .1 of a mile a gallon to be used in calculating a civil penalty *under subsection (b) of this section*." *Id.* § 32912(c)(1).

Here, the Secretary did not adjust the CAFE civil penalty amount using her authority under 49 U.S.C. § 32912(b). Instead, she did so "pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015," JA25 (interim final rule); JA51 (revised final rule). In other words, the revised final rule was not a "regulation prescribed under section 32912(c)(1)."

This conclusion does not rely simply on the labels the Secretary applied to her action, but on its substance. In setting the new $14 civil penalty, the Secretary made none of the findings required under Section 32912(c)(1). Under that provision, before increasing civil penalties, the Secretary was required to find that the proposed increase "will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State," *id.* § 32912(c)(1)(A)(ii), and that the proposed increase will not "(i) cause a significant increase in unemployment in a State or a region of a State; (ii) adversely affect competition; or (iii) cause a significant increase in automobile imports," *id.* § 32912(c)(1)(C).

Instead of making these findings — or even referring to subsection(c)(1) at all — the Secretary employed the procedures prescribed under 2015 Act, including setting an initial "catch-up" amount, as prescribed by the 2015 Act, and relying on OMB guidance stating the cost-of-living adjustment to be applied. JA51 (revised final rule describing the provisions of the 2015 Act and NHTSA's development of "an interim final rule (IFR) implementing the Agency's responsibility under that Act"); JA51 n.6 (citing and relying on OMB guidance found in "Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015," found at JA15). There is no provision in the 2015 Act directing judicial review to the appellate courts, and therefore the "normal default rule" — directing suits challenging agency to district courts in the first instance —

applies to this petition. *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007). Nor does NHTSA's action staying the revised final rule give rise to jurisdiction in this Court, since that act was clearly not promulgation of a "regulation prescribed under section 32912(c)(1)."

Petitioners' reliance on the direct review provision in Section 32909(a) fails, because it "plainly does not apply to the agency action that [petitioner] challenges." *Nat'l Auto. Dealers*, 670 F.3d at 270. If petitioners have standing, the Court should direct petitioners to seek review on the agency record in the appropriate federal district court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated: March 27, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I hereby certify that this response:

(i) complies with the type-volume limits of Rule 27(d)(2)(A), as it contains 11,537 words, including footnotes and excluding the parts of the document exempted by Rule 32(f); and

(ii) complies with the typeface and style requirements of Rule 32(a)(5)–(6), as it has been prepared using Microsoft Word 2013 and is set in 14 point Century Schoolbook font.

/s/ *Ashley C. Parrish*
Ashley C. Parrish

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 29th day of March, 2018, served a copy of the foregoing [corrected] document on all parties through the Court's CM/ECF system (originally filed and served on March 27, 2018).

/s/ *Ashley C. Parrish*
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