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 NEW YORK, STATE OF CALIFORNIA, STATE OF VERMONT, STATE OF MARYLAND, STATE OF PENNSYLVANIA,
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 FROM THE UNITED STATES DEPARTMENT OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

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INTRODUCTION

Petitioners' concerns, and their arguments in this case, are premature. The National Highway Traffic Safety Administration (NHTSA), an agency within the U.S. Department of Transportation, is currently undertaking notice-and-comment rulemaking to reconsider an earlier rule setting civil penalties under the Corporate Average Fuel Economy (CAFE) regulatory regime. When NHTSA announced that reconsideration in July 2017, the agency simultaneously announced that it was delaying the effective date of the earlier rule while the reconsideration was ongoing. The delay decision was merely an interim step in NHTSA's continuing review of issues concerning the civil penalty rate applicable to future violations of CAFE standards for certain motor vehicles.

The delay decision was a procedurally appropriate but practically and legally insubstantial measure that does not provide an appropriate vehicle for petitioners' substantive concerns about the underlying civil penalty rate. Those concerns can be presented to the agency, and to a court in an appropriate case after the reconsideration is complete. The narrow question

in this case—whether the delay of the effective date, pending reconsideration, violated the law—is far more limited than the issues petitioners seek to litigate. And nothing in this Court's precedents or in any statute precludes NHTSA from acting to preserve the status quo while it exercises its policy responsibilities.

Before this Court can address even that narrow question, however, thorny jurisdictional barriers raise serious questions about the justiciability of these petitions. This Court need not resolve the difficult issues of venue, and the scope of the statutory right of action here because petitioners lack standing and failed to file their petitions for review until after the statutory deadline. Dismissing the petitions on standing or timeliness grounds would not prejudice petitioners because they can raise their substantive and procedural concerns at the appropriate stage, in a challenge to NHTSA's final action following reconsideration.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction because petitioners lack standing to sue under Article III of the Constitution. See infra, 10-15. The Court also lacks

jurisdiction because the petitions for review were not filed within the 59-day time limit set forth in 49 U.S.C. § 32909(b). See infra, 15-21. The agency action at issue (the delay decision) was published on July 12, 2017, but was filed with the Office of the Federal Register on July 7, 2017, and made available for public inspection that same date. JA 78; https://www.federalregister.gov/public-inspection/2017/07/07. The time to file a petition for review expired 59 days later, on Monday, September 4. The petitions for review were filed on September 7 and 8, 2017. JA 84-93.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to decide the petitions for review.[1]

[1] This Court directed the parties to address the following issues: (1) under principles of statutory construction, whether the rule 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); (2) whether the 59-day deadline in § 32909(b) is a jurisdictional rule, a claim-processing rule, or a time-related directive, see *Dolan* v. *United States*, 560 U.S. 605, 610-611 (2010); (3) whether the term "person" in § 32909(a) includes states, see *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000); and (4) whether Petitioners Sierra Club, Center for Biological Diversity, California,

2. Whether the delay decision was properly issued without notice and comment and was consistent with any other applicable legal requirements.

STATEMENT OF THE CASE

Petitioners challenge a limited decision by NHTSA: the delay of the effective date of an earlier rule, pending reconsideration of that earlier rule. 82 Fed. Reg. 32139 (July 12, 2017) (JA 77-78) (delay decision). This case solely concerns NHTSA's decision to pause its earlier action while the agency undertook to reconsider that action. Neither the earlier rule nor the agency's ongoing reconsideration of it is before the Court now.

The delay decision was an intermediate step in an ongoing process that began in July 2016 with an interim final rule, issued without notice-and-comment procedures, that set increased amounts for a variety of civil penalties administered by NHTSA, including those applicable to the CAFE

Maryland, and Pennsylvania "reside[]" or have their "principal place of business" in this Circuit, see 49 U.S.C. § 32909(a). See Order (Feb. 16, 2018). Those issues are addressed in the jurisdictional argument. See infra, 10-25.

program. See 81 Fed. Reg. 43524 (July 5, 2016) (JA 25-30). The interim final rule invoked the statutory authority conferred by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, title VII, § 701(c), 129 Stat. 599 (2015) (2015 Act). That statute directed federal agencies to increase certain civil monetary penalties to account for inflation, and specifically authorized agencies to use interim rulemaking procedures. JA 25-26. Among the many penalties that NHTSA increased in that interim final rule were the CAFE civil penalty rate, which the agency raised from $5.50 to $14 per tenth of a mile per gallon (mpg) over the CAFE standard. JA 27; 49 C.F.R. § 578.6(h)(2).[2]

A vehicle manufacturer and manufacturer trade associations filed timely petitions for partial reconsideration of the interim final rule before the effective date, taking issue only with the increases to the CAFE civil penalty rate. JA 31-47; JA 48-50 (supplement). NHTSA acted on those petitions in

[2] As NHTSA has recently explained, there are substantial questions about whether the 2015 Act applied to the CAFE civil penalty rate at all. See NPRM 19-33 (https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nprm_cafe-fines-03262018_0.pdf).

December 2016, granting them in part and determining that the increased CAFE civil penalty rate would not be applied until Model Year (MY) 2019. JA 51-54.[3] That reconsideration decision had an effective date of January 27, 2017. JA 51.

Beginning in January 2017, NHTSA issued periodic delays of the effective date of the December 2016 reconsideration decision. JA 56, 59, 75. The last of those actions extended the effective date until July 10, 2017. JA 75-76. Finally, on July 7, 2017, NHTSA issued the delay decision that petitioners have challenged here. JA 77-78. That decision, unlike the earlier delays, was not for a fixed period. Instead, it delayed the effective date of the December 2016 reconsideration decision "indefinitely pending reconsideration." JA 77.

[3] NHTSA also acted at the same time on a petition for rulemaking filed in 2015 by the Center for Biological Diversity, which sought an increase in the CAFE civil penalty rate. That petition was filed shortly before the passage of the 2015 Act, and the agency determined that its July 2016 interim final rule, as amended on reconsideration, addressed the petition. JA 52-53.

The delay decision explained the earlier agency decisions and the petitions for reconsideration. NHTSA noted that it had addressed concerns about retroactive application of the increased penalty rate but "did not address the other points raised" in the manufacturers' petitions. JA 77; see also JA 78 n.4 (incorporating by reference JA 80-81). NHTSA explained that it "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." JA 77. The agency explained that, "[b]ecause NHTSA is reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration." JA 78.

The agency reconsideration is ongoing. Initially, NHTSA solicited comment on whether $14 per tenth of a mpg is the appropriate civil penalty rate under the CAFE regime. JA 78-83. After the close of that comment period, NHTSA prepared a Notice of Proposed Rulemaking (NPRM). The agency submitted the NPRM on March 27, 2018, to the Office of the Federal

Register for publication; it is also available online: https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nprm_cafe-fines-03262018_0.pdf.

SUMMARY OF ARGUMENT

Petitioners lack standing because their asserted injury is too speculative and indirect. Their claims depend on a highly attenuated chain of possibilities that includes the independent actions of third parties. Because those injuries are neither imminent nor traceable to the agency's narrow procedural decision, this Court lacks jurisdiction to review petitioners' claims.

The petitions for review were also untimely. NHTSA's delay decision expressly had immediate legal effect on July 7, 2017, the same date that it was filed with the Office of the Federal Register and made available for public inspection, pursuant to the Federal Register Act. That is the date on which the delay decision was "prescribed," and the time to file a petition for review—which provides a firm limit on this Court's jurisdiction—expired 59 days later.

On the merits, NHTSA acted entirely reasonably in delaying the effective date of its earlier decision concerning the CAFE civil penalty rate, while the agency undertakes notice-and-comment rulemaking to reconsider serious legal and factual issues that it did not previously address. A delay of an earlier rule's effective date in these circumstances is unexceptional; indeed, agencies routinely issue similar delay decisions in a wide variety of contexts. Petitioners misconstrue the decisions of this Court and others, suggesting that there is a categorical prohibition against delaying the effective date of a rule that has not gone into effect, or that notice and comment is always required prior to such a rule. The cases they cite do not stand for such sweeping generalizations, and this Court should decline the invitation to adopt such a broad holding here.

Dismissing or denying these petitions for review will have little practical or legal consequence. The agency has issued an NPRM, initiating notice and comment rulemaking in its reconsideration of the issues related to the CAFE civil penalty rate, and petitioners, like the rest of the public, will have ample opportunity to raise their substantive concerns in that

proceeding. And any adversely affected person can bring a timely challenge to the agency's final rule after its reconsideration is complete. Petitioners' arguments are thus largely premature, and this case is much ado about very little.

ARGUMENT

I. THIS COURT LACKS JURISDICTION.

A. Petitioners Lack Standing.

This case is not a challenge to the CAFE standards themselves, which remain unchanged.[4] And manufacturers' obligations to comply with those standards has not been altered or excused. Indeed, the options for noncompliance now remain exactly what they were when the CAFE standards were adopted in 2012. See 77 Fed. Reg. 62624, 63126 (Oct. 15, 2012)

[4] Thus, this case is not about direct, proprietary harm resulting from vehicle emissions of greenhouse gases. See *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). In any event, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982). The Supreme Court in *Massachusetts* did not overrule that holding. See 549 U.S. at 522-523 (noting proprietary injury resulting from loss of coastal land).

(explaining how NHTSA calculates compliance, and options for manufacturers who do not comply with standards). At the time those standards were adopted, the civil penalty rate was $5.50 per tenth of a mpg. See 49 C.F.R. § 578.6(h)(2) (2012).[5]

The only issue before the Court is NHTSA's delay of the effective date of a regulatory change to the amount of the CAFE civil penalty rate. But the underlying penalty rate does not always or automatically apply to CAFE shortfalls. In the event that NHTSA determines that a vehicle fleet did not comply with CAFE standards, the manufacturer has multiple alternative options short of paying a civil penalty. See 77 Fed. Reg. at 63126; JA 51.[6] A manufacturer has the option either to pay a civil penalty or to allocate credits

[5] NHTSA determined in a separate decision that the civil penalty rate would be $5.50 per tenth of a mpg during the agency's reconsideration. See JA 81. But that decision is not before the Court in this case, and the delay decision at issue here did not itself address the applicable rate during the agency's reconsideration.

[6] Moreover, NHTSA cannot determine compliance until after the model year has ended and EPA has issued final reports, which generally takes place between April and October for the previous model year. See 77 Fed. Reg. at 63126. Thus, for MY19, NHTSA will not be able to determine compliance until sometime after April (or perhaps after October) 2020.

to offset the shortfall. 77 Fed. Reg. at 63126 (after confirming the shortfall, the manufacturer "must either submit a plan indicating it will allocate existing credits, or if it does not have sufficient credits available in that fleet, how it will earn, transfer and/or acquire credits, or pay the appropriate civil penalty"). NHTSA observed that "few manufacturers have actually paid civil penalties, and the amounts of CAFE penalties paid generally have been relatively low." JA 51. Instead, "many manufacturers have taken advantage of those [credit trading and transfer] flexibilities rather than paying civil penalties for non-compliance." *Ibid.*

The uncertain and conditional nature of CAFE civil penalties, and the fact that manufacturers retain discretion to decide whether to pay a penalty, demonstrates that petitioners cannot satisfy the constitutional standing requirement based on their claim of indirect injuries resulting from the emissions of carbon dioxide and other pollutants from motor vehicles, as well as from upstream activities related to the production of motor vehicle fuels. See States Br. 21-32; NRDC Br. 23-29. "The plaintiff must have suffered or be imminently threatened with a concrete and particularized

'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, __ U.S. __, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). An injury for standing purposes must be direct, not speculative or based on the independent actions of third parties. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398 (2013). That is not a new requirement. The Supreme Court held more than four decades ago that "Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); see also, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 560 ("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") (quotation marks and alterations omitted). *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617-618 (1973) (holding that plaintiff "failed to allege a sufficient nexus between her injury and the government action

which she attacks to justify judicial intervention," where injury of father's failure to pay child support did not directly result from non-enforcement of criminal statute).

Because manufacturers retain the option to satisfy any noncompliance with credits rather than by payment of a civil penalty, petitioners' assertion that they will suffer harms resulting from increased noncompliance with CAFE standards is impermissibly speculative and dependent on the actions of third parties. As in *Amnesty*, petitioners here cannot show that the challenged government action—the delay decision—will directly result in any of the alleged harms they rely on. Instead, they complain of injuries that are directly traceable only to the decisions of third parties (vehicle manufacturers), and that depend on a "highly attenuated chain of possibilities" to find any link even to the underlying amount of the CAFE civil penalty rate. *Amnesty*, 568 U.S. at 410.

Because the agency action at issue in this case is not the underlying penalty rate but only the delay of the effective date for the earlier rule changing that rate, and because the agency is moving forward with the

notice and comment rulemaking proceedings on reconsideration, petitioners' allegations of injury are even more attenuated and speculative. Petitioners do not know how NHTSA will implement any decisions it ultimately makes after the ongoing reconsideration process is complete, nor can they predict how independent actors—vehicle manufacturers—will choose to exercise their own judgment both before and after the government's forthcoming final rule. And just as plaintiffs in *Amnesty* could not know whether any resulting surveillance would even be a result of the statute they sought to challenge, 568 U.S. at 410-411, petitioners here cannot be certain that any business decisions of manufacturers that might increase emissions of carbon dioxide are fairly traceable to the extension of the effective date or even to the underlying CAFE civil penalty rate that remains subject to change.

B. The Petitions Were Untimely.

1. The statute governing judicial review of NHTSA's delay decision provides jurisdiction in the court of appeals but requires that a petition for review "must be filed not later than 59 days after the regulation is

prescribed." 49 U.S.C. § 32909(b). NHTSA has long distinguished between the date a regulation is "prescribed" and the date of publication in the Federal Register, for purposes of determining the timeliness of a petition for review under that jurisdictional statutory provision: "[T]he language of each of these statutes [including 42 U.S.C. § 32909(a)] indicates that *the time period for judicial review does not begin to run on the publication date*; rather it runs from the date that the regulation, standard, or decision on reconsideration is 'issued' or 'prescribed' by the agency." 60 Fed. Reg. 63648, 63650 (Dec. 12, 1995) (emphasis added).

The Ninth Circuit has held that a similar statutory term ("issued") is distinct from the date of publication in the Federal Register, and that the time to file a petition for review begins to run "on the date that the regulation is made available for public inspection." *Public Citizen* v. *Mineta*, 343 F.3d 1159, 1167 (9th Cir. 2003).[7] That court concluded that beginning the 59-day filing

[7] NHTSA has indicated that it interprets the terms "issued" and "prescribed" under the two statutes at issue in *Public Citizen* and this case as "synonymous." 60 Fed. Reg. at 63650.

period when the rule was available for public inspection served the important function of public notice while respecting the statutory language. *Id.* at 1166-1167.

The delay decision was "prescribed" on July 7, 2017, as multiple indications make clear. First, it was filed with the Office of the Federal Register on that date. JA 78; cf. *Public Citizen*, 343 F.3d at 1167-1168. And it was made available for public inspection on the same day. See https://www.federalregister.gov/public-inspection/2017/07/07; see also 44 U.S.C. § 1503 ("Upon filing, at least one copy shall be immediately available for public inspection in the Office [of the Federal Register]."). Moreover, the delay decision had immediate legal effect on that same date, as NHTSA explained in the text of the notice it issued. JA 77 ("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."). In these circumstances, the Court should follow the Ninth Circuit's lead in determining the timeliness of a challenge to NHTSA's delay decision by

measuring from the date the decision was filed with the Office of the Federal Register and made available for public inspection.

Petitioners' contrary argument principally rests on a misreading of this Court's decision in *NRDC* v. *Abraham*, 355 F.3d 179 (2d Cir. 2004). But the Court there did not decide any question of timeliness, let alone the distinct question presented here—the timeliness of a petition for review of a NHTSA delay decision under the CAFE statute. The Court in that case was addressing the different question of the significance of publication for purposes of a statutory constraint (the anti-backsliding provision) on the Department of Energy (DOE), which has no relevance to the NHTSA CAFE statute.[8] In the course of that discussion, the Court simply assumed that

[8] The statutory regime governing DOE's establishment of energy-conservation standards includes a provision known as the "anti-backsliding provision," which prohibits DOE from "prescrib[ing] any amended standard which increases the maximum allowable energy use * * * or decreases the minimum required energy efficiency[] of a covered product." 42 U.S.C. § 6295(o)(1) (consumer products); see *id.* § 6316(a) (industrial equipment). That provision, which has no application here and no corollary in the CAFE statute, was the focus of this Court's decision in *Abraham*. See 355 F.3d at 198-206.

"prescribed" in a different statutory provision, governing judicial review of DOE rules establishing energy-conservation standards, would be equated with Federal Register publication. *Id.* at 196 n.8.

Petitioners emphasize the importance of public notice and the assumption of courts in other cases concerning challenges to rules that had no legal effect before publication. States Br. 48-50; NRDC Br. 21-22. But *Public Citizen* explained that the need for notice is amply addressed by beginning the 59-day clock when NHTSA's rule is filed with the Office of the Federal Register and made available for public inspection. See 343 F.3d at 1166-1167. And even if petitioners are correct that Federal Register publication is a significant event in many instances (and may indicate when some rules are "prescribed"), the delay decision had immediate legal effect, and was made available for public inspection promptly for that very reason.

Nor is the amendment history of the CAFE judicial review statute dispositive. See States Br. 51-52. Notably, Congress eliminated the term "published" from the earlier version of the statutory text, aligning the two provisions by using the term "prescribed," not "published." The general

assertion that the amendment was non-substantive will not bear the interpretive weight petitioners ascribe to it.

2. The Supreme Court has recognized that "lower court decisions have uniformly held that the Hobbs Act's 60–day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. § 2344, is jurisdictional." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 437 (2011) (noting without disagreement observation in government brief). This Court has recognized the jurisdictional nature of statutory time periods for filing a petition for review of agency action. See, *e.g.*, *Malvoisin* v. *INS*, 268 F.3d 74, 75 (2d Cir. 2001) ("compliance with the time limit for filing a petition for review of the BIA's final order is a strict jurisdictional prerequisite"), reaffirmed, *Ruiz-Martinez* v. *Mukasey*, 516 F.3d 102, 117-118 (2d Cir. 2008) (citing *Bowles* v. *Russell*, 551 U.S. 205, 210-211 (2007)). "Courts have frequently stated that the applicable statutory deadlines for seeking court of appeals review of particular types of agency orders are jurisdictional." 16AA Charles Alan Wright, et al., *Federal Practice and Procedure* § 3961.3 (4th

ed. 2017 update) (observing that, after *Bowles*, "it seems likely that such cases are still good law").[9]

Petitioners assert without analysis or authority that the limit on this Court's review of agency action in § 32909 should be treated like a statute of limitations and deemed a non-jurisdictional claim-processing rule. States Br. 53-54; NRDC Br. 22. But unlike a statute of limitations, § 32909 provides the sole statutory basis for this Court's jurisdiction. Thus, while a district court has subject-matter jurisdiction (independent of a statute of limitations) to decide cases asserting a federal question, see 28 U.S.C. § 1331, that statutory grant does not extend to courts of appeals.[10]

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[9] The Seventh Circuit has interpreted the Clean Air Act's time limit as non-jurisdictional, expressly diverging from otherwise unanimous case law. *Clean Water Action Council* v. *EPA*, 765 F.3d 749, 751-752 (7th Cir. 2014); contra, *e.g.*, *Utah* v. *EPA*, 765 F.3d 1257, 1258-1262 (10th Cir. 2014). But the Seventh Circuit's decision is contrary to this Court's analysis in *Ruiz-Martinez*. In any event, as even the Seventh Circuit acknowledges, the time limit is mandatory, even if it is not jurisdictional, and the government has objected to petitioners' untimely filing. See *Clean Water Action Council*, 765 F.3d at 752.

[10] Unlike the Sixth Circuit in *Herr* v. *USFS*, 803 F.3d 809 (6th Cir. 2015), cited in States Br. 54, this Court has not addressed whether the time limit in

C. The Remaining Issues Do Not Preclude Jurisdiction.

The remaining questions about the statutory grant of jurisdiction do not independently warrant dismissal of the petitions here. Nevertheless, this Court need not resolve those issues if it concludes that petitioners lack standing or that the petitions are untimely.

1. The Supreme Court has consistently applied the "longstanding interpretive presumption that [a statutory reference to] 'person' does not include the sovereign." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000). Thus, states are ordinarily not considered persons, absent evidence that Congress intended to overcome that presumption.[11] Here, the context is ambiguous but suggests that Congress may have intended to include states as persons in 49 U.S.C. § 32909(a).

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28 U.S.C. § 2401(a) is jurisdictional. See *Phillips* v. *Boente*, 674 Fed. Appx. 106, 107-108 (2d Cir. 2017).

[11] The Dictionary Act definition of "person," which governs "unless the context indicates otherwise," 1 U.S.C. § 1, does not include states. See *United States* v. *United Mine Workers*, 330 U.S. 258, 275 (1947).

The states point to the definition of "person" in 42 U.S.C. § 6202, which expressly includes states, but is limited to Chapter 77 of Title 42, 42 U.S.C. §§ 6201-6422, and thus by its terms does not apply to 49 U.S.C. § 32909(a). States Br. 44-45. They argue that the language in the public law referring to "this Act" included all of the provisions enacted in the Energy Policy and Conservation Act (EPCA), not just those codified in Chapter 77 of Title 42. Pub. L. No. 94-163, § 3(2), 89 Stat. 871, 874 (1975). But the intent of Congress in that provision remains unclear, as the CAFE provisions enacted in 1975 amended a pre-existing statute, the Motor Vehicle Information and Cost Savings Act, which included its own judicial review provision. See Pub. L. No. 92-513, § 103(a), 86 Stat. 947, 950 (1972). That statute also had a separate definitions provision, which did not refer to states as persons. See *id.* § 2, 86 Stat. 947-948. Thus, Congress may not have intended "this Act" in EPCA to include the CAFE provisions, which came in the form of amendments to another Act.

But the states' argument appears to be at least a possible, and perhaps the more natural, reading of EPCA's general statement of definitions. Thus,

the government does not dispute that there is some evidence suggesting that "person" in 49 U.S.C. § 32909(a) includes states.

2. This Court's jurisdiction is limited to cases brought by a person who "resides or has its principal place of business" within the geographic reach of the Second Circuit. 49 U.S.C. § 32909(a). New York and Vermont, as well as NRDC, appear to satisfy that requirement. The only question is whether jurisdiction is proper over the claims of the remaining petitioners, who reside outside this Circuit.

A petition for review properly invokes this Court's jurisdiction if it is filed by a petitioner who comes within the terms of the statute—that is, who is a "person," and who is "adversely affected" by a NHTSA regulation promulgated under one of the identified statutory sections, 49 U.S.C. § 32909(a)—and if the petition otherwise satisfies Article III of the Constitution, including the related doctrines of standing, ripeness, and mootness. Thus, the reviewing Court should ensure that at least one petitioner satisfies all of the applicable statutory and constitutional requirements to initiate an action. But if this Court's jurisdiction has been

properly invoked, the petitioners may also include other persons who could have brought claims in another circuit but who chose to be co-petitioners in this Court. That understanding is not precluded by the text of the statute or by binding precedent of the Supreme Court or this Court, and is supported by the federal rules.

A contrary interpretation would impose substantial burdens on both litigants and the courts. If each petitioner were required to file a separate petition for review in a different circuit, transfer would be appropriate either to the court where the first petition was filed or to a randomly selected circuit. See 28 U.S.C. § 2112(a)(1). Alternatively, non-local entities could seek to intervene once a properly filed petition had been brought before this Court. See FRAP 15(d).[12] In either case, additional procedural steps would be required, and would serve little purpose.

[12] This Court's precedents support the practice of intervention by an out-of-circuit entity aligned with a petitioner, in a case under the similar provisions of the Hobbs Act. See *Radio Relay Corp.* v. *FCC*, 409 F.2d 322, 324 (2d Cir. 1969).

II. THE DELAY DECISION WAS LAWFUL.

A. NHTSA Reasonably Explained The Delay Decision.

NHTSA explained that it was delaying the effective date of the December 2016 decision "pending reconsideration" of its earlier rule concerning the CAFE civil penalty rate. JA 77. The agency explained that, although the December 2016 reconsideration decision addressed one concern, it "did not address the other points raised in the Industry Petition." *Ibid.* Further reconsideration was necessary because the earlier decision "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." *Ibid.* The agency and the public needed additional time "to thoughtfully consider and address" the issues. JA 78. The agency explained that its delay decision was "consistent with NHTSA's statutory authority to administer the CAFE standards program and its inherent authority to do so efficiently and in the public interest." *Ibid.*

That rationale was sensible, and the agency's explanation amply satisfied the requirements of the Administrative Procedure Act (APA). The previously unaddressed concern about economic consequences implicates multiple legal and factual considerations that require notice and comment rulemaking, which is now underway. As NHTSA explained in the accompanying request for comment on reconsideration, the exception in the 2015 Act called for notice-and-comment rulemaking where a presumptive increase in civil monetary penalties would have a negative economic impact. See JA 80 (noting that "the July 5, 2016 interim final rule did not provide an opportunity for interested parties to provide input fully" concerning how "to implement the Inflation Adjustment Act as it pertains to CAFE penalties"); JA 78 n.4 (incorporating by reference discussions in reconsideration document seeking comment). NHTSA also solicited comment on "whether and how the EPCA requirements in 49 U.S.C. § 32912 for what NHTSA must consider in raising CAFE penalty rates under that section interact with NHTSA's obligations under the Inflation Adjustment Act." JA 80.

The recently released NPRM confirms the serious and complex issues that the agency, and the public, need to address before NHTSA can determine the appropriate CAFE civil penalty rate. In addition to fleshing out the legal and factual economic issues related to the economic impact of an increase, the NPRM identifies a significant legal question that the agency did not address in either the July 2016 interim final rule or the December 2016 reconsideration decision: Whether CAFE civil penalties are within the scope of the 2015 Act's reference to "civil monetary penalties" at all. See NPRM 19-33. Like the other substantive questions at issue in the ongoing notice-and-comment rulemaking, that question of statutory interpretation is not before the Court in this case, but it serves as an example of the reasons why NHTSA reasonably concluded that it would be appropriate to maintain the status quo until the agency completes its reconsideration process.

In light of the serious concerns, and the need for public input and further analysis, arising from those unsettled legal and factual questions, NHTSA explained that it was delaying the effective date of that decision until the reconsideration was complete. JA 78 ("Because NHTSA is

reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration."). NHTSA's delay of the effective date was appropriate in light of the uncertainty about those significant issues, and the time needed for the agency to undertake notice-and-comment rulemaking; to address the substantive legal, factual, and policy questions arising from the pending reconsideration; and to determine the appropriate penalty rate following the conclusion of the reconsideration process.

Moreover, the agency's decision to delay the effective date eliminated legal uncertainty that otherwise could have caused significant disruption for vehicle manufacturers and for the agency itself. In light of the substantial unaddressed questions underlying the earlier increase in the CAFE civil penalty rate, which was undertaken without notice and comment, NHTSA and the regulated industry would have faced unknown issues about the applicability of that rate to future shortfalls. Against that background, the decision to pause CAFE penalty portion of the July 2016 interim final rule, as amended by the December 2016 reconsideration decision, was entirely reasonable and within the agency's authority to establish its own

procedures. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties") (quotation marks omitted).

The APA requires "that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The APA's familiar arbitrary and capricious standard of judicial review, 5 U.S.C. § 706(2)(A), is "narrow," and the Supreme Court has "made clear * * * that a court is not to substitute its judgment for that of the agency." *Fox Television*, 556 U.S. at 513 (quotation marks omitted). Thus, this Court has explained that it "must be satisfied from the record that the agency examined the relevant data and articulated a satisfactory explanation for its action." *NRDC* v. *EPA*, 808 F.3d 556, 569 (2d Cir. 2015) (quotation marks and alterations omitted). The ultimate question under this narrow standard of review is whether the agency's action was reasonable and its explanation was rational. See, *e.g.*, *Fox*

Television, 556 U.S. at 514-515. NHTSA's delay decision fully complied with that requirement, as explained above.

The limited, procedural nature of the delay rule, and its clear link to the agency's ongoing reconsideration, demonstrate that no more detailed explanation was necessary to satisfy the APA's deferential standard of review. If this Court were to conclude that some more detailed explanation were necessary, it should remand without vacatur to allow NHTSA the opportunity to explain its rationale with more specificity. See, *e.g.*, *Allied-Signal, Inc.* v. *NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993), cited in *NRDC* v. *EPA*, 808 F.3d at 584. As explained above, vacatur would create uncertainty for both NHTSA and regulated entities, in light of the agency's ongoing reconsideration of the substantive issues.

B. Delay Of An Effective Date Is Permissible.

1. Notwithstanding NHTSA's rationale, petitioners suggest there is some prohibition against an agency delaying the effective date of an earlier rule. There is no support for that argument. Despite the urgency and outrage that characterize petitioners' briefs in this case, there is nothing

momentous or unusual about an agency delaying the effective date of an earlier rule due to intervening events.

Indeed, agencies undertake similar action as a matter of course, when justified by intervening events such as the substantial issues identified here. There are a variety of reasons why the delay of an effective date may be necessary or appropriate. For example, new information may come to an agency's attention, legislative or regulatory developments in other areas may have an effect on a previously published rule, or different policy views may warrant consideration.

A search of the Federal Register database on Westlaw ("effective date" /s delay! suspend! /s indefinite! "until #further notice") identifies scores of instances in which an agency has indefinitely delayed or suspended the effective date of an earlier action, often without notice and comment, and usually with a minimum of explanation. For example, in 2015, an agency indefinitely delayed (without notice and comment) the effective date of a previously issued rule to allow the agency to address multiple concerns raised in petitions for reconsideration. See 80 Fed. Reg. 58633 (Sept. 30,

2015). Similarly, in 2006, an agency delayed until further notice the effective date of an earlier-published rule, to allow for reconsideration. See 71 Fed. Reg. 52983 (Sept. 8, 2006). Indeed, NHTSA has a well-established practice—further evidence of its inherent authority to administer its regulatory programs efficiently and in the public interest, JA 78—of delaying the effective date of an earlier rule where necessary or appropriate to accommodate reconsideration and other factors. See, *e.g.*, 75 Fed. Reg. 50730 (Aug. 28, 2008); 71 Fed. Reg. 74823 (Dec. 13, 2006); 60 Fed. Reg. 35458 (July 7, 1995); 60 Fed. Reg. 26002 (May 16, 1995). These are just a few of the many instances—analogous to the delay rule challenged here—of the routine and uncontroversial step of permitting the agency and the public the opportunity to consider additional issues before a rule takes effect.

Hundreds of other examples can be found where an agency has delayed the effective date of earlier action either for a specific period or until a specified event occurs. Thus, the three earlier brief delays of the effective date that preceded the delay decision at issue in this case (JA 56, 59, 75) were of a piece with other agency decisions implementing time-limited delays,

extensions, or adoption of new effective dates. See, *e.g.*, 60 Fed. Reg. 26002 (May 16, 1995) (NHTSA, in response to petitions for indefinite delay); 54 Fed. Reg. 40005 (Sept. 29, 1989) (further extension, totaling more than three years). And it is routine for a new Administration to direct agencies to delay the effective dates of rules that were previously promulgated. See, *e.g.*, Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U.L. Rev. 471, 472-473, 530 (2011); William M. Jack, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 Admin. L. Rev. 1479, 1498-1511 (2002).

Indeed, the practice is so common that the Office of the Federal Register recognizes the delay of an earlier rule's effective date as a well-established category of agency action. Thus, that office's guidance to federal agencies includes a discussion of how such a delay decision should be prepared for publication. Office of the Federal Register, *Document Drafting Handbook* (2017 ed.) 3-10 to 3-13, https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf. It lists both "delay of effective date" and

"suspension of effectiveness" as "[f]requently used action lines" for a document published in the Federal Register. *Id.* at 3-5.

2. Petitioners point to a few instances in which courts have determined that a particular agency action was inappropriate in the circumstances, but there is no categorical prohibition against delaying the effective date of an earlier rule. Thus, this Court in *NRDC* v. *Abraham* concluded that the anti-backsliding provision in another statutory regime under EPCA precluded the Department of Energy from reconsidering a published rule establishing energy-conservation standards, and that a delay of the effective date of that rule to permit reconsideration was accordingly impermissible. *Abraham*, 355 F.3d at 194-195, 203-206. But *Abraham* did not announce a sweeping legal rule prohibiting agency reconsideration where the anti-backsliding provision does not apply, and it would be inappropriate here to consider prematurely the question whether NHTSA's ongoing reconsideration of the CAFE civil penalty rate is permissible, as the record

in this case does not include the agency's final decision, including its legal and factual rationale.[13]

Petitioners also cite a recent decision addressing an EPA action under the Clean Air Act. *Clean Air Council* v. *Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (per curiam). There, the D.C. Circuit held that EPA was barred from staying a regulation whose effective date had already passed, where the regulation was therefore in effect and compliance obligations had already accrued. *Id.* at 7. But NHTSA here acted before the effective date of its earlier rule. Indeed, the Office of the Federal Register distinguishes between a delay of an effective date before that date has passed and a stay of the regulatory text after a rule has gone into effect. *Handbook* at 3-10 to 3-13. And the D.C. Circuit specifically addressed whether a provision in the Clean Air Act governing agency stays authorized the EPA action. *Clean Air Council*, 862 F.3d at 9.

[13] The decision in *Abraham* came after the agency's reconsideration was complete. See 355 F.3d at 190-191 (noting petitions for review of delay rule and subsequent petitions for review from final rule).

The unique circumstances addressed in a few cases do not support petitioners' effort to urge a general prohibition against delaying an effective date. And this case presents nothing like those situations.

Many of petitioners' arguments are directed not at the delay decision itself but at NHTSA's decision to reconsider the underlying substantive questions concerning the appropriate CAFE civil penalty rate. But those arguments, including petitioners' views about the appropriate level for such a rate or their assertions about statutory constraints on the agency's authority, are premature. For example, petitioners suggest that the 2015 Act prohibits an agency from undertaking an inquiry into the negative economic impact of a presumptive increase in a civil monetary penalty, including the required notice and comment rulemaking, after August 1, 2016. States Br. 33-34; NRDC Br. 32-33. But nothing in the statute precludes an agency from undertaking notice and comment rulemaking and reconsidering an interim final rule to assess such matters as the statutory standard of "negative economic impact" and the interaction of the 2015 Act with other statutory limits. The 2015 Act includes an "[e]xception" to the August 1, 2016,

statutory deadline and the associated interim final rule procedure: "an agency may adjust the amount of a civil monetary penalty by less than the otherwise required amount if," after notice and comment rulemaking, the agency determines that the higher amount "will have a negative economic impact" or the "social costs outweigh the benefits," and "the Office of Management and Budget concurs with [that] determination." 28 U.S.C. § 2461 note § 4(c). The statute says nothing about the sequence of those events, or whether an agency may, as NHTSA has done here, invoke the exception as part of its reconsideration of an interim final rule.[14] Petitioners' argument is fundamentally an objection to the ongoing reconsideration (and can be raised at the appropriate time in a challenge to that proceeding); it is not a proper basis to challenge the delay rule.

Most significantly, there is nothing in the CAFE statute that restricts or limits NHTSA's authority to delay the effective date of an earlier rule

[14] The passage of the August 2016 deadline in any event does not disempower an agency from exercising its authority. Not every agency acted before the deadline. See, *e.g.* 82 Fed. Reg. 28760 (June 26, 2017) (NASA interim final rule, effective August 25, 2017).

increasing the civil penalty rate while the agency reconsiders that rule. That statute directs NHTSA to implement the CAFE program, and the agency exercised that authority here.

C. Notice And Comment Were Not Required.

Petitioners contend that NHTSA was required to undertake notice-and-comment rulemaking before issuing the delay decision. States Br. 38-43; NRDC Br. 33-41. But not all agency actions require notice and comment. "The APA's notice-and-comment requirements apply only to substantive, what are sometimes termed legislative, rules, not to, *inter alia*, rules of agency organization, procedure, or practice." *Time Warner Cable Inc.* v. *FCC*, 729 F.3d 137, 168 (2d Cir. 2013) (quotation marks omitted). The delay decision was not a substantive or legislative rule. It was merely an interim procedural step, facilitating the agency's own ongoing consideration of the underlying issues.[15]

[15] It does not matter whether the agency identified the delay decision as a procedural rule. *Time Warner*, 729 F.3d at 168 ("label * * * is not, for our purposes, conclusive") (quoting *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 481-482 (2d Cir. 1972)).

"Substantive rules 'create new law, rights, or duties, in what amounts to a legislative act.'" *Time Warner*, 729 F.3d at 168 (quoting *Sweet* v. *Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000)). There is no bright line separating substantive from procedural rules; as this Court recognized, "all procedural rules affect substantive rights to some extent." *Ibid.* Thus, it is not dispositive that petitioners seek to weave a speculative chain of possibilities under which they believe the delayed effective date might alter the incentives of manufacturers to comply with substantive CAFE standards. For the same reasons why that highly attenuated chain of possibilities is insufficient to demonstrate standing, it is also insufficient to show that the delay decision is substantive. See *supra*, 10-15.

Even if the delay decision were a substantive rule, the APA permits an agency to dispense with notice and comment for good cause. NHTSA explained that its delay decision was permitted by the statutory good-cause exception, which provides that notice and comment are not required where those additional procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Here, NHTSA found that the good-

cause exception applied because "the effective date of the rule [was] imminent," and the agency was "already seeking out public comments on the underlying issues" in its sua sponte reconsideration. JA 78. Moreover, because the increased penalty rates would not be applied until 2020 at the earliest, a delay of the effective date would have no immediate practical effect. *Ibid.*

The APA's good-cause exception "is inevitably fact- or context-dependent." *Mid-Tex Elec. Coop., Inc.* v. *FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). And "[t]he interim status of the challenged rule is a significant factor" in applying that contextual inquiry. *Ibid.* ("a rule's temporally limited scope is among the key considerations in evaluating an agency's 'good cause' claim"). Here, the interim nature of the delay decision—extending the effective date of the earlier reconsideration decision while the agency undertakes further reconsideration—confirms that the good-cause exception was properly invoked here.

In context, the delay decision facilitated the agency's notice-and-comment rulemaking proceedings. The delay decision was part of the

agency's ongoing consideration that itself began with an interim final rule issued without notice and comment in July 2016, also based on the good cause exception. JA 28. And the December 2016 reconsideration decision was also issued without the benefit of notice and comment. The justification for the delay rule was to permit the agency, for the first time, to seek the public's views on significant legal and factual questions about the appropriate CAFE civil penalty rate. JA 77-78. And that notice-and-comment rulemaking effort is now underway with the agency's issuance of the NPRM. In context, the delay decision was not required to be preceded by notice-and-comment procedures.

The delay decision is unlike the more consequential agency actions that courts have held must be preceded by notice and comment, such as those that change substantive policy. See, *e.g.*, *Zhang* v. *Slattery*, 55 F.3d 732, 746 (2d Cir. 1995) (rule "creates a new basis on which aliens may be granted refugee status; it changes an existing policy"). Here, by contrast, the delay decision merely maintained the status quo while the agency continued its process of reconsidering the underlying substantive issues before the earlier

rule took effect. That interim, procedural step in an ongoing agency proceeding need not be preceded by cumbersome and unnecessary notice-and-comment procedures.

Moreover, additional procedures would have been unnecessary, both because the agency was simultaneously inviting public comment about the substantive issues in the related reconsideration proceeding that the extension facilitated, and because the interim extension of the effective date would have no practical effect. JA 78. The "unnecessary" prong of the APA's good-cause exception, 5 U.S.C. § 553(b)(B), applies when an administrative rule is "a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Utility Solid Waste Activities Grp.* v. *EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (quotation marks omitted). Here, the public's interest has principally focused on the appropriate level of the CAFE civil penalty rate. By comparison with the substantive issues surrounding that question, the delay of the effective date did not warrant separate notice-and-comment procedures.

Notice-and-comment procedures were also unnecessary because, as NHTSA explained, there would be "no immediate, concrete impact from the delay" of the effective date. JA 78. The December 2016 reconsideration rule—which petitioners did not challenge—"does not increase CAFE penalties before Model Year 2019, and therefore, the delay will not affect the civil penalty amounts assessed against any manufacturer for violating a CAFE standard prior to the 2019 model year at the earliest, *i.e.*, until sometime in 2020." *Ibid.* Because NHTSA's reconsideration will be complete long before then, there will be no practical impact attributable solely to the extension of the effective date.[16]

As NHTSA explained, notice-and-comment procedures were also "impracticable," 5 U.S.C. § 553(b)(B), because of the limited time between the agency's July 7, 2017, decision to reconsider the underlying issues concerning the CAFE civil penalty rate and the July 10, 2017, end of the latest

[16] Petitioners do not argue that agency action has been unreasonably delayed or unlawfully withheld, and this case would in any event not be an appropriate vehicle for such a claim. See 5 U.S.C. § 706(1).

extension of the effective date. That limited time by itself did not require the agency to forgo notice and comment, as NHTSA could have issued another time-limited delay of the effective date in order to conduct notice-and-comment rulemaking about whether to adopt a further delay pending the outcome of the agency's reconsideration of the substantive issues. But combined with the foregoing considerations, it demonstrates that the additional delay and complexity of notice-and-comment procedures would have been "contrary to the public interest," 5 U.S.C. § 553(b)(B). Se *Mid-Tex*, 822 F.2d at 1133 (emphasizing "the combined effect of the cited considerations" in agreeing with an agency "that delaying its interim rule would be contrary to the public interest").[17]

As a practical matter, undertaking notice and comment would have been cumbersome and duplicative, and would have made no substantive difference. There is no reason to believe that comment on the effective date

[17] If this Court were to determine that notice and comment is required before an indefinite delay of the effective date, it should remand without vacating, to permit NHTSA to follow the required procedures. See *Sugar Cane Growers Co-op.* v. *Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

alone was essential or would have been meaningful. Any comment would presumably have addressed issues about the propriety of a particular penalty rate or the effect of imposing an increased rate on a particular model year of vehicles, and the related question of incentives created by such an increased rate. But those substantive issues are precisely the topics on which the agency invited substantive comments in the course of its ongoing reconsideration of those issues. See JA 80-81. Moreover, petitioners and other members of the public will now have the opportunity—in the ongoing notice and comment rulemaking proceeding—to comment on those issues and other substantive aspects of the civil penalty rate. See NPRM 4-8 (summary).

This Court's decision in *Abraham* is not to the contrary. There, the Court concluded that—because the Department of Energy had determined that the effective date was a significant event that triggered the constraints of the anti-backsliding provision—the agency could not describe the effective date as insignificant. See *Abraham*, 355 F.3d 204-205. But there is no similar legal significance attached to the effective date in the

circumstances here. Similarly, the D.C. Circuit's decision in *Clean Air Council* is inapposite because the effective date in that case had already come and gone, and the earlier regulation applied to regulated entities by the time EPA issued its stay. See 862 F.3d at 5.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied or dismissed.

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of FRAP 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 8633 words, excluding the parts of the brief exempted under FRAP 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ H. Thomas Byron III
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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, I electronically filed the foregoing [Corrected] Brief For Respondents with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system (originally filed and served on March 27, 2017).

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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