19-2395(L)

19-2508 (Con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW JERSEY, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WASHINGTON, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JAMES C. OWENS, in his capacity as Acting Administrator of the National Highway Traffic Safety Administration, ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,

Respondents,

ALLIANCE FOR AUTOMOTIVE INNOVATION,

Intervenor.

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

OPENING BRIEF OF
ENVIRONMENTAL PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

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

Dated: March 13, 2020

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INTRODUCTION

In 2018, this Court struck down the National Highway Traffic Safety Administration's (NHTSA) unlawful attempt to suspend a congressionally mandated inflation adjustment to the civil penalty for violating automobile fuel-economy standards. The Court held that the agency could not avoid its statutory obligation to update the outdated penalty and restore its deterrent effect.

The agency has now done the same thing by other means. It has reversed its earlier inflation adjustment—and effectively given automakers a green light to violate the fuel-economy standards—by claiming that the Federal Civil Penalties Inflation Adjustment Act does not apply to *this* federal civil penalty. And the agency asserts, in the alternative, that even if it is wrong about that, it would *still* reverse the statutorily required adjustment by invoking an inapplicable "exception" to the mandatory 2016 adjustment some three years after the fact.

The agency's latest attempt to avoid its statutory obligation fails, just like its last. The plain language and purpose of the Inflation Adjustment Act apply with full force to this civil penalty, as both the agency and automakers recognized for twenty-five years. Nor can the agency now belatedly invoke an exception to the required 2016 adjustment, given the highly circumscribed schedule that Congress imposed. And even if the agency theoretically could still invoke the exception, its application here was textbook arbitrary and capricious because, among other flaws, the agency ignored

its own prior pertinent findings and expressly refused to consider the benefits of updating the civil penalty to restore its deterrent effect.

The Court should reject the agency's latest attempt to flout Congress's directive and should—once again—reinstate the mandatory adjustment to this civil penalty.

JURISDICTION

Petitioners Natural Resources Defense Council (NRDC) and Sierra Club (collectively, Environmental Petitioners) challenge the agency's final rule reversing its prior increase to the civil penalty for violating fuel-economy standards. SA1 (84 Fed. Reg. 36,007 (July 26, 2019)) ("Repeal Rule").[1] This Court has jurisdiction to review the rule under 49 U.S.C. § 32909, and the petition for review is timely because it was filed on August 12, 2019. *See NRDC v. NHTSA*, 894 F.3d 95, 105-07 (2d Cir. 2018).

Environmental Petitioners have standing to challenge NHTSA's reversal of the penalty increase for the same reasons this Court held they had standing to challenge NHTSA's earlier suspension of that increase. *See id.* at 104-05. The "well-documented dangers associated with automobile emissions" constitute injury-in-fact to Petitioners' members who "live in polluted areas and along roadways and have suffered respiratory ailments." *Id.* at 104; *see* ADD10-12 (Woodfield Decl. ¶¶ 1-6); ADD16-17 (Rothschild Decl. ¶¶ 1-6); ADD30-32 (Dykiel Decl. ¶¶ 8-10); ADD35-37 (Parker Decl. ¶¶ 4-7); ADD40-43 (Floyd Decl. ¶¶ 2-7); *see also* 77 Fed. Reg. 62,624, 62,901-08

[1] This brief cites materials in the Special Appendix as SA__; the Joint Appendix as JA__; and materials included in the Addendum at the end of this brief as ADD__.

(Oct. 15, 2012) (describing harmful air pollution that results when fossil fuels are burned to power vehicles). This lawsuit also "easily satisfies" causation and redressability because NHTSA's attempt to replace the updated penalty with a "substantially lesser, outdated penalty" will "affect automakers' business decisions and compliance approaches," resulting in less efficient vehicles and more emissions of harmful pollutants. *NRDC*, 894 F.3d at 104-05.[2] By contrast, a favorable decision reinstating the "significantly increased penalties, which Congress mandated," will promote compliance with the fuel-economy standards and likely result in "declines in the adverse health effects" from associated emissions. *Id.* Indeed, causation and redressability are even more clear-cut in this case because, rather than merely suspending the penalty increase, NHTSA has now sought to permanently reverse it.

STATEMENT OF THE ISSUES

1. Did the agency err in concluding that the Federal Civil Penalties Inflation Adjustment Act does not apply to this federal civil penalty?

2. Did the agency exceed its statutory authority when it belatedly invoked an exception to the required amount of the 2016 inflation adjustment years after that mandatory adjustment became final?

[2] Decreased compliance with fuel-economy standards also results in harmful air pollution from additional oil-refining activities, *see, e.g.*, ADD38 (Parker Decl. ¶ 12); ADD30-32 (Dykiel Decl. ¶¶ 8-10), and reduces opportunities for Petitioners' members to purchase fuel-efficient vehicles, *see, e.g.*, ADD18-20 (Rothschild Decl. ¶¶ 7-14); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1332-33 (D.C. Cir. 1986).

3. Is the agency's application of the exception arbitrary and capricious where the agency applied the wrong standard, refused to consider its own prior findings regarding the benefits of an inflation adjustment, and reversed the entire adjustment instead of simply reducing it?

4. Did the agency violate the National Environmental Policy Act by failing to take a "hard look" at the harmful emissions likely to result from its action?

STATEMENT OF THE CASE

Environmental Petitioners ask this Court to review and set aside NHTSA's final rule, signed by its Deputy Administrator, that reverses a statutorily mandated inflation adjustment to the civil penalty for violating automobile fuel-economy standards. SA1-28 (84 Fed. Reg. at 36,007-34).

Congress Establishes a Civil Penalty to Deter Fuel-Economy Violations

In 1975, Congress enacted the Energy Policy and Conservation Act (EPCA) to, among other things, "provide for improved energy efficiency of motor vehicles." Pub. L. No. 94-163, § 2(5), 89 Stat. 871, 874 (1975). EPCA requires the Secretary of Transportation to establish and enforce automobile fuel-economy standards. *Id.*, sec. 301, §§ 501-512 (codified as amended at 49 U.S.C. §§ 32901-32919). The Secretary has delegated these responsibilities to NHTSA. *See* 49 C.F.R. § 1.95(a).

The corporate average fuel-economy standards—often referred to as CAFE standards—are "performance standard[s]" which "specif[y] a minimum level of average fuel economy" that automakers' fleets must attain in a model year. 49 U.S.C.

§ 32901(a)(6). The standards are measured in miles per gallon and, subject to statutory constraints, are set at the "maximum feasible" levels that automakers "can achieve in that model year." *Id.* § 32902(a). If an automaker exceeds the CAFE standard in a given model year, it earns credits that can be used to cover shortfalls and comply with the standards in other model years. *Id.* § 32903.

Automakers thus comply with the CAFE standards either by implementing fuel-saving technology to improve their vehicles' efficiency or by applying credits they earned or purchased from other automakers. JA684 (81 Fed. Reg. 95,489, 95,489 (Dec. 28, 2016)). Although Congress created the CAFE program primarily to conserve the nation's energy supplies, compliance with the standards provides other crucial public benefits, such as reducing emissions of harmful air pollutants, encouraging technological innovation, promoting the nation's energy security, and saving consumers money at the pump. *See* 77 Fed. Reg. at 62,631-34, 63,002-06, 63,055-62.

Congress requires NHTSA to enforce the fuel-economy standards by assessing civil penalties. 49 U.S.C. § 32912. The purpose of the penalty is to deter violations and "encourage manufacturers to comply with the CAFE standards." JA685 (81 Fed. Reg. at 95,490). The strength of that deterrence depends on the amount of the penalty, however, because automakers "will pursue the strategy … that results in the lowest overall cost." JA663 (81 Fed. Reg. 43,524, 43,527 (July 5, 2016)). If it is cheaper for automakers to pay the penalty than to comply with the standards, some will forego

installing fuel-saving technology and pay the penalty instead. *See, e.g.*, JA981-96 (Summary of CAFE Civil Penalties Collected).

In 1975, Congress established a CAFE civil penalty of $5 per tenth of a mile per gallon by which the average fuel economy of an automaker's fleet falls short of the standard. Pub. L. No. 94-163, sec. 301, § 508(b)(1), 89 Stat. at 913 (codified as amended at 49 U.S.C. § 32912(b)). Questions were soon raised whether the $5 penalty was sufficient to deter noncompliance. *See, e.g.*, S. Rep. No. 95-409, at 45 (1977) ("[I]t is questionable whether the penalties for non-compliance by manufacturers are strong enough to assure that the statutory standards of the existing legislation will be met."). In 1977, the Senate passed a bill to double the civil penalty, from $5 to $10 per tenth of a mile per gallon. *See* S. 2057, 95th Cong. § 411 (as passed by Senate Sept. 13, 1977). The next year Congress enacted a compromise amendment that, rather than doubling the penalty outright, authorized the agency to increase the penalty up to a maximum $10 if it made certain findings. *See* Pub. L. No. 95-619, § 402, 92 Stat. 3206, 3255 (1978) (codified as amended at 49 U.S.C. § 32912(c)).

Congress Requires Agencies to Adjust their Civil Penalties, Including the CAFE Penalty, for Inflation

In 1990, Congress found that inflation had diminished the value of federal civil penalties and "weakened [their] deterrent effect." Pub. L. No. 101-410, § 2(a), 104 Stat. 890 (1990). To address this problem, Congress enacted the Inflation Adjustment Act. *Id.* § 2(b). The Act required the President to submit a report to Congress within six months identifying each civil monetary penalty as defined under the Act, *id.* § 4(1),

and the amount each penalty would need to be adjusted to account for inflation, *id.* §§ 4(4)-(5), 5; *see NRDC*, 894 F.3d at 110 & n.8. The President delegated this task to the Office of Management and Budget (OMB). 56 Fed. Reg. 21,911 (May 10, 1991). The report OMB sent to Congress in 1991 identified the CAFE penalty as a civil monetary penalty and noted that the $5 penalty, if adjusted for inflation, would be $12. JA82, 114, 146 (OMB, Civil Monetary Penalty Inflation Adjustment Report Ex. 1 at 25, Ex. 2 at 25, Ex. 3 at 28 (July 1991) [hereinafter OMB 1991 Report]).

In 1996, Congress amended the Inflation Adjustment Act and directed federal agencies to "adjust each civil monetary penalty" they administered, but it limited the initial adjustment to ten percent. Pub. L. No. 104-134, § 31001(s)(1)-(2), 110 Stat. 1321, 1321-373 (1996). Pursuant to the Act, NHTSA adjusted the CAFE civil penalty by the ten-percent limit, from $5 to $5.50. 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997).

Despite Congress's desire to "maintain the deterrent effect" of federal civil penalties through "regular adjustment[s] for inflation," IAA § 2(b)(1)-(2),[3] certain limitations in the Act—such as the ten-percent limit—prevented many civil penalties from receiving appropriate adjustments. In 2003, the Government Accounting Office (GAO) authored a report for Congress, entitled *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, that highlighted these limitations. *See* JA176-96 (GAO-03-409 at 16-36). The report recommended that "[i]f Congress wants

[3] The Inflation Adjustment Act, as amended, is codified at 28 U.S.C. § 2461 note, and appears in this brief's Addendum at ADD1-4. This brief cites the Act as "IAA."

federal civil penalties to regain their full impact and deterrent effects, it should consider amending the Inflation Adjustment Act to require agencies to adjust their penalties for the full amount of inflation that has occurred since they were last set or adjusted by Congress." JA198 (*id.* at 38).

This 2003 report to Congress specifically identified the CAFE penalty as an example of a civil monetary penalty that, absent further amendments to the Act, would not receive adequate adjustments. *See* JA189 (*id.* at 29). GAO reiterated in another 2007 report to Congress that further inflation adjustments to the CAFE penalty might be warranted. *See* JA244 (GAO-07-921 at 29) ("Because CAFE penalties have not risen since 1997, despite increases in inflation, noncompliance now costs less, in real terms, for manufacturers than it did before 1997.").

In 2008, the Congressional Research Service also prepared a report for Congress that again highlighted the CAFE penalty as one that could use another inflation adjustment to restore its deterrent effect. *See* Cong. Research Serv., RL34368, *Adjustment of Civil Monetary Penalties for Inflation* 9 (2008). The report observed that the "inability of agencies to adjust civil penalties for inflation may be having a deleterious effect on public policy," and cited experts' concerns that the $5.50 CAFE penalty is "not enough of a monetary incentive for manufacturers to comply with CAFE." *Id.*

Congress Renews and Strengthens its Command to Adjust Outdated Penalties

In 2015, Congress enacted the Improvements Act, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015), to amend limitations in the Inflation Adjustment Act that

were impeding adequate inflation adjustments.[4] Congress "made several key changes" to the Inflation Adjustment Act—e.g., it "removed the ten percent cap on penalties, deleted the rounding methodology that had kept penalties stagnant, and set firm dates by which agencies were required to implement the new penalties through interim final rulemaking." *NRDC*, 894 F.3d at 111. These amendments to the Act represented a "renewed effort to tackle the recurring issue of stagnant civil monetary penalties." *Id.*

The Improvements Act mandated that federal agencies "shall adjust" their civil penalties to account for inflation, with an initial catch-up adjustment that "shall take effect not later than August 1, 2016," followed by mandatory annual adjustments "not later than January 15 of every year thereafter." IAA § 4(a), (b)(1)(B). This "highly circumscribed schedule" reflected "Congress's determination to ensure that civil penalties retain their value over time." *NRDC*, 894 F.3d at 109 (quotation omitted).

For the initial 2016 "catch-up" adjustment, Congress mandated that agencies account for all the inflation that occurred since the penalty was established or adjusted under another statute, limited to a 150-percent increase. IAA § 5(b)(2). The Act also contained a narrow "exception" for the catch-up adjustment that allowed agencies to adjust a penalty by a reduced amount if they determined that the otherwise required amount "will have a negative economic impact." *Id.* § 4(c). The exception applied only

[4] *See* James Ming Chen, *Inflation-Based Adjustments in Federal Civil Monetary Penalties*, 34 Yale L. & Pol'y Rev. 1, 41 (2016) (noting the Improvements Act implements many suggestions made by the Administrative Conference of the United States); 78 Fed. Reg. 2939, 2943-45 (Jan. 15, 2013) (Administrative Conference recommendations).

to the "*amount* of the initial catch-up adjustment," however, and "afforded no such discretion regarding the *timing* of the adjustments." *NRDC*, 894 F.3d at 109.

NHTSA Complies with Congress's Command and Updates the CAFE Penalty

In July 2016, NHTSA complied with the Improvements Act by making catch-up adjustments to the various civil penalties it administers, including the CAFE penalty. JA660-65 (81 Fed. Reg. at 43,524-29). NHTSA found that the original $5 penalty from 1975 would be $22 in 2016 dollars, so the agency adjusted the existing $5.50 penalty by the 150-percent limit, to $14. JA662 (*id.* at 43,526). The agency further found that the maximum $10 amount, as established in 1978, would be $35 in 2016, and thus also adjusted it by 150 percent, to $25. JA662 (*id.*).

That same month, NHTSA conducted a comprehensive technical analysis of the CAFE standards it had anticipated adopting for model years 2022 through 2025. JA526-38 (Draft Technical Assessment Report ES-1 to ES-13 (July 2016) [hereinafter 2016 Draft TAR]). NHTSA incorporated the updated $14 penalty into that analysis. JA611-12 (*id.* at 13-57 to 13-58). The agency concluded that the anticipated CAFE standards were technologically feasible at reasonable cost to automakers, *see* JA527 (*id.* at ES-2), and that the standards' fuel-saving benefits alone exceeded the compliance costs, JA537, 656-57 (*id.* at ES-12, 13-102 to 13-103).

The Alliance of Automobile Manufacturers and Association of Global Automakers (collectively, Intervenors) jointly petitioned the agency for partial reconsideration of the CAFE penalty inflation adjustment. They acknowledged that

the Improvements Act "obligated" the agency to increase the penalty, and that "NHTSA is not empowered to exempt the CAFE program from this directive." JA666 (Industry 2016 Petition 1). But they "raised concerns about the method used to calculate the new penalty and its retroactive application." *NRDC*, 894 F.3d at 102.

In December 2016, the agency prescribed a final rule responding to Intervenors' petition. *See id.* The agency concluded that, because the purpose of the civil penalty is to "encourage manufacturers to comply with the CAFE standards," it would apply the updated $14 penalty only to model year 2019-and-after fleets so that automakers had time "to design and produce vehicles in response to the increased penalties." JA685-86 (81 Fed. Reg. at 95,490-91). The agency observed that this would "accomplish [the] goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles in those future model years." JA686 (*id.* at 95,491). NHTSA denied Intervenors' petition "in all other respects." JA686 (*id.*).

NHTSA Unlawfully Attempts to Suspend the Required Adjustment

In July 2017, following a change of administration, NHTSA indefinitely suspended the $14 inflation adjustment to the CAFE civil penalty and reinstated the outdated $5.50 penalty. JA689 (82 Fed. Reg. 32,139 (July 12, 2017)). Environmental Petitioners and several States challenged NHTSA's action in this Court.

In April 2018, the Court vacated NHTSA's unlawful suspension. *See NRDC*, 894 F.3d at 100. The Court explained that NHTSA lacked authority to suspend the inflation adjustment because the Improvements Act's plain terms and core purposes

did not allow the agency to avoid its "clear and mandatory" deadlines. *Id.* at 108-11. The Court also rejected NHTSA's claim that either EPCA or some "inherent authority" allowed the agency to suspend the adjustment. *Id.* at 112-13. The Court held that the "penalty increase is mandated by the Improvements Act," and that "[n]othing in EPCA contradicts or undermines that mandate." *Id.* at 112.

The Court further found that NHTSA violated the Administrative Procedure Act by suspending the adjustment without providing notice or an opportunity for public comment. *Id.* at 113-15. The Court observed that Congress had required agencies "across the federal government to institute mandatory, inflation-linked increases to numerous federal civil penalties, including the CAFE penalties," and that any contrary preference for "different regulations that are easier or less costly to comply with does not justify dispensing with notice and comment." *Id.* at 115.

Finally, the Court made clear that, upon vacating the unlawful suspension, the earlier inflation adjustment to the CAFE penalty was "now in force." *Id.* at 116.

NHTSA Attempts to Reverse the Adjustment Through Other Means

In Spring 2018, just hours before filing its answering brief in this Court to defend the unlawful suspension, NHTSA announced a proposed rule to reverse the 2016 inflation adjustment and reinstate the outdated penalty. SA29 (83 Fed. Reg. 13,904 (Apr. 2, 2018)). In the proposed rule, NHTSA argued—for the first time, and contrary to its longstanding position—that the Inflation Adjustment Act does not apply to the CAFE civil penalty. SA33-36 (*id.* at 13,908-11).

In July 2019, the agency issued a final rule reversing the 2016 catch-up adjustment and reinstating the outdated $5.50 penalty and $10 maximum. NHTSA's primary justification for this rule was its new position that the CAFE civil penalty is not a "civil monetary penalty" under the Act. SA2-3 (84 Fed. Reg. at 36,008-09).[5] The agency asserted, in the alternative, that even if the Act applies to the penalty, NHTSA would *still* reverse the 2016 adjustment based on the above-described "exception" to the required catch-up amount. SA14-17 (*id.* at 36,020-23). NHTSA also asserted that reversing the penalty adjustment would have no significant environmental impacts. SA25-27 (*id.* at 36,031-33).

Environmental Petitioners and several States again ask this Court to review and set aside NHTSA's attempt to undo the statutorily prescribed inflation adjustment.

SUMMARY OF THE ARGUMENT

I. The Federal Civil Penalties Inflation Adjustment Act applies, unsurprisingly, to this federal civil penalty. The Act's plain text and purpose make that clear, and the federal government's contemporaneous construction and a quarter-century of consistent practice also confirm this straightforward conclusion. Even automakers acknowledged the Act "obligated" NHTSA to adjust the CAFE penalty for inflation. NHTSA now attempts to avoid this statutory obligation by asserting—contrary to its

[5] NHTSA acknowledged this "reflected a change in NHTSA's position" from when it adjusted the CAFE penalty from $5 to $5.50 in 1997, but it did not reverse *that* prior adjustment, stating it was "exercising its judgment not to revisit its determination from more than twenty years ago." SA6-7 (84 Fed. Reg. at 36,012-13).

longstanding view—that the Act does not apply to the CAFE penalty because it neither "is for a specific monetary amount" nor "has a maximum amount." But the penalty, as established in 1975, was for $5 per tenth of a mile per gallon—a specific dollar amount that, absent adjustment, loses value over time as a result of inflation. Nor do any of the various features that NHTSA cites, to purportedly distinguish the CAFE penalty from others, somehow remove it from Congress's clear directive. And while the penalty's specific monetary amount alone suffices to bring it within the Act's reach, the CAFE penalty also "has a maximum amount" of $10 that is likewise subject to adjustment for inflation.

II. NHTSA's alternative justification for reversing the mandatory adjustment fares no better. NHTSA belatedly invokes an exception that afforded agencies a "narrow window of discretion" to make a reduced catch-up adjustment in 2016. But as this Court previously explained, the exception conferred no discretion regarding the *timing* of that mandatory adjustment. And NHTSA identifies no support for its latest attempt to avoid the Act's "highly circumscribed schedule." NHTSA therefore lacked authority to invoke the exception in 2019, years after the mandatory catch-up adjustment became final and long after any narrow window of discretion had closed.

III. Even if the Court were to consider NHTSA's belated invocation of the exception, its application here was arbitrary and capricious for at least three reasons. First, NHTSA applied the wrong legal framework in its primary analysis. Rather than determining that the required catch-up adjustment amount "*will* have a negative

economic impact," as required under the Act, NHTSA improperly swapped that test with the framework governing the agency's separate authority to increase the original value of the penalty under EPCA, which imposes the *opposite* burden to demonstrate the likely *absence* of specific economic harms.

Second, NHTSA failed to consider relevant factors. It provided no reasoned explanation for disregarding its own pertinent prior findings about the impact of an inflation-adjusted CAFE penalty. And it expressly *refused* to consider the many positive economic impacts of an inflation adjustment, such as fuel savings that directly benefit consumers. If NHTSA were correct that it could invoke the exception so long as it identified *any* increased cost to automakers—no matter how small, and irrespective of any countervailing benefits—then *every* inflation adjustment would have a "negative economic impact," and the statutory "exception" would swallow the rule.

Finally, even assuming NHTSA could justify invoking the exception here, it still could not eliminate the *entire* catch-up adjustment from 2016. Although the exception permitted a reduced inflation adjustment, it did not allow an agency to decline to make any adjustment whatsoever. And even if the Act theoretically allowed that, the agency would still have to explain why it took that drastic step instead of simply making a more moderate, intermediate adjustment. NHTSA expressly refused to provide any reasoned explanation for its all-or-nothing approach here.

IV. In addition to these substantive errors, NHTSA also failed to comply with the National Environmental Policy Act's procedural requirement that it take a "hard

look" at the environmental impacts of its action. Here, NHTSA acknowledged that reversing the penalty adjustment could result in an additional 54 billion gallons of fuel consumed over a 15-year period, but it conducted no meaningful analysis before asserting that this enormous amount of excess fuel consumption would have no significant environmental impact. A "hard look" in this context required the agency, at minimum, to quantify the harmful emissions that would result from its action. NHTSA's cursory assertion that any impacts would be "very small" relative to the emission *benefits* of another decision cannot substitute for the requisite analysis.

STANDARD OF REVIEW

The Court shall "hold unlawful and set aside" the agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "in excess of statutory … authority"; or "without observance of procedure as required by law." *NRDC*, 894 F.3d at 107 (quoting 5 U.S.C. § 706(2)).

NHTSA receives no deference for its interpretations of the Inflation Adjustment Act, which applies to all federal agencies. *Id.* at 112 n.10. The Court reviews those interpretations de novo. *See Cousin v. Office of Thrift Supervision*, 73 F.3d 1242, 1249 (2d Cir. 1996).

ARGUMENT

I. The Inflation Adjustment Act applies to this federal civil penalty

NHTSA's primary justification for reversing the mandatory inflation adjustment to the CAFE penalty is its newfound contention that the Federal Civil

Penalties Inflation Adjustment Act does not apply to *this* federal civil penalty. But even assuming this Court did not already resolve that question, *see* State Pet'rs Br. Point I.A, the Act's text and purpose plainly encompass the CAFE penalty, as the agency's contemporaneous construction and a quarter-century of practice confirm.

A. The Act's text and purpose encompass the CAFE civil penalty

The Inflation Adjustment Act reflects "Congress's determination to ensure that civil penalties retain their value over time through regular inflationary adjustments." *NRDC*, 894 F.3d at 109. The Act applies "government-wide" to civil penalties administered by "all agencies across the federal government." *Id.* at 112; *see* IAA § 3(1). It requires inflation adjustments of federal civil penalties that include a dollar amount, by broadly defining "civil monetary penalty" as:

> any penalty, fine, or other sanction that—
>
> (A)(i) is for a specific monetary amount as provided by Federal law; or
>
> (ii) has a maximum amount provided for by Federal law; and
>
> (B) is assessed or enforced by an agency pursuant to Federal law; and
>
> (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

IAA § 3(2). In other words, as NHTSA acknowledges, "Congress intended the … Act to apply 'broadly.'" SA15 (84 Fed. Reg. at 36,021).

The CAFE civil penalty is, unsurprisingly, a "civil monetary penalty" subject to adjustment under the Act. Congress expressly designated it "a civil penalty," 49 U.S.C. § 32912(b), and repeatedly referred to it as such, *see, e.g.*, *id.* §§ 32913-32915. Indeed, Congress placed the CAFE penalty in a statutory section titled "Civil penalties," *id.*

§ 32912, alongside another penalty that NHTSA concedes is a civil monetary penalty under the Act, *id.* § 32912(a); *see* SA10 (84 Fed. Reg. at 36,016 & n.73).

The CAFE civil penalty also fits squarely within the Act's broad definition of "civil monetary penalty," as NHTSA itself has long recognized, *see infra* 20-23, and its own regulations (still) impliedly concede. *Compare, e.g.*, 49 C.F.R. § 578.4 (defining "civil penalty" as one that is "for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law," and is "assessed, compromised, collected, or enforced by NHTSA pursuant to Federal law"), *with id.* § 578.6(h)(2) (describing the CAFE penalty as a "civil penalty" and including it in NHTSA's list of "civil penalties"). The penalty is for a specific monetary amount because EPCA provided in 1975 for "a civil penalty of $5" per tenth of a mile per gallon. 49 U.S.C. § 32912(b). Indeed, the penalty *also* has a maximum amount because EPCA provided in 1978 that it "may not be more than $10." *Id.* § 32912(c)(1)(B). Further, NHTSA assesses the civil penalty pursuant to EPCA and enforces it in administrative proceedings or a civil action in federal court. *Id.* §§ 32912(d), 32914(a).

The Inflation Adjustment Act's "primary purpose" also confirms that the Act applies to the CAFE civil penalty. *NRDC*, 894 F.3d at 109. In the Act, Congress recognized that civil penalties play an "important role in deterring violations and furthering the policy goals embodied in [federal] laws and regulations." IAA § 2(a)(1). But it also found that "inflation has weakened the deterrent effect of such penalties." *Id.* § 2(a)(3). Congress therefore enacted (and later strengthened) the Act to require

"regular adjustment for inflation" to "maintain the deterrent effect of civil monetary penalties and promote compliance with the law." *Id.* § 2(b)(1)-(2).

Adjusting the CAFE civil penalty for inflation is entirely consistent with this statutory purpose. Indeed, NHTSA has recognized that the purpose of the CAFE penalty is to "encourage manufacturers to comply with the CAFE standards." JA685 (81 Fed. Reg. at 95,490). "Without the threat of civil penalties, manufacturers will not be prodded to install as many fuel-saving devices, nor to install them as promptly." *Ctr. for Auto Safety*, 793 F.2d at 1332. Thus, to "assure compliance," "Congress imposed a system of financial penalties for companies failing to meet the annual CAFE standards." *Gen. Motors Corp. v. NHTSA*, 898 F.2d 165, 173 (D.C. Cir. 1990).

But aside from a small inflation adjustment of $.50 in 1997, the CAFE civil penalty in 2015 remained essentially unchanged from when Congress first established it four decades earlier. "Due to inflation, this stasis in the law ha[d] the practical effect of decreasing the value of the penalty over time." *NRDC*, 894 F.3d at 100; *cf. Randall v. Sorrell*, 548 U.S. 230, 261 (2006) (inflation causes a "decline in real value each year"). Indeed, the outdated $5.50 penalty in 2016 represented a 75 percent decrease from the penalty's original value. *See* JA662 (81 Fed. Reg. at 43,526) (calculating that $5 penalty from 1975 would be $22 in 2016). This diminished penalty value also "weakened [its] deterrent effect," IAA § 2(a)(3), as Congress was specifically aware.[6]

[6] *See, e.g.*, Cong. Research Serv., RL34368 at 9 (citing expert concerns that, because of inflation, the $5.50 penalty is "not enough of a monetary incentive for manufacturers to comply with CAFE"); GAO-10-336, *Vehicle Fuel Economy* 17 (2010) (similar).

Applying the mandatory 2016 catch-up adjustment to the CAFE penalty thus complied with both the Act's text and purpose by helping to restore its "deterrent effect" and "promote compliance" with the fuel-economy standards. IAA § 2(b)(2).

B. For more than a quarter-century, the federal government and automakers recognized that the Act applies to this civil penalty

While the Act's text and purpose alone establish that the CAFE civil penalty is a civil monetary penalty, a quarter-century of consistent practice further confirms this straightforward conclusion. Across four administrations from both parties, the federal government—including both executive and legislative branch agencies—uniformly agreed that the Act applies to the CAFE civil penalty. This "longstanding practice of the government can inform [the Court's] determination of what the law is." *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quotations omitted).

Particularly instructive is the government's "contemporaneous construction," provided shortly after the Inflation Adjustment Act's enactment, that the Act applied to the CAFE civil penalty. *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981). As described above (at 6-7), the original Act required the executive branch to submit a report to Congress identifying each "civil monetary penalty" as defined in the Act. Pub. L. No. 101-410, § 4(1), 104 Stat. at 891. In the resulting 1991 report to Congress, OMB and NHTSA specifically identified the CAFE civil penalty as such a penalty. *See, e.g.*, JA82, 114 (OMB 1991 Report at Ex. 1 at 25, Ex. 2 at 25). The agencies' "contemporaneous reading of the statute" provides "strong support" that the Act applies to this penalty. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 466 (1986).

Not long after receiving this report identifying the CAFE civil penalty as a civil monetary penalty, Congress revised both the EPCA fuel-economy chapter and the Inflation Adjustment Act, and yet made no effort in either to remove the CAFE penalty from the Act's reach. *See, e.g.*, Pub. L. No. 103-272, § 1(a), (d), 108 Stat. 745, 1056-75 (1994) (recodifying EPCA fuel-economy chapter and stating that any revisions were "without substantive change"). In fact, the Act's 1996 amendments exempted civil penalties under several *other* statutes from the mandatory inflation adjustments. *See* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. at 1321-373 (exempting penalties under Internal Revenue Code, Tariff Act, Occupational Safety and Health Act, and Social Security Act). But Congress did *not* exempt the CAFE penalty, despite having been informed that it was a civil monetary penalty under the Act. "When Congress provides exceptions in a statute," as it did here, the "proper inference … is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *accord Stryker v. SEC*, 780 F.3d 163, 167 (2d Cir. 2015). Consistent with the requirements in Act's 1996 amendments, NHTSA adjusted the CAFE penalty in 1997 by the ten-percent limit, from $5 to $5.50. 62 Fed. Reg. at 5168.

Over the next decade, legislative branch agencies repeatedly informed Congress that limitations in the Act's 1996 amendments were preventing the CAFE civil penalty from keeping pace with inflation. *See, e.g.*, JA189, 208 (GAO-03-409 at 29, 48) (observing that, absent additional amendments to the Act, the CAFE penalty might

not be adjusted for another 28 years); Cong. Research Serv., RL34368 at 9 (noting that, since 1997, "NHTSA has been unable to adjust [the penalty] for inflation," which "may be having a deleterious effect" on compliance with the CAFE standards). Congress enacted the Improvements Act in 2015 to address these limitations and require catch-up inflation adjustments by a clear deadline. *See supra* 8-9. Once again, Congress did not exempt the CAFE penalty from these statutory requirements.[7]

Both NHTSA and automakers recognized that the Improvements Act required the agency to adjust the CAFE penalty. The agency promulgated a catch-up inflation adjustment in July 2016, JA662 (81 Fed. Reg. at 43,526), and explained, in a separate technical analysis of anticipated CAFE standards, that NHTSA was required to do so, JA611 (2016 Draft TAR 13-57). Intervenors agreed, conceding that the Act "obligated" NHTSA to adjust the CAFE penalty, and that "NHTSA is not empowered to exempt the CAFE program from this directive." JA666 (Industry 2016 Petition 1).

Indeed, as late as July 2017—*after* the change of administration—NHTSA still acknowledged that the Act applied and thus invited comment on how to "implement the Inflation Adjustment Act as it pertains to CAFE penalties." JA692-93 (82 Fed.

[7] NHTSA erroneously suggests that Congress "was not … 'on notice' that NHTSA would apply the 2015 Act to the CAFE civil penalty" because, after 1997, "NHTSA did not make any subsequent adjustments to the $5.50 rate." SA11 (84 Fed. Reg. at 36,017). But this ignores that legislative branch agencies specifically informed Congress that NHTSA did not make subsequent adjustments to the CAFE penalty *because of* certain statutory limitations, which the Improvements Act then addressed.

Reg. 32,140, 32,141-42 (July 12, 2017)) (explaining that NHTSA was directed to "adjust its civil penalties, … including the penalty for CAFE shortfalls, pursuant to the Inflation Adjustment Act"). Intervenors, too, continued to recognize that the CAFE penalty fell within the Act's "sweeping mandate for inflation adjustments," and that NHTSA could reduce the catch-up adjustment only by invoking an exception under the Act. JA697-98 (Industry 2017 Comment 1-2). In fact, as NHTSA acknowledges, "none of the commenters who responded to NHTSA's [July 2017] request for comments offered the legal interpretation that NHTSA is now proposing." SA7 (84 Fed. Reg. at 36,013 n.48 (quotation omitted)).

It was not until April 2018—more than a quarter-century after the Inflation Adjustment Act's enactment, and two decades after NHTSA first adjusted the CAFE penalty for inflation under the Act—that *any* entity ever suggested the CAFE civil penalty may not be a "civil monetary penalty" under the Act. *See supra* 12. As explained below, this new attempt by NHTSA to avoid its statutory obligation fails.

C. NHTSA cannot remove the CAFE penalty from the Act's reach

Despite this contemporaneous and longstanding recognition that the Act applies to the CAFE penalty, NHTSA now contends that it is not a "civil monetary penalty" because it neither is "for a specific monetary amount" nor "has a maximum amount." SA9-10 (84 Fed. Reg. at 36,015-16). NHTSA is wrong as to both.

1. The penalty is "for a specific monetary amount"

The CAFE civil penalty is "for a specific monetary amount as provided by Federal Law," IAA § 3(2)(A)(i), because EPCA in 1975 provided for "a civil penalty of $5" per tenth of a mile per gallon, 49 U.S.C. § 32912(b), which is a "specific monetary amount" that can—and should—be adjusted for inflation. NHTSA's two prior adjustments to the CAFE penalty, the multiple executive and legislative branch reports discussing potential inflation adjustments to the penalty, and this Court's prior opinion all prove as much.

In requiring that a civil penalty be either for a specific monetary amount or have a maximum amount, the Act encompasses penalties with dollar amounts because it is those dollar amounts that will lose value over time as a result of inflation. *See supra* 19. By contrast, the Act excludes penalties that have *no dollar amount*—e.g., their value depends on the harm caused by the violation—because inflation does not directly diminish their value in the same way. *See, e.g.*, JA515 (OMB M-16-06, *Implementation of the Improvements Act* 2) (explaining that a penalty for "the full cost of restoration and repair of archaeological resources damaged," *see* 43 C.F.R. § 7.16(a)(1), is not subject to adjustment). Accordingly, the Act's mandatory adjustments "apply only to penalties with a dollar amount." JA515 (*id.*); *see also* JA46 (OMB 1991 Report, App'x I).[8]

[8] *See also, e.g.*, 42 C.F.R. § 460.46(a)(2) (describing a civil penalty of "$25,000 plus double the excess amount above the permitted premium charged"); 81 Fed. Reg. 61,538 (Sept. 6, 2016) (adjusting $25,000 to $36,794 for inflation, but leaving unadjusted the additional "double the excess amount … charged").

Although EPCA specifies a dollar amount for the CAFE civil penalty, NHTSA contends that the $5 penalty nonetheless is not "for a specific monetary amount" because it "is an input in a formula that is used to calculate a penalty." SA9 (84 Fed. Reg. at 36,015). That is, NHTSA seeks to create a distinction between the $5 civil penalty "rate"—a term that does not appear in EPCA—and the total amount that a noncompliant automaker ultimately will owe. SA9-10 (*id.* at 36,015-16). Under this view, "[a]lthough the penalty rate is 'a specific monetary amount,' the penalty itself is indeterminate," JA929 (OMB Non-Applicability Letter 4), because the "higher the [CAFE] shortfall or the higher the number of vehicles in the fleet, the higher the potential penalty," SA9 (84 Fed. Reg. at 36,015).

This is nonsense. Virtually *all* civil penalties operate in this fashion. Penalties commonly function as a rate per infraction and are thus "indeterminate" in the sense that a violator's ultimate liability is determined by the total number of infractions. In EPCA, Congress defined the infraction precisely—as every tenth of a mile per gallon by which an automaker's fleet falls short of the CAFE standard (less any available credits), 49 U.S.C. § 32912(b)(1)-(3)—so that major violations result in greater liability than minor ones. Other agencies have recognized that penalties defining infractions in a variety of ways are still "civil monetary penalties" under the Act. *See, e.g.*, 46 U.S.C. § 55111(c)(2) (towing vessel violating statutory restriction "is liable for a penalty of $60 per ton based on the tonnage of each towed vessel"); 19 C.F.R. § 4.92 (adjusting

to $159 per ton).[9] NHTSA is therefore wrong to characterize the CAFE penalty as a uniquely "complex formula." SA13 (84 Fed. Reg. at 36,019). As the D.C. Circuit has observed, "the methodology for calculating [CAFE] fines is quite straightforward." *Mercedes-Benz of N. Am., Inc. v. NHTSA*, 938 F.2d 294, 295 (D.C. Cir. 1991).

Moreover, contrary to the sharp distinction that NHTSA posits between a penalty "rate" and the total penalty ultimately assessed, it is common to refer to either as "the penalty." *See, e.g.*, *NRDC*, 894 F.3d at 101 ("a 10 percent adjustment raised *the penalty* to $5.50, and the penalty remained at that amount until 2016, when NHTSA … rais[ed] *the penalty* to $14 per tenth of an mpg." (emphasis added)). NHTSA's observation that EPCA refers to an "amount … used in calculating a civil penalty," SA10 (84 Fed. Reg. at 36,016), is thus likewise irrelevant because Congress also made clear that a "higher amount" is one and the same as an "increase in *the penalty*," 49 U.S.C. § 32912(c)(1)(A) (emphasis added); *see also id.* § 32912(c)(1)(C). If anything, this reference to an "amount" helps demonstrate that the CAFE penalty is "for a specific monetary *amount* as provided by Federal law." IAA § 3(2)(A)(i) (emphasis added).

Perhaps recognizing that its attempted distinctions are untenable, *see* SA13 (84 Fed. Reg. at 36,019) (NHTSA "does not take the position that any penalty involving a

[9] *See also, e.g.*, 29 U.S.C. § 1059(b) (employer violating recordkeeping and reporting requirements liable for "a civil penalty of $10 for each employee with respect to whom such failure occurs"); 29 C.F.R. § 2575.2(a) (adjusting to $28 per employee). This $10 penalty administered by the Department of Labor also belies NHTSA's contention that the Inflation Adjustment Act "was not intended to apply to the small dollar value CAFE civil penalty rate." SA14 (84 Fed. Reg. at 36,020).

multiplier is not a 'civil monetary penalty'"), the agency next suggests that the CAFE penalty is different because EPCA allows automakers to use over-compliance credits to make up for CAFE shortfalls. *See* SA10, 13 (*id.* at 36,016, 36,019). But using credits is simply an alternative form of *complying* with the standards. *See* 49 U.S.C. § 32911(b) ("Compliance is determined after considering credits …"); 49 C.F.R. § 536.3(b) (an automaker "achieves compliance" when it uses credits to "cover the gap" between its average fuel economy and the applicable CAFE standard). Put another way, while an automaker can use credits to negate or reduce the occurrence of infractions, *see* 49 U.S.C. § 32912(b)(3), the CAFE penalty is still "for a specific monetary amount"—$5 per infraction—even if the number of infractions depends on "instructions from the regulated entity" as to its credit usage. SA13 (84 Fed. Reg. at 36,019); *see also, e.g.*, 42 U.S.C. § 13258(d)-(e) (allowing regulated entity to use credits to comply with alternative fuel transportation requirements); 83 Fed. Reg. 66,080, 66,083 (Dec. 26, 2018) (adjusting penalty for violating those requirements). NHTSA's observation that credits allow automakers to "take unilateral action" to reduce their liability is therefore correct but irrelevant. SA13 (84 Fed. Reg. at 36,019). Virtually any regulated entity can unilaterally reduce its civil penalty liability by complying with the law to reduce its number of infractions.[10]

[10] NHTSA also observes that, because of credit trading, the "ultimate penalty" may depend on "decisions of *other* manufacturers to earn and sell credits." SA2 (84 Fed. Reg. at 36,008). But acquiring credits generated by another automaker's over-compliance is still a form of complying with the standards. *Cf.* 42 U.S.C. § 13258(e) (similarly allowing for transfer of over-compliance credits). And credit trading cannot

Unable to find a textual basis to exclude the CAFE penalty from the Act, NHTSA also contends that an inflation adjustment would be "gratuitous" because the CAFE standards themselves have, at times, increased in stringency. SA11-12 (84 Fed. Reg. at 36,017-18). This is an odd contention for NHTSA to make: both because it has reversed the penalty adjustment while *also* proposing to flatline CAFE standards for six model years, *see* JA914 (83 Fed. Reg. 42,986, 42,987 (Aug. 24, 2018)), and because, until recently, the standards remained stagnant for two decades, *see* SA11 (84 Fed. Reg. at 36,017 n.97). In any event, that the *standards'* stringency may increase does not make the penalty for violating them something other than what it is—a civil monetary penalty. *See, e.g.*, 42 U.S.C. § 6295(m)-(p) (requiring periodic evaluation for increased stringency of EPCA appliance energy-efficiency standards); 83 Fed. Reg. at 66,081 (adjusting penalty for violating those standards). Congress has expressed *two* goals: CAFE standards at maximum feasible levels to conserve energy *and* an inflation-adjusted penalty to deter violations. NHTSA must implement them both.[11]

Finally, NHTSA appears to contend that its separate authority to increase the CAFE penalty under EPCA, 49 U.S.C. § 32912(c), somehow removes it from the

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possibly remove the CAFE penalty from the Act's reach because, as NHTSA recognizes, trading (1) was not introduced in EPCA until 2007, and (2) is not permitted for domestic passenger fleets. *See* SA10, 23 (84 Fed. Reg. at 36,016, 36,029).

[11] That Congress defined the CAFE infraction based on the "degree of noncompliance with the standard," H.R. Rep. No. 94-340, at 93 (1975), also renders irrelevant NHTSA's observation that a hypothetical penalty-per-gallon-of-fuel-consumed increases as the standards become more stringent. SA12 (84 Fed. Reg. at 36,018). Congress could have defined the CAFE civil penalty that way, but it did not.

scope of the Inflation Adjustment Act. *See* SA11 (84 Fed. Reg. at 36,017). But that separate authority has no bearing on whether the CAFE penalty is a "civil monetary penalty" as defined in the Act. In fact, the Act specifically acknowledges the existence of other statutory mechanisms for adjusting penalty amounts, and makes clear that inflation adjustments are required nonetheless. *See* IAA § 5(b)(2)(A)-(B) (describing how catch-up adjustment applies where a civil penalty was "adjusted under a provision of law other than this Act"); *see also id.* § 4(d) (similar). Thus, NHTSA "agrees," as it must, that "Congress intended the inflation adjustments required under the [Improvements] Act" to "coexist" with "adjustments provided for under other statutes." SA11 (84 Fed. Reg. at 36,017). The 2016 inflation adjustment to the $5.50 CAFE penalty was thus "mandated by the Improvements Act," and "[n]othing in EPCA contradicts or undermines that mandate." *NRDC*, 894 F.3d at 112.

2. The penalty also "has a maximum amount"

As noted above (at 18), NHTSA's argument that the CAFE penalty is not a "civil monetary penalty" is *also* wrong because the penalty "has a maximum amount provided for by Federal law." IAA § 3(2)(A)(ii). Here, EPCA provided (in 1978) that the "amount" of the CAFE civil penalty, if increased under that statute, "may not be more than $10 for each .1 of a mile a gallon." 49 U.S.C. § 32912(c)(1)(B). To the extent NHTSA contends that $10 is not a "maximum amount" because it applies to the CAFE penalty "rate," SA9 (84 Fed. Reg. at 36,015), that fails for the reasons explained above: Indeed, NHTSA concedes that other penalties with maximum per-

violation rates must be adjusted under the Act. *See* SA13 (*id.* at 36,019). NHTSA also recognizes that the phrase "not more than" "plainly denotes" that a penalty has a maximum amount. SA10 (*id.* at 36,016); *see also* SA13 (*id.* at 36,019) (similar). Thus, because Congress used that phrase to describe the $10 maximum, NHTSA ultimately "does not[] dispute that the $10 cap is a 'maximum amount.'" SA23 (*id.* at 36,029).

Instead, NHTSA briefly suggests that the $10 maximum is not subject to the Act because it "cannot be 'assessed or enforced' at the time of the violation as required by the 2015 Act." SA10 (84 Fed. Reg. at 36,016); *see also* SA23 (*id.* at 36,029). But the Act places no temporal limitation on *when* (or even *whether*) a penalty's "maximum amount" must be assessed. A civil penalty is subject to adjustment under the Act when it "*has* a maximum amount" and "*is* assessed or enforced by an agency." IAA § 3(2)(A), (B) (emphasis added). Thus, it is the *penalty itself*, not the maximum amount, that must be "assessed or enforced"—and NHTSA concedes that the CAFE penalty is. SA23 (84 Fed. Reg. at 36,029).

In short, because the CAFE penalty itself clearly qualifies as a "civil monetary penalty," the Improvements Act required adjustment of both the specific $5.50 amount *and* the maximum $10 amount to account for the inflation that had eroded their value over the last four decades. *See* JA662 (81 Fed. Reg. at 43,526); *see also, e.g.*, IAA § 5(a) (requiring adjustment of "the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable"). NHTSA's prior adjustment of these amounts to $14 and $25, respectively, should be reinstated.

II. NHTSA's alternative rationale fails at the outset because it lacked authority to belatedly invoke an "exception" to the 2016 adjustment

NHTSA asserts, in the alternative, that even if the Inflation Adjustment Act applies to the CAFE penalty, the agency would *still* reverse the 2016 adjustment pursuant to an "exception" in the Act that permitted a reduced catch-up adjustment where the full amount would have a "negative economic impact." But NHTSA lacked authority to invoke that exception years after the adjustment became final.

"The text of the Improvements Act requires agencies across the federal government to adjust civil penalties on a set schedule." *NRDC*, 894 F.3d at 108. Congress ordered that agencies' initial catch-up adjustments "shall take effect not later than August 1, 2016," followed by further mandatory annual adjustments "not later than January 15 of every year thereafter." IAA § 4(a), (b)(1)(B). These deadlines are "clear and mandatory." *NRDC*, 894 F.3d at 109.[12]

The exception on which NHTSA relies provides no reprieve from this "highly circumscribed schedule." *Id.* (quotation omitted). That exception permitted an agency to "adjust the amount of a civil monetary penalty by less than the otherwise required amount" if the agency found that the full 2016 catch-up adjustment would "have a negative economic impact," and OMB concurred. IAA § 4(c); *see also* JA516 (OMB M-16-06 at 3) (directing agencies to submit any proposed negative economic impact

[12] NHTSA's disregard for these deadlines is evidenced by the fact that it only recently completed—two-and-a-half years late—the mandatory 2017 annual adjustment for the general EPCA penalty, 49 U.S.C. § 32912(a). SA10 (84 Fed. Reg. at 36,016 n.73).

determinations "as soon as possible, and no later than May 2, 2016"). As this Court already held, however, "the exception regards the *amount* of the initial catch-up adjustment" and "afforded [agencies] no such discretion regarding the *timing*." *NRDC*, 894 F.3d at 109. Thus, even if an agency had grounds to reduce the amount of the catch-up adjustment pursuant to the exception, it was still required to comply with the Act's "strict timeline." *Id.* at 111. But NHTSA did not invoke the exception when it implemented and then finalized its catch-up adjustment to the CAFE penalty in 2016. *See* JA662 (81 Fed. Reg. at 43,526); JA685-86 (81 Fed. Reg. at 95,490-91).

Given these "clear Congressional directives," NHTSA must "'point to something'" in the Improvements Act that authorized it to belatedly reverse course and invoke the exception years after finalizing its catch-up adjustment. *NRDC*, 894 F.3d at 112-13 (quoting *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017)). But NHTSA identifies no provision in that statute that allows it to invoke the exception now. Instead, the agency (1) invokes purported "inherent authority" to reconsider the adjustment; (2) maintains that "nothing in the [Improvements] Act prohibits" the agency from exercising that authority; and (3) disputes that its prior catch-up adjustment is currently in effect. SA8-9, 15-16 (84 Fed. Reg. at 36,014-15, 36,021-22). None of these claims can support NHTSA's untimely action.

First, this Court has now twice rejected "an agency's claim that it possessed an 'inherent power'" to take actions not authorized by statute, including "'to reconsider final rules it has published in the Federal Register.'" *NRDC*, 894 F.3d at 112 (quoting

NRDC v. Abraham, 355 F.3d 179, 202 (2d Cir. 2004)). And where other courts have found implied reconsideration authority, they have held that it must be exercised "in a timely fashion," such as "'within the period available for taking an appeal.'" *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (quoting *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984)). Absent "unusual circumstances," the time period for any reconsideration is "measured in weeks, not years." *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (quotation omitted). "That period has long expired here." *Am. Methyl Corp.,* 749 F.2d at 835.

Second, because any reconsideration authority derives (if at all) from congressional delegation, "Congress … undoubtedly can limit an agency's discretion to reverse itself." *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). NHTSA's contention that the Act imposes no such limitations, SA15 (84 Fed. Reg. at 36,021), ignores this Court's previous holding that "the Improvements Act is an unusually precise and directive statute," which "mandates that all agencies increase penalties by a date certain" and "provides no discretion to the agencies regarding the timing of adjustments," *NRDC*, 894 F.3d at 113 n.12. Congress also limited the negative economic impact exception to only the initial 2016 catch-up adjustment, IAA § 4(c); *see also* SA15 (84 Fed. Reg. at 36,021) (acknowledging the exception "is *part of* making the initial catch-up adjustment" (emphasis added)), and required that agencies make subsequent annual inflation adjustments—based off that initial adjustment—"not later than January 15 of every year thereafter," IAA § 4(a). Congress therefore

precluded agencies from perpetually revisiting the amount of a catch-up adjustment long after it became final. As NHTSA acknowledges, the Act's structure operates "as a 'one-way ratchet,' where all subsequent annual adjustments will be based off this 'catch-up' adjustment *with no ensuing opportunity to invoke the 'negative economic impact' exception*." SA15 (84 Fed. Reg. at 36,021) (emphasis added). Had Congress wanted the exception to be subject to reconsideration years later, it could have provided that opportunity as part of the annual adjustment process. It did the opposite.[13]

Finally, NHTSA appears to contend that it could reconsider its 2016 catch-up adjustment in July 2019 because that adjustment supposedly was not in effect and had no "practical significance" until it was assessed against model-year-2019 vehicles sometime in 2020. SA16 (*id.* at 36,022). This contention ignores that model year 2019 was nearly complete when NHTSA reversed the $14 adjustment, and that—given design and production schedules—the CAFE penalty affects automakers' compliance decisions long before it is assessed. *See* JA685-86 (81 Fed. Reg. at 95,490-91). NHTSA's contention also defies this Court's prior opinion. *See NRDC*, 894 F.3d at 116 (ordering that the 2016 catch-up adjustment "is now in force").

[13] NHTSA observes that an agency "would not be prohibited from making an otherwise required catch-up adjustment simply because it did not meet the statutory deadline." SA15 (84 Fed. Reg. at 36,021). But that an agency must carry out its *mandatory* duties, even if late, *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004); 5 U.S.C. § 706(1), does not mean it may *reconsider* final actions years later and long after any "narrow window of discretion" has closed. *NRDC*, 894 F.3d at 109.

In short, by belatedly invoking an exception to the 2016 catch-up adjustment, NHTSA—once again—"exceeded its statutory authority" under the Act. *Id.* at 107.

III. Even if NHTSA could invoke the exception at this late date, the agency's application of the exception here was substantively flawed

Because Congress did not authorize NHTSA's belated invocation of the negative economic impact exception, it is unnecessary for the Court to review the agency's application of the exception here. But even if the Court were to reach that issue, NHTSA's application of the exception is unlawful for at least three reasons: (1) the agency applied the wrong legal framework in its primary analysis; (2) it refused to consider relevant factors, including its own prior findings and the positive economic impacts of an inflation adjustment; and (3) it could not reverse the entire adjustment and decline to make any adjustment whatsoever.

A. NHTSA cannot determine the required adjustment "will" have a negative economic impact based on an "absence" of evidence

NHTSA acknowledges that the Improvements Act mandated a full catch-up inflation adjustment unless the agency carried the "burden of demonstrating economic harm." SA11 (84 Fed. Reg. at 36,017). Because it cannot meet that burden, NHTSA supplanted the Act's test with a different framework governing the agency's *separate* authority to increase the penalty under EPCA, 49 U.S.C. § 32912(c). That framework, among other differences, imposes the *opposite* burden on the agency: to find the likely *absence* of economic harm. SA11 (84 Fed. Reg. at 36,017). NHTSA erred by conflating these two analyses.

The Improvements Act's negative economic impact exception provided a "narrow window of discretion" regarding the amount of the mandatory catch-up adjustment. *NRDC*, 894 F.3d at 109. An agency could invoke the exception only if it first determined, through notice-and-comment rulemaking, that adjusting a penalty by the otherwise required amount "will have a negative economic impact," and OMB concurred. IAA § 4(c). Then, and only then, could an agency "adjust the amount of [the] civil monetary penalty by less than the otherwise required amount." *Id.*

Rather than conducting this straightforward analysis, NHTSA instead concluded it would *reverse* the inflation adjustment mandated by the Act *unless* it could make findings pursuant to its separate authority under EPCA, which authorizes an increase to the original value of the CAFE penalty if NHTSA decides, among other things, that the higher value "will not have a substantial deleterious impact on the economy." 49 U.S.C. § 32912(c)(1)(A)(ii). To find that no "substantial deleterious impact" will occur, NHTSA must also find it likely that the penalty 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) (emphasis added). In other words, to invoke section 32912(c), NHTSA must "affirmatively determine that it is likely that the increase would *not* cause" those three consequences to occur. SA3 (84 Fed. Reg. at 36,009).

NHTSA purported to "harmonize" the two statutes by applying the so-called "EPCA factors" under section 32912(c) to determine whether the required 2016

catch-up adjustment "will have a negative economic impact" for purposes of the Improvements Act. SA3, 16-17 (*id.* at 36,009, 36,022-23). NHTSA then concluded that "the *absence* of persuasive evidence to support making the EPCA findings"—i.e., that those consequences *would not* occur—automatically meant the inflation adjustment "*would* have a negative impact." SA3 (*id.* at 36,009) (emphases added). Stated differently, NHTSA counterintuitively concluded that it could carry its "burden of demonstrating economic harm" by *failing* to "demonstrate an *absence* of economic harm." SA11 (*id.* at 36,017) (emphasis added). This sophistry was error.

The Supreme Court has repeatedly instructed that courts (and agencies) "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (quoting *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). And because section 32912(c) is "materially different with respect to the relevant burden" to increase the penalty, its provisions "do not control" application of the Improvements Act. *Gross*, 557 U.S. at 173. This is so even though "there may be areas of common definition" between the two statutes. *Fed. Exp. Corp.*, 552 U.S. at 393.

Congress commonly enacts "different statutes, each with its own mechanisms," that nonetheless address some of the same subject matter. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014). And as noted above (at 29), NHTSA concedes that "Congress intended the inflation adjustments required under the 2015 Act" to "coexist" with penalty increases "provided for under other statutes." SA11

(84 Fed. Reg. at 36,017). In 1978, Congress authorized NHTSA to increase the CAFE civil penalty *above* its original $5 value to address concerns it had been set too low in the first instance. *See supra* 6. Years later, Congress gave NHTSA and all other federal agencies a separate and different mandate: to update their civil monetary penalties for inflation and *restore* the penalties' real value. *See NRDC*, 894 F.3d at 100. Given that each statute "has its own scope and purpose," *POM Wonderful*, 573 U.S. at 115—as NHTSA itself acknowledges, *see* SA14 (84 Fed. Reg. at 36,020) ("NHTSA agrees that the overarching purposes of the two statutes are different.")—Congress reasonably assigned them different factfinding regimes and burdens. And it is hardly surprising that the Improvements Act compelled a catch-up adjustment here, irrespective of section 32912(c), as it represented Congress's "renewed effort" and "increasing intervention" to address the "recurring issue of stagnant civil monetary penalties." *NRDC*, 894 F.3d at 111. As this Court has explained, Congress's purpose in the Act "transcended the confines of any given agency's regulatory functions." *Id.* at 112.

Thus, pursuant to the Improvements Act's plain terms, NHTSA could not invoke the exception without first determining that the full catch-up inflation adjustment "*will* have a negative economic impact." IAA § 4(c)(1)(A) (emphasis added). And even assuming NHTSA properly considered the so-called "EPCA factors" at all, NHTSA did not actually *find* a negative economic impact pursuant to any of them. For example, with respect to the first factor, NHTSA concluded only that it "does not have the evidence" to determine whether a $14 penalty would

significantly impact unemployment. SA18 (84 Fed. Reg. at 36,024) (asserting that it had "no evidence of what the unemployment rates … would be with a different CAFE civil penalty," and thus "no way to evaluate the economic impact"). NHTSA's analysis of the other two factors was similar. *See, e.g.*, SA19 (*id.* at 36,025) (observing only that the adjusted penalty "*could* also adversely affect competition" (emphasis added)); SA20 (*id.* at 36,026) (acknowledging that "the strength of the connection between the civil penalty rate and domestic production is tenuous"). And even if the agency did have evidence (which it clearly did not) to conclude a $14 penalty would cause one or more of the "EPCA factor" consequences to occur, that still would not suffice to invoke the exception under the Improvements Act. The Act does not allow an agency to focus on particular economic factors to the exclusion of others. Rather, as explained below, an agency must consider all relevant factors—including the positive economic impacts of an increased penalty.

B. NHTSA failed to consider relevant factors, including its own prior findings about the positive economic impacts of an adjustment

Setting aside the EPCA factors, NHTSA asserted that it would still find a negative economic impact because the statutorily prescribed catch-up adjustment would cause automakers to spend more money either complying with the CAFE standards or paying higher penalties for their noncompliance. SA20-23 (84 Fed. Reg. at 36,026-29). NHTSA based this alternative finding primarily on an "estimate provided by industry," which had assumed that the agency would adopt increasingly stringent CAFE standards for model-years 2021 through 2025. SA20 (*id.* at 36,026).

Because NHTSA has since proposed flatlining those standards, industry Intervenors' outdated overestimate may be largely irrelevant. *See* SA27 (*id.* at 36,033) (projected penalty liability under proposed CAFE standards would be less than half that under more stringent standards). In any event, because NHTSA unlawfully ignored other relevant factors in making its negative economic impact determination, its application of the exception was arbitrary and capricious.

First, when an agency reverses itself, as NHTSA has here, it must provide a "reasoned explanation … for disregarding" any pertinent prior factual findings. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Id.* at 537-38 (Kennedy, J., concurring); *see Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 47-51 (1983) (NHTSA's rescission of safety regulation was arbitrary and capricious where it ignored prior findings that airbags would save lives).

NHTSA has failed to provide the requisite explanation for disregarding its prior findings about the impact of the $14 CAFE civil penalty. As described above (at 10), NHTSA in 2016 incorporated the adjusted $14 penalty into its comprehensive technical analysis of anticipated model-year 2022-2025 CAFE standards, JA611-12 (2016 Draft TAR 13-57 & n.10, 13-58), and found that automakers could comply with the standards, as enforced by the adjusted penalty, at reasonable cost, JA527 (*id.* at ES-2). The agency also found that the economic benefit of consumers' fuel savings,

alone, outweighed any increased cost of compliance to automakers, JA656-57 (*id.* at 13-102 to 13-103), and that the "employment impact" of automakers' compliance with the anticipated standards was "expected to be positive," JA552 (*id.* at 7-14).

In the instant rulemaking, commenters noted that NHTSA's proposed negative economic impact determination failed to reconcile Intervenors' estimated costs with NHTSA's own previous analysis in the 2016 technical report. *E.g.*, JA770 (CARB 2018 Comment 19). They further noted that, because NHTSA had found the CAFE standards technologically feasible at reasonable cost, any additional penalty payments would reflect automakers' deliberate noncompliance rather than inability to comply. *E.g.*, JA739 (Attorneys General 2018 Comment 10). NHTSA's response did not acknowledge that the agency itself had conducted the prior analysis, thereby failing its threshold responsibility to "at least display awareness that it is changing position." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quotation omitted).

Instead, NHTSA cavalierly dismissed the 2016 report's findings as "no longer operative" because the Environmental Protection Agency (EPA)—which had jointly issued the comprehensive technical report with NHTSA as part of an obligation to reevaluate its own vehicle emission standards—decided in 2018 to reconsider another determination that it had reached based in part on the report. SA21 (84 Fed. Reg. at 36,027). But EPA's 2018 decision could not—and did not—void NHTSA's independent findings or analysis. As NHTSA and EPA had previously explained, the agencies conducted "independent analyses" of their respective standards and

"developed independent assessments of technology cost," which meant the "compliance pathways and associated costs that result are also different." JA531, 537 (2016 Draft TAR ES-6, ES-12).

Moreover, the D.C. Circuit recently made clear that EPA's 2018 decision did not supersede even EPA's *own* factual findings in the 2016 report. *See California v. EPA*, 940 F.3d 1342, 1351 (D.C. Cir. 2019) ("EPA has not erased the Draft Technical Assessment Report, Technical Support Document, or any of the other prior evidence it collected."). Rather, if EPA takes final action that deviates from the emission standards it analyzed in the 2016 report, EPA "will need to provide a 'reasoned explanation' for why it is 'disregarding facts and circumstances that underlay'" its earlier findings. *Id.* (quoting *Fox*, 556 U.S. at 515-16). Similarly, here, NHTSA was required to provide its own reasoned explanation. Its failure to do so was arbitrary and capricious. *See Air All. Houston v. EPA*, 906 F.3d 1049, 1066-68 (D.C. Cir. 2018).

Second, even if NHTSA had provided an adequate explanation for disregarding its own prior findings, the agency committed yet another textbook error by expressly refusing to consider the many positive economic impacts of an inflation adjustment. *See* SA17 (84 Fed. Reg. at 36,023) (asserting that NHTSA could "consider the economic harms" of an adjustment "without needing to compare them to any potential benefits"). "[A]gencies are ordinarily required to consider the relative costs and benefits of a regulation as part of reasoned decisionmaking." *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 67 (2d Cir. 2018) (citing *Michigan v. EPA*, 135 S.

Ct. 2699, 2707 (2015)); *see also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 733 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (observing that "common administrative practice and common sense require an agency to consider the costs and benefits of its proposed actions"). Thus, where an agency seeks to justify its chosen action on the basis of "economic costs," it generally must "explain why the costs saved were worth the benefits sacrificed." *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003) (holding that NHTSA acted arbitrarily and capriciously where it failed to do so).

NHTSA's analysis contravenes this well-established principle. For example, NHTSA ignores the economic benefits to consumers from increased fuel savings, despite having previously concluded, *see supra* 40-41, that this "single category of benefits" was "sufficient to ensure" that more stringent CAFE standards, enforced by the $14 penalty, would "result in net benefits." JA656 (2016 Draft TAR 13-102). NHTSA additionally refused to consider the economic benefits to regulated parties, such as electric vehicle manufacturers, whose fleets regularly exceed the CAFE standards. *See* SA17 (84 Fed. Reg. at 36,023 n.167); *see also* Tesla, Inc. Mot. to Participate as Amicus 3-5 (2d Cir. Dec. 3, 2019), ECF No. 152. Because a higher penalty makes credits more valuable, SA4 (84 Fed. Reg. at 36,010), these automakers would benefit financially from the $14 penalty, and had already made investment decisions based on the 2016 adjustment. JA727-28 (Workhorse 2018 Comment 2-3). *Cf. Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019) (agency action was arbitrary and capricious where it did "not take into account the reliance interests of …

providers that had crafted business models and invested significant resources" based on prior policy). NHTSA further overlooked the employment and other economic benefits that flow from automakers' increased investment in compliance technologies. *See, e.g.*, JA785 (CBD 2018 Comment 14); JA549 (2016 Draft TAR 7-11). And NHTSA also ignored that, even where automakers pay a penalty instead of complying with the standards, that *still* may have some positive economic impact because, by statute, half of the penalty payments "shall" go toward grants "for retooling, reequipping, or expanding existing manufacturing facilities in the United States to produce advanced technology vehicles and components." 49 U.S.C. § 32912(e)(2). NHTSA therefore erred "by undervaluing the benefits and overvaluing the costs" of a higher penalty. *Ctr. for Biodiversity v. NHTSA* (*CBD*), 538 F.3d 1172, 1198 (9th Cir. 2008).

NHTSA does not contend that positive economic impacts from the $14 adjustment do not exist—as explained above, NHTSA previously acknowledged they do—nor that they are irrelevant as a matter of "reasonable regulation." *Michigan*, 135 S. Ct. at 2707. Rather, NHTSA inferred that the Inflation Adjustment Act somehow *precluded* the agency from considering any positive economic effects because the Act's *other* exception calls for an express weighing of social costs versus benefits, whereas—in NHTSA's view—the "negative economic impact" exception does not. *See* SA17 (84 Fed. Reg. at 36,023) (discussing IAA § 4(c)(1)(A)-(B)).

But against the backdrop of an "established administrative practice" to consider both costs and benefits, courts do not lightly infer that Congress intends an agency to consider only one side of the equation. *Michigan*, 135 S. Ct. at 2708. The Supreme Court recently explained that it was "unreasonable to infer that, by expressly making cost relevant to other decisions," a statute somehow "implicitly makes cost irrelevant" to the challenged decision. *Id.* at 2709; *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 526 n.42 (D.C. Cir. 1983) (finding it "unlikely that Congress would mandate cost-benefit analysis" under one statutory subsection, but then silently "forbid EPA from considering cost at all" in an adjacent subsection).

The same is true here. Nothing in the Inflation Adjustment Act displaces the commonsense, established administrative practice of considering both costs and benefits. Rather, the Act compels an agency to consider positive economic effects in invoking the exception because, as a matter of ordinary language, the term "negative" impliedly requires consideration of offsetting positives. *See, e.g.*, *Gas Appliance Mfrs. Ass'n, Inc. v. DOE*, 998 F.2d 1041, 1045 (D.C. Cir. 1993) (referring to "a negative cost/benefit analysis"); *NRDC v. EPA*, 937 F.2d 641, 648 (D.C. Cir. 1991) (similar). And even assuming the exception does not require an express *weighing* of costs and benefits, that does not mean Congress instructed the agency to *ignore* any and all positive economic impacts. Whether Congress required an agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value" is a distinct inquiry from whether Congress made "cost [or benefits]

irrelevant to the [agency's] decision." *Michigan*, 135 S. Ct. at 2711. Thus, as NHTSA properly recognized in its July 2017 reconsideration announcement, "information concerning the costs *and benefits* of increased penalties" was "[r]elevant" to the negative economic impact exception. JA693 (82 Fed. Reg. at 32,142) (emphasis added). The agency erred in then refusing to consider evidence about those benefits.

The Act's structure reinforces this construction. Where "a general statement of policy is qualified by an exception, [courts] usually read the exception narrowly in order to preserve the primary operation of the provision." *Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 287 (2d. Cir. 2015) (quoting *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)). This Court has thus looked to a statute's declarations of policy when construing its exceptions. *Id.* at 287-88. Here, the Act's express purpose is to "maintain the deterrent effect of civil monetary penalties" and "promote compliance with the law." IAA § 2(b)(2). Thus, the positive economic impacts from increased compliance must be relevant to applying the exception. *Cf. California v. BLM*, 277 F. Supp. 3d 1106, 1122 (N.D. Cal. 2017) (agency decision was arbitrary and capricious where it "only took into account the costs to … industry of complying with the Rule and completely ignored the benefits that would result from compliance").

NHTSA's contrary construction leads to the illogical conclusion that an inflation adjustment with an overwhelmingly "positive" overall economic impact—as the phrase is ordinarily used—may nonetheless be deemed "negative" if it imposes any economic costs whatsoever. In fact, NHTSA takes the remarkable position that it

is simply "irrelevant … how 'negative' the 'economic impact' would be." SA21 (84 Fed. Reg. at 36,027) (rejecting argument that additional costs were "minimal when spread across the industry"). Thus, NHTSA maintains that it can invoke the negative economic impact exception so long as it identifies *any* increased cost (no matter how small) to *any* automaker, irrespective of the inflation adjustment's positive economic impacts. But if such findings were sufficient to invoke the exception, as NHTSA suggests, then *every* inflation adjustment would have a "negative economic impact," and the statutory "exception" would swallow the rule.

C. Even if NHTSA had properly found a negative economic impact, it could not reverse the entire adjustment under the Act

Finally, even if NHTSA could justify invoking the negative economic impact exception, its decision to undo the *entire* catch-up adjustment and reinstate the outdated $5.50 penalty was still legally erroneous for two independent reasons.

First, NHTSA lacked statutory authority to make no catch-up adjustment pursuant to the Act. Congress mandated that agencies "shall adjust" their civil penalties for inflation by making an initial catch-up adjustment in 2016. IAA § 4(a), (b). It also provided that, if an agency properly invoked the exception for this initial adjustment, it could "adjust the amount of a civil monetary penalty by less than the otherwise required amount." *Id.* § 4(c). Read together, these provisions allowed an agency to make a *reduced* catch-up adjustment pursuant to the exception. But they did not allow an agency to make *no adjustment* whatsoever. *See Adams v. Holder*, 692 F.3d 91, 97 (2d Cir. 2012) ("To 'adjust' means *to change*, usually to bring something from the

current to a more satisfactory state." (citing Webster's Third New Int'l Dictionary 27 (1986)) (emphasis added)). The Act does not state that an agency could *decline to* adjust a civil penalty if it invoked the exception. Rather, even where the exception applies, an agency still must make an adjustment. NHTSA's refusal to do so here was unlawful.

Second, even assuming the Act authorized an agency to make no catch-up adjustment (which it did not), any such decision must, at the very least, be tethered to the negative economic impact on which the agency relied. It is a "basic procedural requirement of administrative rulemaking" that an agency must provide "a rational connection between the facts found and the choice made." *Encino Motorcars*, 136 S. Ct. at 2125 (quoting *State Farm*, 463 U.S. at 43). NHTSA disagrees, contending that once it invoked the exception, it had unfettered discretion to refuse to make any adjustment whatsoever. *See, e.g.*, SA16, 21 (84 Fed. Reg. at 36,022 n.160, 36,027 n.226).

NHTSA's cited authority does not support, let alone require, this absurd result. To be sure, when it regulates, "[a]n agency is not required to identify the optimal threshold with pinpoint precision." *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (quotation omitted). But the agency is still "required to identify the standard and explain its relationship to the underlying regulatory concerns." *Id.* Here, NHTSA contends that, if it determined that a $14 penalty would cause a negative economic impact, the agency could then select any lesser amount on a whim—and even decline to make any inflation adjustment—without regard to the governing standard or the congressional concerns underlying the adjustment and the

exception. But NHTSA's reading would subvert the Improvements Act's purpose and "'flout the … core objects' of that Act." *NRDC*, 894 F.3d at 111 (quoting *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 781 (2016)). It is implausible that, by providing agencies with a "narrow window of discretion" regarding the catch-up adjustment amount, *id.* at 109, Congress intended to confer unilateral authority to maintain outdated penalties in their "diminished" and "weakened" state, IAA § 2(a)(2)-(3). And NHTSA nowhere even considers whether the outdated $5.50 penalty suffices to deter CAFE violations—in fact, it does not. *See, e.g.*, JA780-83 (CBD 2018 Comment 9-12).

In a final effort to salvage its untenable all-or-nothing approach, NHTSA cursorily asserts in a footnote that it determined "any increase in the CAFE civil penalty rate would have a 'negative economic impact.'" SA16-17 (84 Fed. Reg. at 36,022-23 n.160). But not once in NHTSA's application of this exception did it identify any potential penalty between $5.50 and $14, let alone consider the economic impacts of such an intermediate adjustment. NHTSA, yet again, chose not to do that work.

Thus, even if the Improvements Act permitted NHTSA's belated invocation of the exception, NHTSA's reversal of the entire 2016 catch-up adjustment should be vacated as unlawful.

IV. NHTSA violated NEPA by failing to take a hard look at the environmental impacts of its decision

In addition to the multiple substantive errors described above, NHTSA's reversal of the CAFE penalty adjustment was also procedurally invalid because the

agency did not adequately address the environmental impacts of its action as required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*. NHTSA's failure to follow required procedures provides yet another independent ground for vacatur. *See, e.g.*, *NRDC*, 894 F.3d at 107-08, 113-15 (finding procedural violation and vacating NHTSA's unlawful suspension of the penalty adjustment).

NEPA requires agencies to prepare a detailed environmental impact statement (EIS) for actions that "significantly" affect the environment. 42 U.S.C. § 4332(2)(C). NHTSA refused to prepare an EIS here. *See* SA26-27 (84 Fed. Reg. at 36,032-33). In reviewing an agency's "decision not to issue an EIS," courts first "consider whether the agency took a 'hard look' at the possible effects of the proposed action," *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997)—that is, whether the agency "adequately considered and elaborated the possible consequences of [its] action," *CBD*, 538 F.3d at 1215. If the agency has taken the requisite hard look, the court next considers whether declining to prepare an EIS was reasonable in light of the action's possible effects. *Id.*; *see Nat'l Audubon Soc'y*, 132 F.3d at 14.

Here, NHTSA violated NEPA because it "fail[ed] to take a 'hard look' at the greenhouse gas implications of its rulemaking." *CBD*, 538 F.3d at 1181. The agency acknowledged that reducing the CAFE penalty from $14 to $5.50 could result in an additional 54 billion gallons of excess fuel consumed over a 15-year period. *See* SA26 (84 Fed. Reg. at 36,032) (citing JA806 (IPI 2018 Comment 11)). But NHTSA made no attempt to convert the combustion of this enormous amount of fuel into a quantity of

greenhouse-gas (and other harmful) emissions or otherwise analyze their impacts. Given the billions of gallons of fuel at stake, the hard look mandated by NEPA required NHTSA to, at minimum, quantify the likely emissions resulting from its decision. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (where feasible, agency is required to quantify greenhouse-gas emissions indirectly resulting from agency action); *see also, e.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 70-71 (D.D.C. 2019) (where data is available, qualitative analysis of likely greenhouse-gas emissions is "not enough"); *San Juan Citizens All. v. BLM*, 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018) (similar). NHTSA did not—and could not—assert it was impractical to conduct that analysis, as it has quantified the emissions resulting from changes to the CAFE program for decades.[14] Accordingly, NHTSA violated NEPA by failing to provide a "quantitative estimate of the downstream greenhouse emissions that will result" from its reversal of the penalty adjustment. *Sierra Club*, 867 F.3d at 1374.

Instead of conducting that analysis, NHTSA merely asserted that the impacts of its decision would be "very small" compared to the *reductions* in emissions resulting from increasing the stringency of the CAFE standards for model-years 2017 through 2025. SA26 (84 Fed. Reg. at 36,032). But prior analysis of the environmental *benefits* of

[14] *See, e.g.*, JA341 (2012 CAFE EIS 5-41) (quantifying greenhouse gas emissions and reductions from model year 2017-2025 CAFE standards); *City of Los Angeles v. NHTSA*, 912 F.2d 478, 497 (D.C. Cir. 1990) (Wald, J., for the court) (noting that "NHTSA estimated that the maximum carbon dioxide produced by reducing the CAFE standard for [model year] 1989 … is *17.75 billion pounds*"), *overruled on other grounds by Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (en banc).

increased CAFE standards cannot substitute for analysis of environmental *harms* resulting from decreased compliance with those standards. *See NRDC v. Herrington*, 768 F.2d 1355, 1431-32 (D.C. Cir. 1985) (rejecting agency's "bald assertion" that "increases in energy consumption are environmentally significant only if a decrease in consumption of the same amount would be environmentally significant"). And in any event, NHTSA cannot dismiss the significant impacts of its current decision merely because they may be smaller than impacts resulting from a prior decision. *See, e.g.*, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (hard look at post-fire salvage logging required more than conclusory assertion "that the expected level of increased erosion and sediment delivery will be small in comparison to that caused by the fire" itself); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 153-54 (D.C. Cir. 1985) (dismissing effects as "very small" "utterly fails to meet the standard of environmental review necessary before an agency decides not to prepare an EIS"). Were NHTSA to dismiss any effect as insignificant merely because it is smaller than another, the agency would forever ignore actions that have an "'individually minor' effect" but are "'collectively significant actions taking place over a period of time.'" *CBD*, 538 F.3d at 1217 (quoting 40 C.F.R. § 1508.7); *accord NRDC v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

NHTSA's conclusory assertion that the environmental impacts from its penalty adjustment would be "very small" therefore flouted NEPA's requirement to "discuss the *actual* environmental effects resulting from" its action. *CBD*, 538 F.3d at 1216.

Without quantifying the emissions that would likely result from reducing the CAFE penalty, it is "difficult to see" how NHTSA could adequately determine that the impacts are insignificant or otherwise "engage in 'informed decision making' with respect to the greenhouse-gas effects of this [decision]." *Sierra Club*, 867 F.3d at 1374; *cf.*, *e.g.*, *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (describing agency's quantification of greenhouse-gas emissions, which allowed for meaningful analysis). NHTSA's "refusal to prepare a complete EIS" was therefore "markedly deficient." *CBD*, 538 F.3d at 1220.

In sum, as with its flawed application of the Improvements Act's negative economic impact exception, NHTSA took essentially no look, let alone the "hard look" required by NEPA, at the greenhouse-gas emissions and ensuing harms likely to result from its decision. This was unlawful.

CONCLUSION

The Court should vacate NHTSA's reversal of the 2016 inflation adjustment to the CAFE civil penalty.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitations of Second Circuit Rule 32.1(a)(4)(A) because it contains 13,959 words, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

Dated: March 13, 2020

/s/ *Ian Fein*
Ian Fein

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on March 13, 2020.

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

/s/ *Ian Fein*
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