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

REPLY BRIEF OF
ENVIRONMENTAL PETITIONERS

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INTRODUCTION

For over a quarter-century, the National Highway Traffic Safety Administration (NHTSA) acknowledged that the Federal Civil Penalties Inflation Adjustment Act applies to the federal civil penalty for violating corporate average fuel-economy (CAFE) standards. This clear and common-sense conclusion is consistent with the Act's purposes: Congress created the Act to counteract the effect of inflation, which weakens the deterrent effect of civil penalties with specific or maximum dollar amounts, such as the CAFE penalty. Indeed, NHTSA and other agencies repeatedly informed Congress that inflation had eroded the original value of the CAFE penalty, and that it would continue to do so unless the penalty was adjusted under the Act.

NHTSA has now reversed its interpretation as part of a stubborn effort to undo a mandatory 2016 catch-up adjustment. But NHTSA offers no coherent explanation *why* Congress would have drawn the obscure, textual distinctions the agency now reads into the statute. Nor does NHTSA reconcile its new position with its decision to leave the CAFE penalty at $5.50—an amount that, itself, reflects an earlier adjustment under the Act. Instead, NHTSA and Intervenor Alliance for Automotive Innovation (Alliance) resort to conflicting—and meritless—theories of deference in a futile effort to salvage the agency's strained interpretation.

NHTSA's fallback argument fares no better. The agency identifies no statutory authority that permits it to reconsider (much less eliminate) the 2016 adjustment *years* after it became final. And NHTSA's determination that the adjustment would have a

negative economic impact cannot withstand scrutiny. The agency's projections of additional penalty payments are vastly overblown, and NHTSA's analysis arbitrarily ignored the many economic benefits of promoting compliance with the underlying fuel-economy standards—including the agency's own prior finding that consumer savings at the pump would, alone, outweigh automakers' compliance costs.

This Court has already stepped in once to reinstate the mandatory inflation adjustment and fulfill Congress's directive that NHTSA restore the penalty's deterrent effect and promote compliance with the law. The Court should do so again here.

ARGUMENT

I. The Inflation Adjustment Act applies to the CAFE penalty

The CAFE civil penalty is a "civil monetary penalty" under the Inflation Adjustment Act. IAA § 3(2).[1] Even assuming the Court did not already resolve the question, *see* NY26-30, this straightforward conclusion is compelled by the Act's text and purposes. NHTSA's new interpretation, by contrast, relies on a strained reading of statutory text unmoored from Congress's stated purposes. It also contradicts more than a quarter-century of consistent government practice.

[1] This brief cites the Inflation Adjustment Act, codified as amended at 28 U.S.C. § 2461 note, as "IAA"; the Special Appendix as SA__; the Joint Appendix as JA__; Environmental Petitioners' opening brief as NRDC__; State Petitioners' opening brief as NY__; Institute for Policy Integrity's amicus brief as IPI__; Tesla's amicus brief as TESLA__; NHTSA's answering brief as NHTSA__; and Alliance's answering brief as AAI__.

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

The Act defines a "civil monetary penalty," in relevant part, as "any penalty, fine, or other sanction that" either "(i) is for a specific monetary amount … or (ii) has a maximum amount." IAA § 3(2). The CAFE civil penalty fits comfortably within this broad definition—twice over. It is "for a specific monetary amount" because the Energy Policy and Conservation Act (EPCA) provided a fine *for* a specific dollar amount—$5 per tenth of a mile per gallon by which an automaker's fleet violates the standard. *See* 49 U.S.C. § 32912(b). And it also "*has* a maximum amount" because EPCA provided that the dollar amount, if increased under that statute, "may not be more than $10." *Id.* § 32912(c)(1)(B). Because decades of inflation diminished the value of these dollar amounts that EPCA first set in the 1970s, the Act required NHTSA to adjust the CAFE penalty and restore its deterrent effect. *See* NRDC19.

NHTSA, notably, does not dispute that the $5 figure "is 'a specific monetary amount,'" JA929 (OMB Non-Applicability Letter 4), or that "the $10 cap is a 'maximum amount,'" SA23 (84 Fed. Reg. 36,007, 36,029 (July 26, 2019)). And its own regulations still recognize that the CAFE penalty meets the Act's definition of a civil monetary penalty. *See* 49 C.F.R. § 578.6(h)(2) (identifying the CAFE penalty as a "civil penalty"); *id.* § 578.4 (defining "civil penalty" as one that "[i]s for a specific monetary amount" or "has a maximum amount," and is "assessed … or enforced by NHTSA pursuant to Federal law").

Instead, NHTSA (now) claims that the Act does not apply because the ultimate CAFE "penalty" owed by an automaker is different than the dollar "amount" used in calculating the penalty. NHTSA19. That is, NHTSA contends the $5 figure "is not itself the CAFE penalty," but rather only a "base amount," and that the $10 maximum does not suffice "for that same reason." *Id.* But contrary to NHTSA's contention, the Act does not require that a penalty and its constituent dollar amount(s) be one and the same. Congress did not define a civil monetary penalty as one that "*is* a specific monetary amount." Rather, "any penalty" qualifies that "is *for* a specific monetary amount" or "*has* a maximum amount." IAA § 3(2) (emphases added).

Nor would NHTSA's new construction make sense, as a practical or purposive matter. Many civil monetary penalties operate, like the CAFE penalty, as a dollar amount multiplied by incidents of noncompliance. *See* NRDC25 (citing 46 U.S.C. § 55111(c)(2) (describing "a penalty of $60 per ton based on the tonnage of each towed vessel")); *see also, e.g.*, 33 U.S.C. § 1321(b)(7)(D) (describing, for "a violation," a civil penalty up to "$3,000 per barrel of oil … discharged"). And Congress has recognized, with the CAFE penalty specifically, that a "higher amount" is functionally the same as an "increase in the penalty." 49 U.S.C. § 32912(c)(1)(A). NHTSA asserts this "merely confirms as a matter of basic math" that raising the $5 "*base amount* … also increases the resulting *penalty*." NHTSA31. But the same "basic math" underscores why NHTSA's new interpretation is nonsensical: As inflation erodes a

penalty's "dollar amount," it also decreases "the value of the penalty," and its deterrent effect. *NRDC v. NHTSA*, 894 F.3d 95, 100 (2d Cir. 2018).[2]

This basic math also explains why the Act applies to penalties with dollar amounts, but not those without: Absent adjustment, inflation will weaken the deterrent effect of the former, but not the latter. NHTSA suggests this clear and common-sense reading is "atextual" because Congress did not define a civil monetary penalty as one "with" or "based on" dollar amounts. NHTSA32. But NHTSA does not explain how those terms are meaningfully different than the Act's definition of a penalty that "has" or "is for" a dollar amount. IAA § 3(2)(A). And to the extent the Act's definition is not as "concise[]" as NHTSA would like, NHTSA33, that is because Congress emphasized the Act's breadth by encompassing "any penalty" with *either* a specific "or" maximum dollar amount. IAA § 3(2); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (highlighting the "expansive meaning" of "any").

Nor does NHTSA reconcile its current critique with the Office of Management and Budget (OMB)'s repeated explanation that the Act applies to penalties "*with* a dollar amount." JA515 (OMB M-16-06 at 2) (emphasis added); *see also* JA680 (OMB

[2] The fine-grained distinctions NHTSA attempts to draw in EPCA's text—such as its placement of "the preposition 'of,'" NHTSA18—are therefore immaterial. But even were they relevant, NHTSA's reading ignores the general rule that a "prepositive … modifier normally applies *only* to the nearest reasonable referent," *Travelers Indem. Co. v. Mitchell*, 925 F.3d 236, 243 (5th Cir. 2019) (emphasis added) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 152 (2012))—which, here, would result in a "civil penalty *of $5*," 49 U.S.C. § 32912(b) (emphasis added).

M-17-11 at 2); JA714 (OMB M-18-03 at 3); JA920 (OMB M-19-04 at 3).[3] NHTSA claims OMB's explanation "does not mean that *all* penalties 'with' a dollar amount are civil monetary penalties." NHTSA33. But the Act sought "to increase compliance with *all* federal regulatory programs." *NRDC*, 894 F.3d at 112. And, notably, NHTSA does not identify any other example of a civil penalty with a dollar amount that is *not* a civil monetary penalty.

As NHTSA previously recognized, "Congress intended the 2015 Act to apply 'broadly.'" SA15 (84 Fed. Reg. at 36,021). NHTSA and Alliance therefore err in attempting to "limit the Act's scope" by construing its civil monetary penalty definition "narrowly." AAI28. Moreover, in the few instances when Congress wished to exclude penalties with dollar amounts from the Act, it used express exceptions, *see* NRDC21-22—not obscure textual distinctions like the one NHTSA now draws. Yet despite being repeatedly informed, for decades—by NHTSA, OMB, and legislative branch agencies—that the CAFE penalty was a civil monetary penalty, *see* NRDC7-8, 20-22, Congress never sought to exclude the penalty from the Act's reach.

B. Nothing in EPCA overrides the Act's mandates

Congress's goals in the Inflation Adjustment Act "transcended the confines of any given agency's regulatory functions." *NRDC*, 894 F.3d at 112. And in passing the Improvements Act, "Congress was aware of the longstanding CAFE civil penalty,"

[3] OMB contrasts such penalties with those that *lack* dollar amounts and are instead "written as functions of violations," such as "the full cost of restoration and repair" or "twice the value of the transaction." JA515 (OMB M-16-06 at 2); *contra* NHTSA27.

SA14 (84 Fed. Reg. at 36,020), but—as noted above—did not exclude it. Thus the 2016 adjustment to the CAFE penalty was "mandated by the Improvements Act," and "[n]othing in EPCA contradicts or undermines that mandate." *NRDC*, 894 F.3d at 112. NHTSA's various attempts to exclude the CAFE penalty from the Act all fail.

First, NHTSA counterintuitively contends that the monetary CAFE civil penalty is not a civil monetary penalty because the CAFE *standards* increase, at times. But this does not mean that the CAFE penalty "increases automatically." NHTSA20. For one thing, NHTSA ignores that the CAFE standards remained stagnant for two decades, and that NHTSA itself has proposed recently to flatline the standards for six model years. *See* NRDC28. NHTSA nowhere explains how the penalty would maintain its deterrent effect during such periods, absent adjustment for inflation.

Moreover, even when the standards do increase, an automaker's incentive to *comply* with the new standards will deteriorate if the penalty is not adjusted for inflation. Under that scenario, a recalcitrant automaker—such as the one NHTSA posits in its brief, *see* NHTSA20—can lag further and further behind the standards at effectively the same cost, as inflation erodes the *real* value of the penalty. To fulfill EPCA's goal of "improved energy efficiency of motor vehicles," 42 U.S.C. § 6201(5), however, and to ensure that higher CAFE standards are not merely illusory, an automaker that refuses to improve its fleets *should* face greater liability that more closely reflects the real value of EPCA's original penalty. There is nothing "gratuitous," SA12 (84 Fed. Reg. at 36,018), about "promot[ing] compliance," IAA

§ 2(b)(2), with fuel-economy standards that NHTSA itself has determined to be economically and technologically "feasible," 49 U.S.C. § 32902(a), (f).

Second, the availability of credits as an "alternative compliance mechanism[]," NHTSA20, does not make the penalty for *non*-compliance any less of a civil monetary penalty. *See* NRDC26-27; NY40-43; IPI6-12. Further, NHTSA is wrong in suggesting these credits will continue to incentivize "fuel-economy innovation" "irrespective" of whether the penalty is adjusted for inflation. NHTSA21. As Tesla has explained (and NHTSA nowhere rebuts), because the penalty amount directly affects the price of credits, NHTSA's reversal of the 2016 penalty adjustment "[w]ill [d]isincentivize [i]nnovation." TESLA7-10; *see also* JA727-28 (Workhorse 2018 Comment 2-3) (similar).

Finally, NHTSA contends that adjusting the CAFE penalty for inflation would conflict with the separate authority Congress gave NHTSA to increase the penalty under EPCA. NHTSA21-22; AAI22-25. But NHTSA conceded earlier that "Congress intended the inflation adjustments" to "coexist" with penalty increases "provided for under other statutes." SA11 (84 Fed. Reg. at 36,017); *see* NRDC29. And NHTSA also acknowledged that the two mechanisms' purposes are "different." SA14 (84 Fed. Reg. at 36,020). Accordingly, there is no conflict between the Act's mandate to partially *restore* the penalty's value by adjusting it for inflation, and EPCA's separate process for increasing the penalty *above* its original value. *See* NRDC38. Indeed, NHTSA retains authority to increase the penalty under EPCA, up to the (properly adjusted) maximum

amount of $25. *See* NRDC30. Any "presumption against implied repeals" therefore "has no relevance" here. *DHS v. MacLean*, 135 S. Ct. 913, 923 (2015).[4]

C. No deference is warranted

In a last-ditch attempt to defend their new interpretation, NHTSA and Alliance each resort to conflicting—and meritless—theories of deference. *See* NHTSA22-24; AAI19. At the outset, deference is "not appropriate" here because—even if the Act's text alone were unclear (which it is not), *contra* NHTSA30—its "purpose" and "history" confirm that the CAFE penalty is a civil monetary penalty. *Li v. Renaud*, 654 F.3d 376, 382 (2d Cir. 2011); *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (deference is appropriate "only when th[e] legal toolkit is empty").[5] Regardless, even if there were ambiguity "after exhausting the traditional tools of statutory construction," *Li*, 654 F.3d at 382, deference would *still* be unwarranted in this case.

As this Court has already held, deference is "clearly not warranted" to NHTSA's interpretation of the Act because it "applies to all federal agencies, meaning NHTSA has no special expertise in interpreting its language." *NRDC*, 894 F.3d at 112

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[4] Alliance is also mistaken in arguing (at AAI26) that a Congressional Budget Office estimate somehow bears on the interpretive question here. *See Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005); JA800 (2018 IPI Comment at 5 & n.30) (citing cases). Regardless, even if that estimate were relevant, NHTSA's projected additional penalties under the 2016 adjustment are vastly overblown. *See infra* 17-18.

[5] Notably, neither NHTSA nor OMB purported to interpret any statutory ambiguity, and "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Peter Pan Bus Lines, Inc. v. FMCSA*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (quotation omitted).

n.10. Undaunted, NHTSA contends that Congress nonetheless authorized each federal agency to "identify" and "determine" which penalties were subject to the Act. NHTSA22. But no such delegation of interpretive authority appears in the statute. And the Improvements Act reflects "increasing intervention" by Congress to address the "recurring issue of stagnant civil monetary penalties," *NRDC*, 894 F.3d at 111, undermining any suggestion that Congress impliedly empowered agencies to exclude their penalties from the Act's reach.

Nor can NHTSA "bootstrap[] itself" into deference by claiming that its interpretation turns, in part, on the meaning of EPCA. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (quotation omitted). NHTSA "hasn't just sought to interpret" EPCA "in isolation," but rather "has sought to interpret th[e] statute in a way that limits the work of a second statute," the Inflation Adjustment Act, which it "does not administer." *Id.* Indeed, that NHTSA and Alliance disagree which agency deserves deference here underscores the conflicts that could arise if courts abdicated their independent responsibility to "reconcile[]" two statutes. *Id.* (quotation omitted).

Alliance is therefore also wrong in contending that OMB is entitled to *Chevron* deference, AAI19, especially for an interpretation it offered only in an advisory letter that lacks the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 229-34 (2001). Unlike interpretations reached in "formal adjudication or notice-and-comment rulemaking," non-binding opinion letters "do not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *accord Hill v. Del. N. Cos. Sportservice*,

838 F.3d 281, 290-91 (2d Cir. 2016); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 127 (2d Cir. 2008) (Sotomayor, J.). And because Alliance does not contend that OMB's letter here constitutes "binding authority," *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 149 (2d Cir. 2008), the cases it cites about OMB's "binding guidance" in other statutory contexts are irrelevant. AAI19.

This is presumably why NHTSA concedes (at NHTSA26) that OMB's interpretation receives only whatever respect might be due under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). But OMB's new position has no particular "power to persuade," given the "[in]validity of its reasoning" (*supra* 3-9), and its "[in]consistency with earlier … pronouncements." *Id.* at 140. Under *Skidmore*, courts consider whether an agency's interpretation is "contemporaneous" with a statute's enactment and "longstanding" or "consistent over time." *Sai Kwan Wong v. Doar*, 571 F.3d 247, 262 (2d Cir. 2009) (quotations omitted). In 1991, OMB specifically informed Congress that the CAFE penalty is a "civil monetary penalty" as defined under the Act. *See* NRDC6-7, 20; NY10.[6] Compared to that "contemporaneous construction"—which the agencies maintained for many "years thereafter"—their new interpretation is "wholly unpersuasive." *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981).

[6] As State Petitioners previously explained, NY51-52; *contra* NHTSA26, 34, it is irrelevant that an earlier 1988 report did not identify the CAFE penalty as a civil monetary penalty, as that report predated the Act's definition and did not identify *any* penalty administered by NHTSA, including those NHTSA concedes are subject to the Act.

The agencies and Alliance cannot erase the stark inconsistency of their current position with their prior statements and actions. *See* NRDC20-23. Neither NHTSA's nor Alliance's brief squares their current position with the decision to leave the CAFE penalty at $5.50—which is, itself, the result of NHTSA's prior inflation adjustment under the Act. *See* NRDC7, 13 n.5. Instead, NHTSA tries to sweep that inconsistency under the rug, even altering $5 to $5.50 when purportedly quoting the statute. NHTSA18; *see also id.* at 30 (similar). Alliance's brief also overlooks its own admission that the Improvements Act "obligated" the agency to adjust the CAFE penalty. *NRDC*, 894 F.3d at 102. As Alliance (correctly) explained then, NHTSA is "not empowered to exempt the CAFE program from this directive." *Id.*

II. NHTSA lacked authority to reconsider the 2016 adjustment years later

NHTSA next maintains that even if the CAFE penalty is subject to mandatory inflation adjustments under the Act, the agency could still reverse the 2016 catch-up adjustment by invoking a narrow exception regarding the otherwise required amount. But as Environmental Petitioners have explained, *see* NRDC31, NHTSA lacked authority to invoke the exception years after the 2016 adjustment became final.

NHTSA now contends that its decision to invoke the exception is "separate" from any asserted authority to reconsider the 2016 adjustment. NHTSA40. That is, NHTSA appears to suggest that agencies have unbounded authority to invoke the exception whenever they wish, *see* NHTSA36-39, even though the Improvements Act's "deadlines for adjustments are clear and mandatory," *NRDC*, 894 F.3d at 109.

But this theory—that the exception operates independently of the adjustments and their mandatory deadlines—misreads both the Improvements Act and this Court's prior opinion. By its express terms, the exception applies only "[f]or the first adjustment." IAA § 4(c). Further, this Court held that the exception applies only to "the *amount* of the initial catch-up adjustment," and provided agencies with "no … discretion regarding the *timing*." *NRDC*, 894 F.3d at 109. NHTSA now tries to avoid this Court's holding by distinguishing between "the statute's exception" and "its first adjustment." NHTSA38-39. But any such distinction is illusory. As NHTSA previously conceded, the Act allowed agencies to invoke the exception only as "part of making the initial catch-up adjustment," and provided them "with no ensuing opportunity to invoke the 'negative economic impact' exception." SA15 (84 Fed. Reg. at 36,021).

Importantly, NHTSA here *finalized* its catch-up adjustment in December 2016. JA684 (81 Fed. Reg. 95,489 (Dec. 28, 2016)). NHTSA's present contentions that Congress did not impose a specific deadline for finalizing the interim adjustment, and that agencies do not lose power to act after missing deadlines, NHTSA37-38; AAI53-54, are therefore beside the point. The relevant question is whether NHTSA had any authority to invoke the exception by *reconsidering* the 2016 adjustment "years after the adjustment became final." NRDC31; *see* NRDC34 n.13 (an agency's ability to carry out mandatory duties late "does not mean it may *reconsider* final actions years later").

Indeed, NHTSA previously made clear that it purported to "reconsider" the 2016 adjustment. *See* SA3, 15-16 (84 Fed. Reg. at 36,009, 36,021-22).

NHTSA is now largely silent on its reconsideration authority, however, and what little it says lacks merit. To the extent NHTSA still maintains it enjoys "inherent power" to reconsider final rules, NHTSA40; AAI49-50, it ignores this Court's holding—in striking down NHTSA's unlawful suspension of the same final rule—that an agency must identify statutory authority for its actions, given "the well-established principle that an agency literally has no power to act unless and until Congress confers power upon it." *NRDC*, 894 F.3d at 112 (quoting *NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004)).[7] And even those courts that have found implied reconsideration authority have held that it must be exercised "in a timely fashion," *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014)—i.e., weeks or months, not (as here) years later. *See Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977).

Moreover, even were NHTSA correct that "the statute itself" must limit reconsideration, NHTSA40, the "unusually precise and directive" Improvements Act *does* limit agencies' ability to reverse themselves, *NRDC*, 894 F.3d at 113 n.12. As NHTSA has acknowledged, the Act operates as a "one-way ratchet," SA15 (84 Fed. Reg. at 36,021), by limiting the negative economic exception to *only* the "first

[7] Alliance's reliance on *Dun & Bradstreet Corp. Foundation v. USPS*, 946 F.2d 189, 193 (2d Cir. 1991), is misplaced, *see* AAI49, as that case involved only "the power to reconsider decisions reached in individual cases by agencies in the course of exercising quasi-judicial powers." *Abraham*, 355 F.3d at 202.

adjustment," and then requiring subsequent, annual adjustments based off that first adjustment "not later than January 15 of every year thereafter," IAA § 4(a), (c). This one-way ratchet is analogous to the statutory anti-backsliding provision at issue in *Abraham*, where this Court rejected another agency's assertion of "inherent power" to reconsider a final rule. 355 F.3d at 202-04. Here, as in *Abraham*, NHTSA's claim of "unlimited discretion to revisit and amend" the 2016 adjustment would "eviscerate" the limits Congress placed on the agency. *Id.* at 200.[8] An unbounded authority to perpetually revisit the catch-up adjustment, including years down the road, is "simply incompatible" with the Act's "highly circumscribed schedule" that imposes a "strict timeline" for regular adjustments. *NRDC*, 894 F.3d at 109-11 (citation omitted).

III. NHTSA's application of the exception was substantively flawed

Even if NHTSA could invoke the negative economic impact exception years after the 2016 catch-up adjustment became final, its application of the exception here was still unlawful, and its attempt to undo the entire 2016 adjustment contrary to law.

A. NHTSA no longer contends that EPCA's framework governs

The Improvements Act's exception applies only when an agency demonstrates that the otherwise required amount of the catch-up inflation adjustment "*will* have a

[8] NHTSA misrepresents *Abraham* and the relevant portion of EPCA when it claims that the "statute provide[d] for 'timely-initiated' reconsideration." NHTSA40. Rather, the agency's *disputed rule* claimed that reconsideration authority, *see Abraham*, 355 F.3d at 198 (quoting 67 Fed. Reg. 36,368, 36,406 (May 23, 2002)), and the Court *struck down* the rule, noting that the agency's "reading would effectively render [the statutory] 'anti-backsliding' mechanism inoperative," *id.* at 197.

negative economic impact." IAA § 4(c)(1)(A) (emphasis added). The Repeal Rule, however, unlawfully inverted the Act's burden of proof by applying EPCA's different framework, *see supra* 8-9, which allows NHTSA to increase the CAFE penalty above its original value if it "*will not* have a substantial deleterious impact on the economy," 49 U.S.C. § 32912(c)(1)(A)(ii) (emphasis added). Applying this wrong legal standard, *see* NRDC35-39, NHTSA initially found a negative economic impact from the 2016 inflation adjustment based primarily on the "absence of persuasive evidence" that such an impact would *not* occur. SA3 (84 Fed. Reg. at 36,009); *see also* SA38-40 (83 Fed. Reg. 13,904, 13,913-15 (Apr. 2, 2018)) (noting NHTSA had "not [d]etermined" that the 2016 adjustment "will not have" the impacts listed under EPCA).[9]

In its brief, NHTSA no longer defends that position, presumably because any "erroneous reordering of the burden of proof necessarily constitutes an abuse of discretion." *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 529 (D.C. Cir. 2019). Instead, NHTSA now acknowledges it must establish that a negative economic impact *will* occur, and that no single EPCA factor is dispositive. NHTSA44-45. But given this about-face, the Repeal Rule's purportedly "holistic consideration" of the EPCA factors, NHTSA42, plainly cannot sustain the exception here because it "did not actually *find* a negative economic impact pursuant to any of them," NRDC38; *see*

[9] Alliance, notably, still tries to defend NHTSA's analysis on the basis that the agency "could not rationally conclude that raising the CAFE civil penalty rate would ***not*** cause a significant increase in unemployment in a State or region of a State." AAI43.

also IPI25-26. Instead, the agency merely concluded that it did "not have the evidence needed to make the determination required under EPCA" and its more demanding burden. SA18 (84 Fed. Reg. at 36,024); *see also* SA3 (*id.* at 36,009) (similar); SA39 (83 Fed. Reg. at 13,914) ("NHTSA does not have sufficient evidence to make the requisite finding under EPCA"). Even putting aside that defect, however, NHTSA's analysis was still arbitrary and capricious, given its refusal to consider the economic benefits of an inflation adjustment. *See infra* 20-21; SA17 (84 Fed. Reg. at 36,023).

B. NHTSA's analysis was otherwise arbitrary and capricious

NHTSA now bases its negative economic impact determination primarily on the size of the additional penalties that would purportedly result from partially restoring the CAFE penalty's value. It points repeatedly to a pair of tables included at the end of the final rule which, NHTSA asserts, estimated that "additional penalties would amount to hundreds of millions of dollars each year and potentially more than one billion dollars for some years." NHTSA41; *see also id.* at 43-45 (similar). These highly inflated figures (like Alliance's own outdated estimate, *see* NRDC39-40, which NHTSA does not rely on in its brief) cannot justify the exception.

1. To start with, NHTSA vastly overstates to this Court the additional penalties automakers might pay under the 2016 inflation adjustment because its projections *do not account for credits*. SA22 (84 Fed. Reg. at 36,028); *see also* SA27 (*id.* at 36,033 app. A, tbls. 1, 2) ("**Note:** Projected penalties could be offset by the application of credits."). The figures are therefore highly inflated because, as NHTSA explains elsewhere,

credits are a means of complying with the CAFE standards. *See* NHTSA5. In other words, projecting potential penalties "*before* accounting for credits," SA22 (84 Fed. Reg. at 36,028) (emphasis added), is inherently misleading because "[c]ompliance is determined *after* considering credits," 49 U.S.C. § 32911(b) (emphasis added). Unsurprisingly, NHTSA's own CAFE compliance data shows that accounting for credits would change the results dramatically. For example, automakers during model year 2015 posted a miles-per-gallon shortfall equivalent to over $458 million, but—after accounting for compliance credits—incurred *zero* penalties. JA925 (NHTSA, MY 2011-2018 Industry CAFE Compliance 3 (2018)). And the following model year, a miles-per-gallon shortfall equivalent to over $973 million resulted—after accounting for credits—in penalties of only about $77 million. JA925 (*id.*). NHTSA remarkably failed to inform the Court of this fundamental limitation in its estimated projections.[10]

Regardless, even assuming these projections reflected automakers' true penalty payments or compliance costs, they still would not justify invoking the exception. Congress mandated regular inflation adjustments to "maintain the deterrent effect of civil monetary penalties," "promote compliance with the law," and "improve the collection by the Federal Government of civil monetary penalties." IAA § 2(b)(2)-(3). Given these express purposes, Congress could not have intended for increased

[10] Further, for any (limited) additional penalty payments that *would* result from a $14 adjustment, Congress has directed that half be returned to automakers in the form of grants. *See* NRDC44; 49 U.S.C. § 32912(e). On this point, too, NHTSA is silent.

penalties or compliance costs *themselves* to trigger the Act's exception, *see* NY63-65—especially in the context of the CAFE program, where any additional costs would fall only on automakers that *choose* to violate standards that NHTSA itself has found to be "feasible," 49 U.S.C. § 32902(a). Rather, by restoring penalties' real value, the Act necessarily contemplates increased compliance (and attendant costs) and greater penalties for non-compliance. NHTSA's contrary determination—that these intended outcomes somehow precluded the otherwise mandatory adjustment—is "simply incompatible" with the Act's "primary purpose." *NRDC*, 894 F.3d at 109-10; *see Gresham v. Azar*, 950 F.3d 93, 103-04 (D.C. Cir. 2020) (agency action was "arbitrary and capricious" where it "disregarded" a statute's "primary purpose"). Further, relying on the magnitude of these outcomes—as NHTSA did here—has the irrational effect of excepting penalties that most sorely need an update. The Court "cannot read the Improvements Act" to leave in place the most outdated penalties "that it was enacted to [address]." *NRDC*, 894 F.3d at 111.[11]

[11] NHTSA's analysis also failed to contextualize its penalty projections, despite comments that the "impact of [such] additional costs" would be "minimal when spread across the industry." SA21 (84 Fed. Reg. at 36,027); *see* JA744 (Attorneys General 2018 Comment at 15) (estimated costs represent less than 0.2 percent of vehicles' purchase price); JA810 (IPI 2018 Comment at 15) (estimated costs represent roughly 0.2 percent of industry's annual revenue). Instead, NHTSA dismissed the need for this context as "directed towards the irrelevant question of how 'negative' the 'economic impact' would be." SA21 (84 Fed. Reg. at 36,027). But NHTSA, notably, no longer claims that only a minimal impact would suffice. *See* NHTSA46.

2. Even if NHTSA could rely on its projections of potential penalties, its analysis was still arbitrary and capricious. *First*, NHTSA "refused to consider" the many economic *benefits* of adjusting the CAFE penalty for inflation, which it erroneously deemed "irrelevant" to its decision. *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015); *see* NRDC42-47. NHTSA does not dispute that agencies, as a matter of reasonable regulation, must ordinarily consider both the costs and benefits of their actions. *See* NHTSA46-47. NHTSA insists, however (at NHTSA41-42), that Congress's express reference to "benefits" in the Improvements Act's second exception, IAA § 4(c)(1)(B), makes positive economic impacts irrelevant for the first, *id.* § 4(c)(1)(A). But just as "[i]t is unreasonable to infer that, by expressly making costs relevant to other decisions, the Act implicitly makes costs irrelevant to" another, it is likewise unreasonable to assume the same regarding benefits. *Michigan*, 135 S. Ct. at 2709. Nor does NHTSA explain how, as a matter of ordinary language, an action with overwhelmingly *positive* economic effects overall would produce a "negative economic impact." NRDC46-47. Because the Improvements Act thus "invite[s]" consideration of both costs and benefits, NHTSA46, NHTSA fails to distinguish *Michigan* and similar cases applying this established principle of reasoned decisionmaking.

Moreover, statutory exceptions must be read narrowly, in light of a statute's purposes. *Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 287-88 (2d Cir. 2015). That rule of construction does not call for "a free-floating inquiry," NHTSA45, but rather weighs in favor of construing the exception in accord with the

Improvements Act's "primary purpose," *NRDC*, 894 F.3d at 109. Because the Act's express purpose is to "promote compliance with the law," IAA § (2)(b)(2), the economic benefits of compliance are clearly relevant to whether an adjustment has a "negative economic impact." But given the final rule's assertion that such benefits were irrelevant, *see* SA17 (84 Fed. Reg. at 36,023), NHTSA cannot now credibly maintain that it *did* consider them. *See* NHTSA47. In fact, the economic benefits here described by numerous other entities—and which are nowhere addressed in NHTSA's final rule—are enormous. *See* NRDC43-44; IPI19-24; TESLA12-18.

Second, NHTSA's analysis was *also* arbitrary and capricious because it provided no "reasoned explanation" for disregarding the agency's own prior findings. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *see* NRDC40-42. In a 2016 technical report, NHTSA found that, with the adjusted $14 penalty in place, automakers' compliance with projected CAFE standards remained feasible at reasonable cost, and that those compliance costs were less than the economic benefits to consumers in fuel savings alone. JA527, 656-57 (2016 Draft TAR ES-2, 13-102 to 13-103). Each of these findings directly refutes NHTSA's current assertion of a "negative economic impact" from a $14 penalty. But NHTSA's final rule did not "display awareness" of—much less attempt to reckon with—either of them. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quotation omitted). This "[u]nexplained inconsistency" is a textbook case of arbitrary and capricious rulemaking. *Id.*

NHTSA's continued effort to excuse the unacknowledged inconsistency—by pointing to the Environmental Protection Agency's (EPA) separate reconsideration of another decision based on the technical report, *see* NHTSA48—fails for at least two reasons. *See* NRDC41-42. First, NHTSA cannot disavow its earlier findings based on *EPA's* reconsideration because each agency conducted "independent analyses" in the 2016 report. JA531, 535 (Draft TAR ES-6, ES-10). Second, as the D.C. Circuit has held, EPA's reconsideration did not supersede even EPA's *own* findings in the report, such that it "will need to provide a 'reasoned explanation'" before disregarding any of those findings in a later final action. *California v. EPA*, 940 F.3d 1342, 1351 (D.C. Cir. 2019). NHTSA's failure to respond to—let alone rebut—these two errors speaks volumes.

C. NHTSA could not reverse the entire adjustment

Even if NHTSA had properly justified invoking the exception, its decision to undo the *entire* catch-up adjustment was still unlawful for two independent reasons.

First, NHTSA lacked authority to make *no* adjustment to the outdated $5.50 penalty. *See* NRDC47-48. NHTSA does not dispute that to "adjust" requires some "change." NHTSA49. Instead, NHTSA now claims that, even though the 2016 increase from $5.50 to $14 was "the first adjustment," it made a second "adjustment" when it reversed the penalty back to $5.50. *Id.* But that contention is belied by NHTSA's earlier—and repeated—insistence that it "*declined to adjust* the CAFE penalty." NHTSA17 (emphasis added); *see also* SA3 (84 Fed. Reg. at 36,009) (asserting

the agency was "retaining the current civil penalty"); SA24 (*id.* at 36,030) (asserting the rule "maintains the existing penalty rate"). Moreover, as described above (*supra* 13), the exception applies only to "the first adjustment," IAA § 4(c), meaning that agencies could invoke it only as "part of making the initial catch-up adjustment," SA15 (84 Fed. Reg. at 36,021). Thus, where the exception provides that agencies may "adjust the amount of a civil monetary penalty by less than the otherwise required amount," IAA § 4(c), it unambiguously describes an adjustment *from* the prior, outdated amount.

Second, even assuming the Act permitted agencies to make no adjustment in certain circumstances, NHTSA here failed to do the work necessary to justify its all-or-nothing approach. That is, NHTSA failed to provide any "rational connection" between the negative economic impact it purportedly found and its decision to make no adjustment at all. *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003). To the extent NHTSA maintains that it need not identify any connection, NHTSA49, that position is meritless. *See* NRDC48-49. And its alternative contention that it did consider lesser adjustment amounts collapses under scrutiny.

The only mention of a lesser penalty adjustment NHTSA identifies, *see* NHTSA49, is in the agency's *refusal* to analyze its economic impacts. In the final rule, NHTSA declined to conduct economic cost-benefit analyses required by various executive orders on the basis that reversing the $14 adjustment merely maintained the status quo and thus "ha[d] no economic impact." SA24 (84 Fed. Reg. at 36,030). NHTSA stated that adjusting the penalty "to $14 or even just $10, would have had

economic impacts, but analyzing the impacts of alternatives that would have changed the status quo is different than analyzing an actual rule that does so." *Id.* In other words, NHTSA *declined* to analyze the economic impacts of that (hypothetical) $10 alternative, and thus could not possibly have found that such impacts were "negative."

NHTSA's remaining ipse dixit—that *any* penalty increase would have a negative economic impact, SA16-17 (84 Fed. Reg. at 36,022-23 n.160)—likewise does not show it considered any lesser adjustment. NHTSA seems to suggest no analysis was necessary given the magnitude of additional penalties it estimated from a $14 adjustment. *See* NHTSA49-50. But, as described above (*supra* 17-18), those estimates are overstated, and NHTSA never even calculated projected penalties for any lesser adjustment.

At bottom, NHTSA's position reduces to the unsupportable proposition that a negative economic impact occurs whenever an adjustment requires regulated entities either to spend more to comply with the law or to pay higher penalties for non-compliance. But that is the Act's very purpose. If those findings justified leaving an outdated penalty entirely unadjusted, the "exception" would swallow the rule.

IV. NHTSA violated NEPA by failing to quantify and disclose the harms that would result from its reversal

NHTSA does not dispute that reversing the 2016 inflation adjustment could result in an additional 54 billion gallons of fuel consumed over a 15-year period. But it made no attempt to quantify the emissions of harmful air pollutants that would result from the combustion of that enormous amount of fuel, or otherwise analyze their

impacts. This failure violated NHTSA's procedural obligations under the National Environmental Policy Act (NEPA). *See* NRDC49-53; IPI27-31.

NHTSA has not suggested that quantifying those emissions was impractical—nor could it. *See* NRDC51. Instead, it protests that quantifying emissions is too trivial a task. NHTSA53-54. That argument flips the logic of NEPA on its head.

NEPA serves two goals. First, it ensures that federal agencies consider the environmental consequences of their actions. Second, and "perhaps more significantly," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), it requires that agencies "inform the public" about those consequences, *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). To fulfill this "larger informational role," *Robertson*, 490 U.S. at 349, NEPA here required NHTSA to, at the very least, translate the additional fuel consumption its decision will produce into actual emissions. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (quantified analysis of greenhouse-gas emissions required, where practical); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 75 (D.D.C. 2019) (same, in an Environmental Assessment (EA)); 84 Fed. Reg. 30,097, 30,098 (June 26, 2019) (draft Council on Environmental Quality guidance) (quantifying emissions and putting them in context "allows an agency to present the environmental impacts of a proposed action in clear terms and with sufficient information").

Thus, even if NHTSA believed that the "scant information" it provided here somehow allowed *the agency* to consider the environmental impacts of its decision,

"NEPA documents are inadequate" unless they provide information that "'*the public* can readily understand.'" *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 996 (9th Cir. 2004) (quoting 40 C.F.R. § 1502.8) (emphasis added). Here, that meant informing the general public about the emissions that would result from NHTSA's decision, especially given the "well-documented dangers associated with [such] automobile emissions." *NRDC*, 894 F.3d at 104.[12]

Nor can NHTSA paper over this omission by pointing to analyses of emissions it conducted for other actions in a 2018 draft EIS and 2012 final EIS. *See* NHTSA51-52, 53-55. To begin with, NHTSA's attempt to tier to a *draft* EIS is "improper" because that document, by definition, has "not [yet been] subject to the full NEPA review." *All. for the Wild Rockies v. USFS*, 907 F.3d 1105, 1119 (9th Cir. 2018); *see also Conservation Law Found. v. FHWA*, 24 F.3d 1465, 1475 (1st Cir. 1994) (draft EIS "has no legal effect" and thus "cannot, by itself, serve as the first tier in the EIS process").

NHTSA's reliance on the 2012 EIS fares no better, because that document analyzed the environmental *benefits* of decreased fuel consumption, not the environmental *harms* of increased consumption. *See* NRDC51-52. But it is "far from self-evidently true" that "increased energy consumption [has] precisely the same degree of 'impact' on the environment as decreased consumption." *NRDC v.*

[12] Moreover, had NHTSA quantified emissions, it likely would have realized that a full Environmental Impact Statement (EIS) was required. *See* 49 C.F.R. § 520.5(b)(9) (any action that may result in a "significant increase in the amount of harmful emissions resulting from the operation of a motor vehicle" ordinarily requires an EIS); IPI30-31 (estimating roughly 480 million metric tons of greenhouse-gas emissions).

Herrington, 768 F.2d 1355, 1431-32 (D.C. Cir. 1985). "[R]elatively slight increases in consumption [c]ould have quite dramatic environmental effects, even if a corresponding decrease had very moderate effects." *Id.* at 1432. NHTSA's "bald assertion" to the contrary does not suffice for purposes of NEPA, *id.*, especially where any "continued increase in greenhouse gas emissions may change the climate in a sudden and non-linear way," *Ctr. for Biological Diversity v. NHTSA* (*CBD*), 538 F.3d 1172, 1221 (9th Cir. 2008).

Regardless, even *were* NHTSA justified in relying on either of these documents, it *still* violated NEPA for the agency to merely assert that the environmental impacts of its current action would be "very small" in comparison. *See* NRDC52-53. Even a seemingly "very small portion" of a "gargantuan source" of pollution can "constitute[] a gargantuan source of … pollution on its own terms." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019). NHTSA's "conclusory assertion" to the contrary was "markedly deficient" under NEPA. *CBD*, 538 F.3d at 1220.

CONCLUSION

The Court should vacate NHTSA's reversal of the 2016 adjustment to the CAFE 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)(B) because it contains 6,987 words, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

Dated: March 13, 2020

/s/ *Ian Fein*
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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.

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