19-2395(L)

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 MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW JERSEY, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WASHINGTON, STATE OF MAINE, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, HEIDI KING, in her capacity as Deputy Administrator of the National Highway Traffic Safety Administration, ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,

Respondents,

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

Intervenors.

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

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY
AT NEW YORK UNIVERSITY SCHOOL OF LAW
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity") submits this brief as *amicus curiae* in support of Petitioners.

In this case, Petitioners have challenged the National Highway Traffic Safety Administration's ("NHTSA") repeal, *see* Civil Penalties, 84 Fed. Reg. 36,007 (July 26, 2019) ("Repeal Rule"), of the agency's 2016 inflation adjustment of the penalty for violation of the corporate average fuel economy standards ("CAFE penalty"), *see* Civil Penalties, 81 Fed. Reg. 43,524, 43,526 (July 5, 2016), *modified by* 81 Fed. Reg. 95,489 (Dec. 28, 2016) (collectively, "2016 Adjustment"). The 2016 Adjustment was adopted pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("Act"),[1] and, with its repeal, NHTSA reduces the CAFE penalty from $14 to $5.50 per tenth-of-a-mile-per-gallon shortfall.

Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in administrative law, economics, and public policy, with a focus on environmental economics. And Policy Integrity has expertise on the questions raised in this case because of its academic

[1] The Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, which is codified at 28 U.S.C. § 2461, note. For the sake of simplicity, this brief uses "Act" to refer to the text of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by Congress in 2015.

research on compliance enforcement regimes as well as scholarship on how to factor costs and benefits into regulatory decisions.

Policy Integrity's director, Professor Richard L. Revesz, has published over 80 articles and books on environmental and administrative law, including several works on the legal and economic principles for rational regulatory decisions. Dr. Sylwia Bialek, on staff at Policy Integrity, holds a Ph.D. in economics and has extensive experience analyzing environmental and energy policies, including the CAFE penalty. Policy Integrity's legal director, Jason Schwartz, is an expert in the compliance regime at issue, as he served as consultant to the Administrative Conference of the United States on marketable permit programs, with his report providing the basis for the Conference's recommendations. *See* Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,730 n.1 (Dec. 29, 2017). And members of Policy Integrity's staff have developed significant expertise on the law governing disclosure of environmental risk, authoring publications, comments, and an environmental law casebook.

Moreover, Policy Integrity has participated in prior agency and court proceedings leading to the Repeal Rule, submitting comments on NHTSA's reconsideration of the 2016 Adjustment[2] and the proposed rule ("Policy Integrity

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[2] A*vailable at* https://www.regulations.gov/document?D=NHTSA-2017-0059-0006.

Comments"), Civil Penalties, 83 Fed. Reg. 13,904 (Apr. 2, 2018) ("Proposed Rule").[3] Policy Integrity also submitted a petition for reconsideration of the Repeal Rule.

Furthermore, Policy Integrity submitted an *amicus* brief on consent in support of petitioners, with a declaration from Dr. Bialek, in the challenge to NHTSA's suspension of the 2016 Adjustment, Civil Penalties, 82 Fed. Reg. 32,139 (July 12, 2017) ("Suspension Rule"). *See* Br. of the Institute for Policy Integrity as *Amicus Curiae*, *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018). In that case, Policy Integrity argued that the agency's claim that the Suspension Rule would cause no harm was unreasonable because, as NHTSA's own model shows, a lowered penalty decreases fuel efficiency and makes consumers buy more fuel. This Court vacated the Suspension Rule, holding, among other things, that the record established that the lowered penalty harmed petitioners. *Nat. Res. Def. Council*, 894 F.3d at 104, 115–16.

Policy Integrity's experience with the Repeal Rule and expertise in regulatory decisionmaking give it a unique perspective on Petitioners' claims.

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[3] *Available at* https://www.regulations.gov/document?D=NHTSA-2018-0017-0017.

SUMMARY OF ARGUMENT

While NHTSA attempts to use economics to justify the Repeal Rule, it makes critical errors at every juncture and ultimately cannot lawfully justify its findings. This brief focuses on NHTSA's economic arguments and supports Petitioners' claims that NHTSA misinterprets the Act's scope, misapplies its "negative economic impact" exception, and violates the National Environmental Policy Act ("NEPA").

NHTSA's argument that the Act does not apply to the CAFE penalty fails because NHTSA cannot meaningfully distinguish the CAFE penalty from the many similar penalty provisions that are routinely adjusted under the Act. In support of its flawed argument that the availability of credit offsets makes the CAFE penalty unique, NHTSA fundamentally mischaracterizes these credits and repeatedly attempts to complicate an enforcement regime that is actually straightforward. NHTSA's interpretation subverts the Act's core deterrence principles and should be rejected.

NHTSA alternatively attempts to justify the Repeal Rule by claiming that the 2016 Adjustment would impose a "negative economic impact," but the agency arbitrarily disregards the Repeal Rule's significantly larger costs, including considerable environmental and public-health harms and hundreds of billions of dollars in forgone consumer fuel savings. In contrast, the impacts that NHTSA cites as a basis for repealing the 2016 Adjustment are speculative and exaggerated. Courts have long held that cost is "a centrally relevant factor when deciding whether to regulate," and by giving "cost no thought *at all*," *Michigan v. EPA*, 135 S. Ct. 2699, 2706–07 (2015), NHTSA fails to engage in reasoned decisionmaking as the Administrative Procedure Act requires.

NHTSA's failure to consider the Repeal Rule's environmental harms also violates NEPA. Although this rule will cause massive environmental and public-health impacts, the agency does not meaningfully assess these effects as NEPA requires, but instead perfunctorily—and incorrectly—finds these impacts to be "very small." 84 Fed. Reg. at 36,032. For this reason as well, the Court should grant the petition for review.

ARGUMENT

I. Economic Principles Strongly Support Petitioners' Argument that the Act Applies to the CAFE Penalty

Basic economic principles underlying the Act undeniably support its application to the CAFE penalty. As Congress recognized in the Act, inflation "has weakened the deterrent effect" of monetary penalties, § 2(a)(3), and so an inflation adjustment is required to "maintain [their] deterrent effect," *id.* § 2(b)(2). Because the $5.50 rate is a "penalt[y] with a dollar amount," the deterrent value of which declines with inflation, *see* Memorandum from Shaun Donovan, Office of Mgmt. & Budget ("OMB") Director, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016) ("OMB Guidance

Letter")[4], an inflation adjustment is needed to "maintain [its] deterrent effect," Act § 2(b)(2). Indeed, as this Court has recognized, the 2016 Adjustment "correct[ed] for decades of inaction" during which the CAFE penalty's impact eroded from inflation, and thus the adjustment promoted compliance with the CAFE standard pursuant to the Act. *Nat. Res. Def. Council*, 894 F.3d at 109–10.

NHTSA's newfound position that the 2016 Adjustment was unlawful, in contrast, allows the "impact" of the CAFE penalty to be further "diminished due to the effect of inflation," Act § 2(a)(2), thereby perpetuating the problem that the Act sought to correct. Ignoring this concern, NHTSA argues that the CAFE penalty is unique and so does not fall within the statute's reach, but that argument fails, and NHTSA's other arguments to support this interpretation similarly lack merit.

A. The CAFE Program's Credit Offsets Help Smooth Compliance and Do Not Make the Program Unique

NHTSA's attempts to evade the Act's clear application mischaracterize the CAFE penalty and fail to meaningfully distinguish it from the many penalty provisions subject to the Act. Under the CAFE program, automobile manufacturers are charged a fixed rate for each tenth of a mile-per-gallon that their average fleet fuel economy falls short of the CAFE standard, multiplied by the number of

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[4] *Available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.

automobiles in the fleet. 49 U.S.C. § 32912(b). Manufacturers that over-comply earn credits that can generally be applied to offset shortfalls in other years, helping smooth out their compliance obligations. *See* Policy Integrity Comments at 5. The CAFE program also allows manufacturers to sell credits to one another, 49 U.S.C. § 32903(f), allowing manufacturers facing relatively higher compliance costs to comply with the CAFE standard by purchasing credits from other manufacturers instead of making reductions themselves. This feature helps reduce the aggregate compliance costs of the program.

NHTSA argues that the CAFE penalty is unique and thus not subject to the Act in part because of the availability of this credit program. 84 Fed. Reg. at 36,017. But credit trading approaches of this sort are found in numerous federal regulatory programs, including the Department of Energy's ("DOE") alternative fuel transportation program for state-owned vehicles, 42 U.S.C. § 13258, and the Environmental Protection Agency's ("EPA") programs for motor vehicle pollution, 40 C.F.R. § 80.1270, and cross-state air pollution, 40 C.F.R. § 97.1. Like the CAFE program, regulated entities in these programs earn credits for overcompliance, which they can either apply toward future compliance or trade to another regulated entity. And penalties for these programs are subject to the Act's inflation adjustment. *See* Inflation Adjustment of Civil Monetary Penalties, 83 Fed. Reg. 66,080, 66,080 (Dec. 26, 2018) (adjusting penalties for violations of DOE alternative fuel program, 10

C.F.R. § 490.604); Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2,056, 2,059 (Feb. 6, 2019) (adjusting penalties for violations of EPA motor-vehicle emissions standards, 42 U.S.C. § 7524); *id.* (adjusting penalties for violations of cross-state air pollution standards, 42 U.S.C. § 7413(b)). NHTSA fails to reconcile these similar examples with its claims about the "unique nature of the CAFE civil penalty," 84 Fed. Reg. at 36,010.

Instead, NHTSA complicates the straightforward CAFE program by arguing that the CAFE penalty is unique because credits allow an "entity that violated the law [to] take unilateral action to decrease or eliminate the penalty," whereas other penalties "can only go up," *id.* at 36,019. But this characterization of credits as a means for a violator to satisfy its penalty is erroneous. Credits are *a means of compliance* with the CAFE standard—not a way to pay the penalty. In other words, the penalty is calculated only after all credits are applied. Indeed, the Energy Policy and Conservation Act ("EPCA"), under which NHTSA administers the CAFE program, explicitly provides that "[c]ompliance is determined after considering credits available to the manufacturer." 49 U.S.C. § 32911(b); *see also id.* § 32912(b)(3) (subtracting credits used before applying noncompliance penalty).

Thus, contrary to NHTSA's characterization, manufacturers that apply credits have not "violated the law" or been assessed a "penalty," 84 Fed. Reg. at 36,019. Indeed, consistent with EPCA's text, the agency has acknowledged that the use of credits is a way to comply with the CAFE standards both in prior rulemakings, *see, e.g.*, 74 Fed. Reg. 14,196, 14,206 (Mar. 30, 2009) ("[C]redit holders . . . will be able to hold credits [and] apply them to compliance with CAFE standards[.]"), and in a footnote in the Repeal Rule itself, 84 Fed. Reg. at 36,016 n.81 (recognizing that manufacturers use "credits . . . to achieve compliance").

To give a simple numerical example, consider a manufacturer with a three-mile-per-gallon shortfall with enough credits to make up the entire shortfall. Because "[c]ompliance is determined after considering credits," 49 U.S.C. § 32911(b), this manufacturer has complied with the CAFE standard and, contrary to NHTSA's contention, does not use credits to "meet[] [its] . . . liability," 84 Fed. Reg. at 36,008. In contrast, if the manufacturer has credits to make up for only half the shortfall, NHTSA would take that compliance into account before assessing the penalty under 49 U.S.C. § 32912(b)(3), and thus, contrary to the agency's account that it "cannot readily calculate the penalty inputs" for the CAFE penalty, would "determine the penalty inputs by adding up the number of violations . . . under the statute," 84 Fed. Reg. at 36,019.

The agency's additional rationales to justify its interpretation of credits as a means of penalty payment—not statutory compliance—are increasingly confused. For instance, NHTSA attempts to minimize the connection between credits and compliance by claiming that compliance credits are "unrelated to the manufacturer's actions to meet the [CAFE] standard" due to the availability of trading, which is a common feature of credit programs as discussed above. 84 Fed. Reg. at 36,019. This characterization ignores the fact that credits are earned through over-compliance with the CAFE standard, 49 U.S.C. § 32903, and were designed, in important part, to help smooth out automakers' compliance from year to year while still serving Congress's goal of energy conservation.

NHTSA also claims that the CAFE penalty is just "a single input in a complex market-based penalty program" rather than "the penalty amount itself." 84 Fed. Reg. at 36,017. But *every* penalty is an "input" in the "formula" to calculate the amount that regulated entities are assessed. For instance, other NHTSA penalties are enforced per day, *see, e.g.*, 49 U.S.C. § 32912(a) (general penalty under EPCA), per offense, *see, e.g.*, 49 C.F.R. § 578.6(a)(2) (penalty for school bus-related violations), or per product, *see, e.g.*, *id.* (providing "separate violation . . . for each motor vehicle"), making the penalty just one input in a formula to calculate the total assessment. And NHTSA acknowledges that these penalties were "properly adjusted pursuant to the . . . Act." 84 Fed. Reg. at 36,016; *see also id.* at 36,019 n.106.

Additionally, the agency is incorrect that the CAFE standard uniquely allows regulated entities to "decide how to achieve the required fuel economy improvements," *id.* at 36,016. This, too, is a standard feature of civil penalties: Regardless of how a penalty is set, the regulated entity chooses when and how to comply with the legal standard. For instance, school-bus importers determine their incidence of noncompliance with NHTSA's rules by deciding whether and how many noncompliant buses to import, *see* 49 C.F.R. § 578.6(a)(2), just as automakers determine their incidence of noncompliance with the CAFE standards by deciding how many credits to use. And with school buses, too, the penalty amount influences compliance decisions, which is why an inflation adjustment is needed to "promote compliance with the law," Act § 2(b)(2).

In any event, NHTSA's arguments on the uniqueness of credit offsets are not only incorrect but also immaterial, because even under NHTSA's interpretation, it remains the case that the $5.50 penalty is "diminished due to the effect of inflation" and must be adjusted to "maintain [its] deterrent effect . . . and promote compliance" with the CAFE standard. *Id.* §§ 2(a)(2), (b)(2). Indeed, a manufacturer with the same annual shortfall one year after another, after credits are taken into account, will be assessed the same annual penalty amount under NHTSA's approach, even though inflation diminishes that amount's impact—precisely the situation that the Act was designed to avoid. Accordingly, OMB has instructed agencies to "adjust[]" the "dollar figure" portions of a penalty formula in the case of a penalty calculation based on "only some dollar amounts" together with other factors, OMB Guidance Letter at 2, as all dollar values—whether they constitute the full penalty or just one of several factors—see their "impact . . . diminished due to the effect of inflation," Act § 2(a)(2). Thus, even under NHTSA's misreading of EPCA—in which either dollars or credits are used to satisfy one's liability—the $5.50 "dollar figure" must be adjusted to "maintain [its] deterrent effect," *id.* § 2(b)(2).

The availability of credit offsets thus has no bearing on the Act's applicability, belying NHTSA's principal argument that the Act does not apply.[5]

B. NHTSA's Other Economic Justifications Fail

NHTSA's two other economic justifications for why the Act does not apply are also easily refuted.

First, the agency argues that because the CAFE standard itself may increase in stringency over time, "[r]equiring an inflation adjustment on top of that would be gratuitous." 84 Fed. Reg. at 36,018. This argument not only has no basis in the Act, but also reflects a misunderstanding of basic economic principles. The objective of "improv[ing] energy efficiency of motor vehicles," 42 U.S.C. § 6201(5), would be severely impaired if the penalty for violating the CAFE standard were continually "diminished due to the effect of inflation," Act § 2(a)(2), as this would hinder NHTSA's ability to "promote compliance with" an increased standard, *id.* § 2(b)(2). Adjusting the CAFE penalty for inflation thus does not conflict with an increasing

[5] For these reasons, we agree with the Petitioners that the Act also requires adjustment of the $10 maximum CAFE penalty.

standard, but rather helps ensure that those increases are real rather than illusory by maintaining the penalty's deterrent impact.

Indeed, recognizing the importance of maintaining deterrence, other agencies with increasingly stringent standards have adjusted their corresponding penalties under the Act. For instance, DOE adjusted the penalties enforcing its energy efficiency standards for various consumer products—standards that also appear under EPCA and largely mirror the CAFE program in requiring regular updates to achieve the "maximum improvement in energy efficiency," 42 U.S.C. § 6295(m) & (o)(2)(A). *See* Inflation Adjustment of Civil Monetary Penalties, 83 Fed. Reg. 1289, 1291 (Jan. 11, 2018) (adjustment of 10 C.F.R. § 429.120). And EPA adjusted the penalty for violations of pollution standards for new sources, which are revisited at least every eight years, 42 U.S.C. § 7411(b)(1)(B). *See* 84 Fed. Reg. at 2,058 (adjustment of 42 U.S.C. § 7413(b)).

Second, NHTSA complains that when the CAFE standard increases, the "cost of the penalty per increased gallon consumed . . . increase[s]," and so the "penalty rate for excessive fuel consumption has increased." 84 Fed. Reg. at 36,018. But the per-gallon penalty lacks legal basis, as Congress set the CAFE standard in terms of a fleet's "average fuel economy" 49 U.S.C. § 32902, not total gallons of fuel consumed, and designed the penalty as a function of the manufacturer's noncompliance with that standard, *id.* § 32912. Adjusting the CAFE penalty to keep up with inflation "maintain[s] [its] deterrent effect" and thus "promote[s] compliance with the law," Act § 2(b)(2), as it maintains the value of the penalty designed by Congress. The penalty assessed per gallon is not relevant, because Congress pinned the penalty to a different target.

In short, NHTSA's various economic rationales are unpersuasive. Rather, economic principles support the Act's application to the CAFE penalty, corroborating Petitioners' claim that the Act applies.

II. The Repeal Rule Is Arbitrary and Capricious Because It Ignores Forgone Benefits and Relies on Speculative and Inflated Impacts

In the alternative, NHTSA justifies the repeal of the 2016 Adjustment on the ground that the adjustment would cause a "negative economic impact." 84 Fed. Reg. at 36,010. Even assuming NHTSA has authority to invoke this exception,[6] the agency impermissibly ignores the Repeal Rule's expected costs—including hundreds of billions of dollars in lost fuel savings to U.S. consumers, plus substantial environmental and public-health harms—and relies instead on largely speculative and comparatively miniscule cost savings to industry.

[6] Petitioners argue that NHTSA missed the statutory deadline to invoke this exception. *See, e.g.*, Br. of Envtl. Pet'rs at 31–35.

A. NHTSA Unreasonably Ignores the Repeal Rule's Costs in the Form of Forgone Benefits

NHTSA justifies the Repeal Rule by citing compliance cost savings and penalty savings while entirely disregarding the harms that the Repeal Rule will cause. This not only violates longstanding executive guidance instructing agencies to consider regulatory costs and make "a reasoned determination that the benefits of the intended regulation justify its costs," Exec. Order 12,866 § 1(b)(6), 58 Fed. Reg. 51,735 (Sept. 30, 1993), *see also* Dep't of Transp., Order No. 2100.6, at 3 (2018) ("Unless required by law or compelling safety need, regulations should not be issued unless their benefits are expected to exceed their costs."), but also applies the Act unreasonably.

"Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate." *Michigan*, 135 S. Ct. at 2707; *see also Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003) (agencies must "look at the costs" of regulation (internal quotation marks omitted)). Indeed, as the Supreme Court has explained, an agency acts unreasonably in giving "cost no thought *at all*," *Michigan*, 135 S. Ct. at 2706, unless a statute "on its face" precludes consideration of costs, *id.* at 2709; *see also id.* at 2716 (Kagan, J., dissenting) (agreeing that agency "acts unreasonably" by disregarding costs "[u]nless Congress provides otherwise"). And in the context of regulatory reversals, like here, agencies must rationally consider any "important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), which includes considering the costs, in the form of forgone benefits, of the regulation being repealed or changed, *see Air Alliance Houston v. EPA*, 906 F.3d 1049, 1067–68 (D.C. Cir. 2018) (vacating suspension for failing to adequately address suspended rule's forgone benefits).

Here, Congress directed each agency to conduct an immediate "catch up" adjustment, but provided that the agency "*may* adjust the amount" of that initial adjustment "by less than the otherwise required amount if . . . [doing so] will have a negative economic impact." Act §§ 4(b)(1), (c)(1)(A) (emphasis added). Thus, reducing the otherwise-required initial adjustment requires an agency to both (1) determine that the adjustment would result in a "negative economic impact" and (2) *choose* to exercise discretion to invoke the exception. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion . . . particularly . . . [when] used in contraposition to the word 'shall[.]'").

No part of that statute, "on its face" or otherwise, authorizes or instructs NHTSA to ignore the costs of its action. Rather, the statute delegates broad discretion to the agency in three ways. First, the phrase "economic impact" is a "broad and all-encompassing term" covering many impacts on the economy, including employment, growth and innovation, and consumers. *See Michigan*, 135 S. Ct. at 2707 (internal quotation marks omitted) (explaining that "appropriate" similarly "includes consideration of all the relevant factors"). Second, the term "negative," denoting less than zero, involves some consideration of the countervailing impacts.[7] *See* Br. of Envtl. Pet'rs at 45 (collecting cases). To illustrate, if a person must spend $275 to fly to a job interview to secure a job that provides a $200,000 raise, the $275 expense would ordinarily not be considered a "negative" impact. Third, the Act gives agencies discretion over whether to apply the full catch-up adjustment even after a finding that it would cause a "negative economic impact."

NHTSA argues that the Act's adjacent exception—which allows an agency to consider reducing the adjustment if "the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits," Act § 4(c)(1)(B)—"must mean" that the agency is not required to find that a "negative economic impact" outweighs the "positive economic impact" of the adjustment. 84 Fed. Reg. at 36,023. But the fact that the exception for "social costs" requires a direct weighing against forgone benefits does not allow NHTSA to ignore all forgone benefits when considering whether an adjustment would cause "negative economic impact." In fact, in *Michigan*, the Supreme Court rejected a similar argument, holding that "by

[7] *See* Merriam-Webster (definition (3) of "negative"), https://www.merriam-webster.com/dictionary/negative; *see id.* (defining "negative income" as "having more outgo than income: constituting a loss").

expressly making cost relevant to [some] decisions," a statute does not "implicitly" make cost "irrelevant" to others. 135 S. Ct. at 2709.

Here too, regardless of which exception NHTSA tries to invoke—whether the agency seeks to find a "negative economic impact" *or* "social costs"—the agency must assess that concern from a baseline that includes the 2016 Adjustment's benefits, and so NHTSA must rationally address the forgone benefits of invoking either exception. *See Air Alliance*, 906 F.3d at 1068 (explaining that the agency must assess the impact of its decision against a status quo that includes the rule that the agency seeks to roll back).

And even if NHTSA were somehow correct that a "negative economic impact" finding looked only at cost savings, this would not explain why consideration of forgone benefits is not required when the agency actually decides to reduce the adjustment under this exception. By giving agencies discretion over whether to reduce the penalty adjustment even after making a finding of "negative economic impact," the Act does not "direct[]" agencies to regulate "on the basis of" any particular "factor." *See Michigan*, 135 S. Ct. at 2709. Instead, Congress intended agencies to account for "all the relevant factors," and NHTSA therefore "stray[s] far beyond" the "bounds of reasonable interpretation" by reading the Act "to mean that it could ignore cost." *See id.*

Because the Act does not direct that a "negative economic impact" finding—much less the subsequent determination to reduce an otherwise-required inflation adjustment—be made without any consideration of the harmful impacts of the agency's decision, NHTSA's outright disregard of costs renders the Repeal Rule arbitrary and capricious.

B. The Repeal Rule's Costs Are Substantial and Widespread

While NHTSA's failure to consider the Repeal Rule's costs is itself unlawful, this failure is particularly egregious considering the costs' magnitude. The Repeal Rule will not only cause lost fuel savings, environmental harms, and competitive disadvantages, but these costs also vastly exceed the rule's projected cost savings to affected manufacturers.

As this Court has recognized, lowering the CAFE penalty will "affect automakers' business decisions and compliance approaches" and reduce the incentive for automakers to increase fuel efficiency, because automakers will frequently choose to pay penalties when doing so is cheaper than increasing fuel efficiency. *Nat. Res. Def. Council*, 894 F.3d at 105. Contrary to NHTSA's claim, *see* 84 Fed. Reg. at 36,025–26, consumer demand does not provide sufficient incentive for automakers to invest in fuel-saving technology. In fact, as NHTSA has previously acknowledged, consumers often make vehicle purchasing decisions that fail to fully account for future fuel savings. *See* 77 Fed. Reg. 62,624, 63,114 (Oct.

15, 2012) (recognizing "lack of salience of . . . fuel savings to consumers at the time they make purchasing decisions"). Therefore, as NHTSA has also previously acknowledged, the 2016 Adjustment would "increase[] compliance with the CAFE standards, which would result in greater fuel savings and other benefits." Suspension Rule, 82 Fed. Reg. at 32,142; *see also* NHTSA, Draft Technical Assessment Report 13-58 (2016) (explaining that following the 2016 Adjustment, manufacturers "will respond more aggressively to CAFE requirements").[8]

In contrast, decreasing the CAFE penalty lowers automakers' incentive to develop fuel-efficient vehicles, and so decreases the fleets' overall fuel efficiency. *See* Policy Integrity Comments at 6; *Nat. Res. Def. Council*, 894 F.3d at 105. Policy Integrity assessed this impact using NHTSA's publicly available model ("Model"), and the results—presented in public comments[9]—are stark.

Lost Fuel Savings: Policy Integrity's analysis demonstrates that the Repeal Rule will reduce the average passenger car fuel economy by 2.24 miles per gallon by 2022, with the gap widening to almost five miles per gallon by 2032. Policy Integrity Comments at 7. This decline corresponds to an additional 54 billion gallons

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[8] *Available at* https://www.regulations.gov/document?D=NHTSA-2018-0017-0014 (Ex. 2, pt. 6).

[9] *See* Policy Integrity Comments at 6–10. Policy Integrity's projections were produced using the agency's 2016 version of the Model. Although an updated version was released in late 2018, the update was not available when comments to the Proposed Rule were due. Additionally, the projections are made relative to the existing CAFE standards.

of fuel consumed domestically through model year 2032—a projection NHTSA does not dispute, *see* 84 Fed. Reg. at 36,032—thereby producing significant consumer, environmental, public-health, and economic losses that NHTSA impermissibly disregards. Particularly since the CAFE program was created to "conserve energy supplies," 42 U.S.C. § 6201(4), in ignoring fuel consumption, NHTSA ignores "an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Consumer Costs: Consumption of an additional 54 billion gallons of fuel will cost U.S. consumers at the pump. Even assuming a conservative estimate of $2.25 per gallon,[10] the Repeal Rule will cause more than $120 billion in consumer costs over the next fifteen years, or over $8 billion per year on average. This cost alone vastly exceeds the projected penalty savings that the agency predicts under the Repeal Rule of between $560 million and $1.65 billion annually. 84 Fed. Reg. at 36,033. Additionally, by imposing significant costs on consumers, the Repeal Rule is likely to reduce consumer spending elsewhere, with resulting economic impacts. *See* Sanya Carley et al., *A Macroeconomic Study of Federal and State Automotive Regulations* 3 (Mar. 2017) ("I.U. Study") (cited in 84 Fed. Reg. at 36,024)

[10] Since 2005, average per-gallon domestic gasoline prices have ranged from $2.25 to $3.68. *See* U.S. Energy Information Administration, U.S. All Grades All Formulations Retail Gasoline Prices, *available at* https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=EMM_EPM0_PTE_NUS_DPG&f=A.

("[S]avings in gasoline expenditures trigger reallocations in spending that have a much more positive impact on the economy[.]").

Environmental and Public-Health Costs: Higher fuel consumption also means that more greenhouse gases and toxic pollutants will be emitted into the atmosphere, exacerbating climate change and producing substantial public-health costs. These harms are also considerably greater than NHTSA's estimates of forgone compliance costs. Policy Integrity's comments urged NHTSA to calculate and monetize forgone emissions reductions, Policy Integrity Comments at 11, but NHTSA did not do so.

One reasonably simple method to estimate the emissions harms would have been to estimate the emissions that will be caused by the additional gasoline consumption under the rule, and then—applying the calculation upheld as reasonable in *Zero Zone, Inc. v. United States Dep't of Energy*, 832 F.3d 654, 678 (7th Cir. 2016)—multiply the emissions total by an estimate of the damages associated with each additional unit of emissions. *See* Policy Integrity Comments, Ex. A. This method demonstrates that the Repeal Rule's emissions will cause more than $25 billion in global climate costs—such as property damage from sea-level rise and extreme weather events, along with human health impacts and mortality from heat-related illnesses.[11] NHTSA impermissibly "fail[s]. . . to quantify" or even consider this "certain cost[]." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011).

Competitive Harms: The Repeal Rule also harms automakers that have invested heavily in fuel efficiency and earned (or expect to earn) tradable credits for exceeding the CAFE standard, because decreasing the CAFE penalty reduces the demand for—and, accordingly, price of—tradable compliance credits. *See* 84 Fed. Reg. at 36,029 ("[I]f the civil penalty rate [were] increased, the price of credits would increase[.]"). By reducing the penalty, NHTSA thus substantially decreases the asset value of credits owned by automakers who exceeded the CAFE standards. Yet again, however, NHTSA entirely fails to consider these harms.

[11] As explained above, the Final Rule causes the consumption of an additional 54 billion gallons of fuel. Combustion of each gallon of gasoline emits 0.008887 metric tons of carbon dioxide, and so, using multiplication, 54 billion gallons of gasoline produces about 479.89 million metric tons of carbon dioxide. *See* EPA, Greenhouse Gases Equivalencies Calculator, *available at* https://www.epa.gov/energy/greenhouse-gases-equivalencies-calculator-calculations-and-references. The federal Interagency Working Group has provided a monetized estimate of the damages associated with an incremental increase in carbon emissions, with a central estimate of $42 (in 2007$) per metric ton emitted in 2020. Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* 16 (2016). Adjusted for inflation using the CPI Inflation Calculator, that equals $53.40 in 2019$. Multiplying 479.89 million metric tons by $53.40 yields $25.626 billion in undiscounted climate-related damages. This value represents an underestimate of climate damages from the Final Rule, because the social cost of carbon increases each year, *id.*, and most of the Final Rule's emissions occur after 2020.

By promulgating the Repeal Rule solely on the basis of costs saved "without factoring in the substantial [forgone] advantages" of maintaining the 2016 Adjustment totaling tens of billions of dollars in fuel savings, climate and health benefits, and investment-backed expectations, NHTSA violates the Administrative Procedure Act. *See Mineta*, 340 F.3d at 57–58.

C. In Stark Contrast to Its Disregard for Real Costs, NHTSA Relies on Alleged Cost Savings that Are Speculative and Comparatively Minor

While NHTSA's disregard for the Repeal Rule's substantial costs is arbitrary on its own, the agency compounds its error by giving controlling weight to speculative and illusory cost savings that are, at best, far smaller than the rule's costs. The Administrative Procedure Act requires "balanced consideration" of the "impact[s] of any [regulatory] action," *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1221 (5th Cir. 1991) (internal quotation marks omitted), which NHTSA violates by "put[ting] a thumb on the scale," *Ctr. for Biol. Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

First, most of the 2016 Adjustment's supposedly adverse impacts are largely speculative, as opposed to its certain and substantial benefits. In fact, NHTSA justifies the Repeal Rule on the grounds that it has not "affirmatively determine[d] that [the 2016 Adjustment] is likely . . . [to] not cause a significant increase in unemployment in a State or a region of a State; adversely affect competition; or cause a significant increase in automobile imports." 84 Fed. Reg. at 36,009 (emphasis omitted). In other words, NHTSA is imposing certain and enormous harm because it lacks "sufficient data" to eliminate the possibility that the 2016 Adjustment would result in some adverse effects on employment or competition. *Id.* at 36,022. This is hardly the "balanced consideration" that the law requires. *See Corrosion Proof Fittings*, 947 F.2d at 1221.[12]

Despite lacking "sufficient data," NHTSA nonetheless speculates that the 2016 Adjustment might "likely" have adverse "effects" on "unemployment, competition, and automobile imports," 84 Fed. Reg. at 36,022, and cause "short-term macroeconomic losses" in several states, *id*. at 36,024. But NHTSA bases this speculation on a study showing that improved fuel-efficiency produces investments that "boost employment, output, and disposable income," such that its "impact . . . on the national economy is . . . positive in the long-term," I.U. Study at 3. Indeed, in a related proceeding, the study authors themselves "clarif[ied]" their findings to emphasize that increased fuel economy has "long-run positive effects," meaning that it would *improve* the economy. Comment Submitted by John D. Graham, Ph.D., et al. 2 (May 3, 2018).[13] By disregarding the significance of this broader impact and

[12] NHTSA argues that its interpretation of the Act and EPCA allow its imbalanced consideration of the Final Rule's impacts. *See* 84 Fed. Reg. at 36,020–21. But that is incorrect as explained by Petitioners, *see* Br. of State Pet'rs at 60–62.

[13] *Available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0827-11416.

focusing narrowly on short-term regional effects, NHTSA "inconsistently and opportunistically frame[s] the costs and benefits of the rule." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

Nor does NHTSA give balanced treatment to its conclusion that the 2016 Adjustment would increase automakers' compliance costs and penalty payments. For example, NHTSA fails to recognize that any penalty reduction is accompanied by a corresponding loss to taxpayers of federal revenues and thus impairs the Act's purpose of "improv[ing] the collection by the Federal Government of civil monetary penalties," Act § 2(b)(3). This "transfer" from the federal government to automakers "do[es] not affect total resources available to society," Office of Mgmt. & Budget, Circular A-4 on Regulatory Analysis 38 (2003), but instead has distributional impacts that should be addressed separately so that "decision makers can properly consider them along with the effects on economic efficiency," *id.* at 14. By treating this reduction in penalty payments as a basis for its rulemaking without even recognizing the countervailing cost to the federal treasury, NHTSA again "opportunistically frame[s] the costs and benefits of the rule." *Bus. Roundtable*, 647 F.3d at 1148–49.

Additionally, while NHTSA accepts industry's estimate that the 2016 Adjustment would cost industry over $1 billion annually, 84 Fed. Reg. at 36,027, that estimate was calculated using the Model and, as the agency does not refute, *see* *id.*, the Model "tend[s] to overestimate fuel economy costs," Policy Integrity Comments at 13. In any event, when compared to the costs of the Repeal Rule, *see supra* Section II.B, imposing large costs on consumers, health, and the environment to obtain a far smaller cost savings is irrational. *Cf. Michigan*, 135 S. Ct. at 2707 ("No regulation is 'appropriate' if it does significantly more harm than good.").

Because NHTSA ignores the Repeal Rule's substantial costs while regulating based on speculative and far smaller countervailing effects, the Repeal Rule is arbitrary and capricious. *See Mineta*, 340 F.3d at 58 (finding that NHTSA impermissibly sacrificed large benefits for smaller cost savings to industry).

III. NHTSA Violates NEPA by Summarily Finding that the Repeal Rule Will Have "No Significant Impact"

NHTSA's disregard for the Repeal Rule's significant costs also violates NEPA. By summarily concluding that the rule "will not have a significant effect on the human environment" without even quantifying its contribution to climate change or otherwise evaluating its environmental impacts, 84 Fed. Reg. at 36,033, the agency violates NEPA's requirement that agencies take a "hard look at the environmental consequences before taking a major action," *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal quotation marks omitted).

As noted above, estimates based on the additional gallons of gasoline consumed under the Repeal Rule demonstrate that the rule will cause substantial environmental harms by exacerbating climate change, producing more than $25 billion in incremental damages such as property loss and human-health impacts. But NHTSA never even quantifies the emission increases from the Repeal Rule, let alone assesses the rule's real-world contributions to health and environmental impacts. Instead, with virtually no explanation or analysis, the agency concludes that the rule's environmental impacts are "very small." 84 Fed. Reg. at 36,032.

The Repeal Rule's environmental impacts are undoubtedly significant. The transportation sector accounts for nearly thirty percent of U.S. greenhouse gas emissions, and over half the emissions of other pollutants like carbon monoxide and nitrogen oxide. Center for Biological Diversity et al., Comment on Notice of Proposed Rulemaking 4 ("CBD Comments").[14] Decreasing average fuel economy by up to five miles per gallon—the Repeal Rule's projected consequence, according to NHTSA's own model, Policy Integrity Comments at 7—will thus have drastic environmental impacts, including significantly exacerbating climate change. CBD Comments at 3–6. Because NHTSA can "reasonably foresee" this effect, it must "give[] a quantitative estimate of the downstream greenhouse emissions that will

[14] *Available at* https://www.regulations.gov/document?D=NHTSA-2018-0017-0012.

result from" the Repeal Rule, as otherwise "it is difficult to see how [the agency] could engage in 'informed decision making' with respect to the [rule's] greenhouse-gas effects." *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017).

Indeed, while NEPA at minimum requires agencies to quantify "reasonably foresee[able]" greenhouse gas impacts whenever possible, *id.*; *see also San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1244 (D.N.M 2018) (collecting cases), several courts have gone further, finding that a quantified estimate of greenhouse gas emissions is insufficient when the agency does not also "evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally" through a monetized estimate of climate damages, *Ctr. for Biological Diversity*, 538 F.3d at 1216; *see also, e.g.*, *High Country Conservation Advocates v. United States Forest Serv.,* 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014). Under either standard, NHTSA's failure to quantitatively assess emissions of greenhouse gases and other pollutants—even though Policy Integrity specifically urged NHTSA to calculate and monetize forgone emissions reductions, Policy Integrity Comments at 11, and the agency's own model is designed to make such projections—violates NEPA. Without such an analysis, the agency cannot purport to "disclose" the Repeal Rule's "actual environmental effects," *Balt. Gas & Elec. Co.*, 462 U.S. at 96.

While NHTSA attempts to justify its finding of no significant impact by claiming that the Repeal Rule's impact is "much smaller" than that of its 2012 rule to increase the CAFE standards, 84 Fed. Reg. at 36,032, this falls woefully short of the agency's obligations. The fact that the Repeal Rule may cause *relatively less* impact than one of NHTSA's other rules—a rule, it bears noting, that produced *massive* environmental benefits, *see* Final Environmental Impact Statement, CAFE Standards, Passenger Cars and Light Trucks, Model Years 2017–2025 at 5-62 (cited in 84 Fed. Reg. at 36,032) (finding that 2012 rule would reduce climate-related damages by central estimate of $142 billion compared to no-action alternative)—does not mean that those impacts are not significant "on [their] own." *See Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019) (explaining that even a seemingly "very small portion" of a "gargantuan source of . . . pollution" may "constitute[] a gargantuan source of . . . pollution on its own terms"). Just because the Repeal Rule is not the most impactful action that NHTSA has ever taken, in other words, does not mean that its impacts are insignificant.

Indeed, the environmental impacts of the greenhouse gas emissions at stake in this rulemaking—an estimated additional 479.89 million metric tons of carbon dioxide emissions and over $25 billion in climate-related damages, *see supra* n.11—are far greater than those in the cases cited above where courts faulted agencies for failing to evaluate incremental environmental impacts. *Ctr. for Biological Diversity*, 538 F.3d at 1216 (122–196 million metric tons) *and High Country*, 52 F. Supp. 3d at 1191 (1.23 million annually). The estimates here do not support the agency's conclusion that the impacts of the Final Rule are "very small." 84 Fed. Reg. at 36,032. Instead, they compel the opposite conclusion.

NHTSA's failure to evaluate the Repeal Rule's environmental impacts in any meaningful fashion—culminating in its dismissal of enormous "economic, social, [and] health" effects, 40 C.F.R. § 1508.8(b), as "very small," 84 Fed. Reg. at 36,032—violates NEPA's "hard look" requirement.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions and vacate the Repeal Rule.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7), the foregoing Brief contains 6,965 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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