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 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, JAMES C. OWENS, in his capacity as Acting Administrator of the National Highway Traffic Safety Administration, ELAINE L. 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

FINAL BRIEF FOR RESPONDENTS

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INTRODUCTION

The U.S. Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") administers a regulatory program governing automobile fuel-economy requirements known as the Corporate Average Fuel Economy ("CAFE") standards. NHTSA sets CAFE standards ahead of each model year at "the maximum feasible average fuel economy level" that the agency decides automakers can achieve. 49 U.S.C. § 32902(a). Then, following the model year, the government measures the average fuel economy across an automaker's fleet, and that automaker might either exceed or fall short of the applicable standard. An automaker that exceeds the standard earns credits that may be used to meet the standard in prior or subsequent model years, traded for monetary value with others, or (for automakers with multiple fleets) transferred between fleets. *Id.* § 32903(a), (f), (g). An automaker "commits a violation if the manufacturer fails to comply with an applicable [CAFE] standard," but only if the "credits available to the manufacturer" do not bridge the shortfall. *Id.* § 32911(b).

If there is a remaining shortfall for the model year, the automaker faces a financial sanction for that violation. The CAFE penalty is the result of a multi-variable formula consisting of: a now-$5.50 base amount, the applicable CAFE standard, the automaker's average fuel economy, the number of vehicles manufactured, and the number of available credits (past, future, traded, or transferred). *See* 49 U.S.C. § 32912(b). NHTSA may issue regulations raising the $5.50 base amount, up to a $10 statutory cap. *Id.* § 32912(c)(1)(B).

Petitioners in this case challenge NHTSA's regulatory determination that the agency was not required to adjust the CAFE penalty's $5.50 base amount and related $10 cap to account for inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("Improvements Act"), Pub. L. No. 114-74, § 701, 129 Stat. 599, 599-601 (codified at 28 U.S.C. § 2461 note). *See* 84 Fed. Reg. 36,007 (July 26, 2019) ("2019 Final Rule") (SA1). The 2019 Final Rule had two bases, which reflect the two principal issues here: that the CAFE penalty is not a "civil monetary penalty" subject to the statute and that, if it is, the "negative economic impact" exception to the adjustment under that statute is satisfied:

That 2019 Final Rule also reconsidered an earlier NHTSA adjustment of the base amount and cap based on the (unexplained) conclusion that the Improvements Act applied. *See* 81 Fed. Reg. 43,524 (July 5, 2016) (JA660); 81 Fed. Reg. 95,489 (Dec. 28, 2016) (JA684). NHTSA had sought to delay that adjustment, and in an earlier case challenging the delay, this Court held that NHTSA had violated the statute's deadlines. *NRDC v. NHTSA*, 894 F.3d 95, 107-08 (2d Cir. 2018) ("*NRDC*"). But the *NRDC* deadlines ruling was based on NHTSA's own premise that the Improvements Act applied, and this Court's precedents make clear that such prior decisions do not foreclose agencies from reaching a different determination based on statutory provisions that the Court did not conclusively interpret. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017) ("*Catskill III*").

STATEMENT OF JURISDICTION

Petitioners invoke the Court's jurisdiction under 49 U.S.C. § 32909(a) to review NHTSA's 2019 Final Rule issued July 26, 2019. *See* 84 Fed. Reg. 36,007 (SA1). Several States and the District of Columbia ("State Petitioners") petitioned for review on August 2, 2019, and two environmental organizations ("Environmental Petitioners") petitioned on August 12, 2019. *See* 49 U.S.C. § 32909(b); *see also* No. 19-2395, Doc. 1-2 (2d Cir.) (JA942); No. 19-2508, Doc. 1-2 (2d Cir.) (JA978).

STATEMENT OF THE ISSUES

1. Whether NHTSA properly concluded that the CAFE penalty is not subject to inflation adjustments under the Improvements Act.

2. Whether, in the alternative, NHTSA reasonably satisfied the Improvements Act's "negative economic impact" exception to the first adjustment.

3. Whether NHTSA complied with the procedural requirements of the National Environmental Policy Act of 1969.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. The CAFE Program

Since 1975, the Energy Policy and Conservation Act ("EPCA") has authorized the Secretary of Transportation to promulgate regulations establishing fuel-economy requirements for automobiles under the CAFE program. *See* Pub. L. No. 94-163, § 301, 89 Stat. 871, 901-16 (1975) (codified as amended at 49 U.S.C. § 32901 *et seq*.). NHTSA sets, 18 months in advance of each model year (which begins prior to the calendar year), CAFE standards at "the maximum feasible average fuel economy level that the [agency] decides the manufacturers can achieve in that model year." 49 U.S.C. § 32902(a); *see* 49 C.F.R. § 1.95(a) (delegating authority to NHTSA). The CAFE standards started at 18.0 miles per gallon ("mpg") for each automobile fleet for model year 1978. *See* 43 Fed. Reg. 28,204 (June 29, 1978). They reached an average of 36.9 mpg for 2020, and NHTSA has proposed new standards through 2026. *See* 83 Fed. Reg. 42,986, 42,989 (Aug. 24, 2018) (JA916).

Following the model year, the government measures the average fuel economy of the automobiles across an automaker's fleet. *See* 49 U.S.C. § 32904(a), (c). An automaker "commits a violation if the manufacturer fails to comply with an applicable [CAFE] standard" for that model year—that is, if the automaker has a shortfall between its average mpg and the CAFE standard. *Id.* § 32911(b). EPCA further specifies methods for achieving compliance and consequences for a violation in a model year.

First, "[c]ompliance is determined after considering credits available to the manufacturer." 49 U.S.C. § 32911(b). An automaker that exceeds the applicable CAFE standard in a model year earns credits based on how much it exceeds the standard and the number of automobiles manufactured. *Id.* § 32903(a), (c). An automaker may accumulate credits for itself, trade credits for monetary value with others, or (for an automaker with multiple fleets) transfer credits between fleets. *Id.* § 32903(f), (g); *see*

Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 104(a), 121 Stat. 1492, 1501-02. The automaker can then use the credits to meet the CAFE standard for the five subsequent model years or, with NHTSA's approval, for the three prior model years. 49 U.S.C. § 32903(a), (b). An automaker that has or will have enough credits to completely cover the mpg shortfall has not "commit[ted] a violation" that year, *id.* § 32911(b).

Second, EPCA provides for a financial sanction where an automaker nonetheless falls short of the CAFE standard for a model year after counting past, future, traded, and transferred credits. As relevant here, that CAFE penalty is expressed as follows:

> [A] manufacturer that violates a standard prescribed for a model year … is liable to the Government for a civil penalty of $5 multiplied by each .1 of a mile a gallon by which the applicable [CAFE] standard under [EPCA] exceeds the average fuel economy—
>
> (1) calculated under [EPCA] for automobiles to which the standard applies manufactured by the manufacturer during the model year;
>
> (2) multiplied by the number of those automobiles; and
>
> (3) reduced by the credits available to the manufacturer under [EPCA] for the model year.

49 U.S.C. § 32912(b). Thus, even if available credits were insufficient to erase the mpg shortfall and thus the violation altogether, those credits can reduce the CAFE penalty. And because the CAFE penalty depends on the mpg difference between "the applicable [CAFE] standard" and an automaker's performance, increases in the standard expand that gap and thus increase the penalty.

EPCA further authorizes NHTSA to raise the $5 base amount used to calculate the CAFE penalty. As to that base amount, the Secretary may "prescribe by regulation a higher amount for each .1 of a mile a gallon to be used in calculating a civil penalty," but that "amount … may not be more than $10 for each .1 of a mile a gallon." 49 U.S.C. § 32912(c)(1)(A), (B). The Secretary may only raise the base amount, however, if she follows the statutory procedures, which include holding a public hearing and requesting comment from the Federal Trade Commission, and if she finds that the "increase in the penalty": first, "will result in, or substantially further, substantial energy conservation"; and second, "will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State," after accounting for the effects on unemployment, competition, or imports. *Id.* § 32912(c)(1)(A), (2).

B. Inflation Adjustment Act's "Civil Monetary Penalty" Definition

Congress later enacted the Federal Civil Penalties Inflation Adjustment Act of 1990 ("Inflation Adjustment Act") to "establish a mechanism" for regular adjustments of civil monetary penalties for inflation to maintain their deterrence and compliance value. *See* Pub. L. No. 101-410, § 2(b), 104 Stat. 890 (codified as amended at 28 U.S.C. § 2461 note). As relevant here, the statute provides that the term "civil monetary penalty" means any penalty that either "is for a specific monetary amount as provided by Federal law" or "has a maximum amount provided for by Federal law." *Id.* § 3(2) (codified at 28 U.S.C. § 2461 note sec. 3(2)). Under the statute's 1996 Amendments, the "head of each agency" must, every four years, "by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency," with a 10-percent limit on the first adjustment. *See* Debt Collection Improvement Act of 1996 ("1996 Amendments"), Pub. L. No. 104-134, § 31001(s)(1)(A), (2), 110 Stat. 1321, 1321–373.

NHTSA and other components of the Executive Branch have, throughout the years, been inconsistent on whether the CAFE penalty satisfies the definition of a "civil monetary penalty." Prior to the Inflation Adjustment Act, a presidential council identified 311 penalties using Congress's proposed definition of "civil monetary penalty," which was later included in that statute. President's Council on Integrity & Efficiency, *Civil Monetary Penalties* 2, 4 (June 30, 1988) ("1988 Presidential Report") (JA5, 7). The CAFE penalty was not among them. *Id.*, attach. D at 6-7 (JA30-31). But following that statute, the Office of Management and Budget ("OMB") identified the $5 base amount in the CAFE penalty—but not the related $10 cap—in connection with a report to Congress. *See* OMB, *Civil Monetary Penalty Assessments & Collections*, Exh. 1 at 25, Exh. 2 at 25, Exh. 3 at 28 (July 1991) ("1991 OMB Report") (JA82, 114, 149); *see also* Inflation Adjustment Act § 4(5)(A) (requiring report). NHTSA accordingly implemented the 1996 Amendments by increasing that base amount from $5 to $5.50, consistent with Congress's 10-percent limit. 62 Fed. Reg. 5,167, 5,168 (Feb. 4, 1997) (codified at 49 C.F.R. § 578.6(h)).

C. Improvements Act and "Negative Economic Impact" Exception

In November 2015, Congress enacted the Improvements Act. *See* 28 U.S.C. § 2461 note. The Improvements Act does not modify the statutory definition of "civil monetary penalty." It instead requires "the head of each agency [to] adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency" on an annual basis (as opposed to every four years). *Id.* sec. 4(a)(1), (b)(2). Congress required OMB, by February 2016 and annually after that, to "issue guidance to agencies on implementing the inflation adjustments." *Id.* sec. 7(a).

For "the first adjustment," the Improvements Act requires "the head of an agency [to] adjust civil monetary penalties through an interim final rulemaking" "[n]ot later than July 1, 2016" and provides that "the adjustment shall take effect not later than August 1, 2016." 28 U.S.C. § 2461 note sec. 4(a), (b)(1). The Improvements Act includes as an exception to that first adjustment permitting "the head of an agency"—with OMB's concurrence—to "adjust the amount of a civil monetary penalty by less than the otherwise required amount if" she determines through notice-and-comment rulemaking that either (1) the increase "will have a negative economic impact" or (2) "the social costs" of the increase "outweigh the benefits." *Id.* sec. 4(c). The amount of the first adjustment is in all events limited to 150 percent of the existing penalty. *Id.* sec. 5(b)(2)(C).

II. Prior Proceedings

A. NHTSA's 2016 Inflation Adjustment

1. Following the Improvements Act, OMB issued guidance confirming that agencies were "responsible for identifying the civil monetary penalties that fall under the statutes and regulations they enforce." OMB, M-16-06, *Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015*, at 2 (Feb. 24, 2016) ("2016 OMB Guidance") (JA680). OMB explained that, under the "civil monetary penalty" definition, inflation adjustments "apply only to penalties with a dollar amount, and will not apply to penalties written as functions of violations." *Id.* OMB instructed that agencies should consult their general counsels or request further clarification from OMB as necessary. *Id.*

2. NHTSA published an interim final rule that adjusted the CAFE penalty and solicited petitions for reconsideration. The interim rule did not separately evaluate whether the CAFE penalty's base amount met the Improvements Act's definition but nonetheless increased that amount from $5.50 to $14, consistent with the statutory limit for the first adjustment. 81 Fed. Reg. at 43,526 (JA662). NHTSA noted that the related $10 cap on that amount would accordingly increase to $25. *Id.*

In December 2016, NHTSA promulgated a final rule confirming the increase in the base amount used in the CAFE penalty from $5.50 to $14 (while failing to raise the cap from $10 to $25) and reconsidering other aspects of the first adjustment based on a petition. NHTSA on reconsideration determined that it would not implement the increase immediately but rather beginning with model year 2019. 81 Fed. Reg. at 95,490-91 (JA685-86). NHTSA explained that this approach was consistent with EPCA's scheme of providing advance notice to automakers, in which increases to the CAFE standard—which in effect increase the CAFE penalty—must issue 18 months prior to each model year. *Id.* NHTSA denied the petition's request for notice-and-comment rulemaking on the "negative economic impact" exception without explanation. *Id.*

3. Beginning in January 2017, NHTSA took a series of actions to suspend the effective date of the 2016 inflation adjustment. *See* 82 Fed. Reg. 8,694 (Jan. 30, 2017) (JA688); 82 Fed. Reg. 15,302 (Mar. 28, 2017); 82 Fed. Reg. 29,009 (June 27, 2017). The last of those suspensions indicated that NHTSA planned to reconsider the rule because it "did not give adequate consideration to all of the relevant issues, including the potential economic consequences of increasing CAFE penalties by potentially $1 billion per year." 82 Fed. Reg. 32,139, 32,139 (July 12, 2017) (JA689).

B. This Court's *NRDC* Decision

This Court vacated NHTSA's suspension of the 2016 inflation adjustment and concluded that the adjustment "is now in force" without deciding the questions at issue in this case. *NRDC*, 894 F.3d at 115-16. Based on NHTSA's own predicate conclusion (in its earlier rule) that the Improvements Act required inflation adjustments, the Court held that NHTSA had "exceeded its statutory authority in indefinitely delaying" such a required adjustment. *Id.* at 107-08. The Court held that the Improvements Act's "deadlines for adjustments are clear and mandatory," emphasizing that the first adjustment required an interim final rule "'[n]ot later than July 1, 2016'" and "'shall take effect not later than August 1, 2016.'" *Id.* at 108-09 (emphases omitted) (quoting 28 U.S.C. § 2461 note sec. 4(a), (b)(1)). The Court, however, did not decide questions relevant to the two principal issues here: whether NHTSA could later rely on a "relevant ambiguity" in EPCA or exercise its "discretion" under the Improvements Act's "negative economic impact" exception to the first adjustment. *Id.* at 109 & n.7, 112 n.10.

C. NHTSA's 2019 Final Rule

Following reconsideration, NHTSA promulgated the 2019 Final Rule through notice-and-comment rulemaking. First, NHTSA concluded that the Improvements Act does not govern the CAFE penalty because the $5.50 base amount is not the penalty itself but rather, as EPCA describes, "the amount … used in calculating a civil penalty," and because the related $10 cap only limits that amount and not the penalty. 84 Fed. Reg. at 36,016 (SA10) (quoting 49 U.S.C. § 32912(c)(1)(A)). Second, even under the Improvements Act, NHTSA found that the "negative economic impact" exception to the first adjustment was satisfied, determining that the increase would result in costs on the magnitude of billions of dollars over the next several years. *Id.* at 36,009 (SA3) (citing 28 U.S.C. § 2461 note sec. 4(c));. In written opinions, OMB concurred in both determinations. *See* OMB Non-Applicability Letter (JA926); OMB Negative Economic Impact Letter (JA934). Finally, NHTSA addressed the impact of the 2019 Final Rule on fuel consumption, greenhouse-gas emissions, and climate change under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq*. 84 Fed. Reg. at 36,031-33 (SA25-27).

SUMMARY OF ARGUMENT

NHTSA properly concluded that the CAFE penalty—which is not for an amount set or limited by statute but comprises a multi-variable formula—should not undergo inflation adjustments under the Improvements Act. NHTSA sets CAFE standards for each model year at "the maximum feasible average fuel economy level" that the agency decides automakers can achieve, 49 U.S.C. § 32902(a), and after the model year, the government measures each automaker's average fuel economy. Those automakers that exceed the applicable CAFE standard obtain valuable credits, and those that fall short—after accounting for whether past, future, traded, or transferred credits completely cover the shortfall—have "commit[ted] a violation" for that model year. *Id.* § 32911(b). For that violation, the CAFE penalty is the result of a multi-variable formula: a $5.50 base amount multiplied by the difference between the CAFE standard and the automaker's average fuel economy (in tenths of an mpg), multiplied by the number of vehicles manufactured, and then reduced according to available credits. *Id.* § 32912(b). EPCA imposes its own comprehensive statutory mechanism that permits the agency to determine whether to raise the $5.50 base amount, up to a $10 cap. *Id.* § 32912(c)(1).

The 2019 Final Rule properly declined to adjust the CAFE penalty for inflation on two grounds: first, the CAFE penalty is not a "civil monetary penalty" as defined in the Improvements Act; and second, if it is, the statute's "negative economic impact" exception to the adjustment here is satisfied. In reaching those determination, NHTSA thus reconsidered the 2016 inflation adjustment of the $5.50 amount and $10 cap, which had been based on the unexamined premise that the CAFE penalty is a "civil monetary penalty." Following delays to that adjustment, the Court held that NHTSA could not suspend the effective date of that adjustment because the relevant deadlines were "clear and mandatory" and "unambiguous." *NRDC*, 894 F.3d at 108-09, 112 n.10, 113. The Court, however, never addressed whether NHTSA could, in the then-ongoing reconsideration of the earlier adjustment, reach the issues presented here. *See id.* at 109 & n.7, 112 n.10. This Court has held that such prior decisions do not foreclose agencies from reaching a different bottom line based on statutory provisions that the Court's previous decisions did not conclusively settle. *See Catskill III*, 846 F.3d at 510-12.

NHTSA has now properly reached both issues and reasonably explained its reconsideration of the 2016 inflation adjustment. The Court should accordingly deny the petitions for review.

1. NHTSA properly interpreted EPCA to conclude that inflation adjustments do not apply to the CAFE penalty's $5.50 base amount or related $10 cap. The Improvements Act's definition of "civil monetary penalty" covers "any penalty" that "is for a specific monetary amount" or "has a maximum amount." 28 U.S.C. § 2461 note sec. 3(2). The Improvements Act then directs "the head of each agency [to] adjust each civil monetary penalty provided by law within [its] jurisdiction" on an annual basis. *Id.* sec. 4(a)(1).

NHTSA reasonably concluded under EPCA that the $5.50 base amount is not the CAFE penalty, but rather a single variable in a multi-variable statutory formula that comprises the penalty. *See* 49 U.S.C. § 32912(b). The CAFE penalty thus depends on the base amount, CAFE standard, automaker's performance, number of manufactured vehicles, and available credits. EPCA indeed describes the $5.50 figure as the "amount … used in calculating a civil penalty," and not the penalty itself. *Id.* § 32912(c)(1)(A). And the $10 cap is a limit on that base "amount" and not on the penalty. *Id.* § 32912(c)(1)(B).

Even if EPCA is ambiguous, the Court should accord deference to NHTSA's interpretation. The Improvements Act instructs agencies to interpret their own statutes in applying the inflation adjustment, and the ambiguity here indeed involves a component of EPCA—namely, whether the CAFE penalty is the $5.50 base amount or the result of the statutory formula that includes multiple other factors. Ordinary principles of *Chevron* deference thus apply where NHTSA has completed its "narrowly defined delegation" and has not ventured "beyond the statute's specific grants of authority." *Gonzales v. Oregon*, 546 U.S. 243, 264-65 (2006). That NHTSA's present interpretation departs from a prior one does not undermine those principles, as "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). NHTSA has explained that the present interpretation is the better one, and in any case, the statutory construction that NHTSA and OMB have both offered cogently reconciles the unique nature of the CAFE penalty framework with the Improvements Act. *See* OMB Non-Applicability Letter (JA926).

Petitioners all but concede that EPCA is ambiguous. They contend that the penalty is sometimes the $5.50 base amount and sometimes the result of the formula, and the $5.50 figure is at times the penalty but at other times just a variable in the formula. *See* Envtl. Br. 26; State. Br. 39-40. Petitioners' contrary interpretation thus hinges on an atextual reading of the Improvements Act itself as covering all penalties "with" or "based on" dollar amounts, a formulation that would implausibly subsume Congress's definition that provides for discrete categories of specific and maximum amounts. *See* Envtl. Br. 24; State Br. 33-36.

2. In the alternative, NHTSA properly concluded that the Improvements Act's "negative economic impact" exception applies to 2016's first adjustment from $5.50 to $14. First, NHTSA correctly exercised its authority to engage in a rulemaking under that exception. *See* 28 U.S.C. § 2461 note sec. 4(c). NHTSA properly recognized that, though the first adjustment had a July 2016 deadline for its interim final rulemaking and an August 2016 deadline for its effective date, the statute provides no deadline for either a final rule further considering the first adjustment or the exceptions to the first adjustment. *See id.* sec. 4(a), (b)(1). The first-adjustment provisions are instead "subject to" the "negative economic impact" exception. *Id.* sec. 4(a). Petitioners' contention that NHTSA lacks authority because the 2019 Final Rule is late is, in any event, contrary to the Supreme Court's repeated instruction that Congress's deadline "does not deprive a … public official of the power to take the action to which the deadline applies if the deadline is missed." *Dolan v. United States*, 560 U.S. 605, 611 (2010).

Second, NHTSA reasonably found a negative economic impact. Congress did not define that term, and NHTSA appropriately considered a broad range of factors, including effects on unemployment, competition, imports, and automakers themselves. NHTSA determined based on its economic model (of both the existing and proposed CAFE standards) that the increased financial burdens for the 2016 inflation adjustment would be on the order of $350 to $900 million each year and potentially over a billion dollars in some years. 84 Fed. Reg. at 36,033 app. A, tbls 1, 2 (SA27). Petitioners assert that NHTSA needed to balance economic costs against economic benefits, but that interpretation of the "negative economic impact" exception is difficult to square with the Improvements Act's neighboring exception, which specifically inquires whether "the social costs" of the inflation adjustment "outweigh the benefits." 28 U.S.C. § 2461 note sec. 4(c)(1).

3. NHTSA complied with the procedures of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq*. NEPA does not mandate "particular results"; it "simply prescribes the necessary process" to ensure that agencies take a "hard look" at environmental consequences. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quotation omitted). NHTSA here addressed environmental impacts—including the effects on fuel consumption, greenhouse-gas emissions, and climate change—relying on recent CAFE rulemakings where the agency had prepared 824- and 500-page documents on those NEPA issues.

STANDARD OF REVIEW

Under the "deferential standard of review" of the Administrative Procedure Act ("APA"), the Court "may set aside an agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' or if it is 'unsupported by substantial evidence.'" *Kilgour v. SEC*, 942 F.3d 113, 120 (2d Cir. 2019) (quoting 5 U.S.C. § 706(2)(A), (E)); *see NRDC*, 894 F.3d at 107 (reviewing EPCA rule under APA).

ARGUMENT

I. NHTSA PROPERLY CONCLUDED THAT THE IMPROVEMENTS ACT DOES NOT GOVERN THE CAFE PENALTY

A. The CAFE Penalty Framework's Text, Structure, and Purpose Confirm That Inflation Adjustments Are Not Required

1. NHTSA properly declined to adjust the CAFE penalty base amount and related cap for inflation because the Improvements Act's definition does not govern the CAFE penalty. The term "civil monetary penalty" only covers "any penalty" that "is for a specific monetary amount as provided by Federal law" or "has a maximum amount provided for by Federal law." 28 U.S.C. § 2461 note sec. 3(2). Congress required annual inflation adjustments for those penalties, *id.* sec. 4(b)(2), and directed "the head of each agency [to] adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency," *id.* sec. 4(a). In the 2019 Final Rule, NHTSA considered whether the CAFE framework established in EPCA presents such a "civil monetary penalty provided by law within [its] jurisdiction," *id.*, and concluded that the CAFE penalty did not satisfy the statutory definition. *See* 84 Fed. Reg. at 36,015-20 (SA9-14). In reviewing that interpretation, the Court's "proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

NHTSA properly determined that EPCA's $5.50 base amount and related $10 cap on that amount are not themselves the penalty or the maximum penalty. The CAFE penalty framework instead provides for:

> a civil penalty of $5[.50] multiplied by each .1 of a mile a gallon by which the applicable [CAFE] standard under [EPCA] exceeds the average fuel economy—
>
> (1) calculated under [EPCA] for automobiles to which the standard applies manufactured by the manufacturer during the model year;
>
> (2) multiplied by the number of those automobiles; and
>
> (3) reduced by the credits available to the manufacturer under [EPCA] for the model year.

49 U.S.C. § 32912(b); *see* 49 C.F.R. § 578.6(h)(2). The most natural reading of EPCA is that the complete clause following the term "civil penalty" defines the penalty. This is because "the preposition 'of' serves to link the objects" in the statute, *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 824 (8th Cir. 2009), such that the entire remainder of the sentence modifies the term "civil penalty." Consistent with that reading, NHTSA

concluded that the $5.50 figure is not itself the CAFE penalty but rather one variable in the statutory formula that produces the penalty. *See* 84 Fed. Reg. at 36,010 (SA4). And for that same reason, the $10 cap on the $5.50 base amount is a maximum for that variable but not a maximum for the CAFE penalty itself. *See* 49 U.S.C. § 32912(c)(1)(B).

NHTSA recognized that EPCA confirms in the next provision (and sentence) that the $5.50 base amount is the "amount … used in calculating a civil penalty," and that the base amount is thus distinct from the broader civil penalty. 49 U.S.C. § 32912(c)(1)(A); *see* 84 Fed. Reg. at 36,016 (SA10). The related $10 cap is accordingly a limit only on that "amount." 49 U.S.C. § 32912(c)(1)(B), (D); *see* 84 Fed. Reg. at 36,015-16 (SA9-10). A contrary interpretation that the $5.50 or $10 figures are themselves the penalty or its maximum would rest on the "implausible assumption" that the term "civil penalty" has "different meanings in consecutive, related [provisions]" of EPCA. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 889 (2019); *see Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes."). In one sentence, "civil penalty" would refer to $5.50 itself; in the next sentence, "civil penalty" would refer to the entire formula of which $5.50 was only the "amount." *Compare* 49 U.S.C. § 32912(b), *with id.* § 32912(c)(1)(A).

2. NHTSA also properly concluded, with OMB's concurrence, that EPCA's "statutory context, structure, history, and purpose" support the conclusion that the

CAFE penalty is not subject to inflation adjustments. *Abramski v. United States*, 573 U.S. 169, 179 (2014) (quotation omitted); *see* OMB Non-Applicability Letter (JA926).

NHTSA sensibly pointed out that the CAFE penalty in fact "increases automatically." 84 Fed. Reg. at 36,018 (SA12). The CAFE standard rises according to the agency's determination of "the maximum feasible average fuel economy level" that automakers can achieve. 49 U.S.C. § 32902(a). Take the simple example where an automaker continues to build passenger cars at 25 mpg despite an increase in the CAFE standard from 30 mpg to 40 mpg from one model year to the next. Because the CAFE penalty depends on the shortfall between the CAFE standard and automaker performance, *id.* § 32912(b), the 25-mpg automaker is, following the heightened standard, subject to a penalty that is three times higher—based on a 15-mpg rather than 5-mpg shortfall—even without an increase to the $5.50 base amount or $10 cap. *See* 84 Fed. Reg. at 36,018 (SA12) (another example). The CAFE framework thus underscores that the penalty for each model year is "indeterminate" based on the changing standards and varying automaker performances, and is not for a specific monetary amount or limited by a maximum amount. *See* OMB Non-Applicability Letter 4 (JA929).

The CAFE program, and its goal of encouraging improvements in fuel economy, also does not hinge on NHTSA's collection of monetary sanctions but rather provides a system of "incentives to produce fuel-efficient vehicles" and alternative compliance mechanisms, such as credits. *Public Citizen v. NHTSA*, 848 F.2d 256, 263 (D.C. Cir.

1988). Automakers that exceed the CAFE standard obtain credits and are thus encouraged to produce fuel-efficient vehicles. *See* 49 U.S.C. § 32903(a). Because automakers that fall short can avoid either a violation or a portion of the penalty by purchasing credits from others, those purchases shift resources to more fuel-efficient automakers. *Id.* §§ 32903(f), 32911(b), 32912(b); *see id.* § 32903(f)(1) (providing that credits must "preserv[e]" "the total oil savings"). And automakers may obtain NHTSA's approval to use credits from subsequent model years earned by improving their fuel economy. *Id.* § 32903(b). These incentive-based dynamics support fuel-economy innovation, regardless of whether penalties are collected or in what amount, and irrespective of whether the base amount for calculating those penalties is increased.

As NHTSA explained, Congress appropriately accounted for this "unique" CAFE framework in enacting a standalone mechanism for increasing the base amount used in the CAFE penalty. *See* 84 Fed. Reg. at 36,017 (SA11). EPCA authorizes the Secretary to "prescribe by regulation a higher amount" than the now-$5.50 base amount only after finding that the increase will further "substantial energy conservation" and not produce "a substantial deleterious impact on the economy," and after a public hearing and opportunity for comments from the Federal Trade Commission, among other procedures. 49 U.S.C. § 32912(c)(1)(A), (2). A contrary interpretation of EPCA that results in automatic annual inflation adjustments would mean that NHTSA can set a higher amount both without proceeding by regulation and without deciding that Congress's conditions are satisfied. *See* 28 U.S.C. § 2461 note sec. 4(b)(2) (requiring automatic adjustments without rulemaking). The suggestion that a later Congress *sub silentio* excused NHTSA from those procedural and substantive limitations on the same topic—an increase to the $5.50 base amount—merely by imposing a general obligation in the Improvements Act, runs counter to the interpretive canon that absent a clear indication the requirements of "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007) (quotation omitted).

B. NHTSA Reasonably Determined That the Contrary Assumption in the 2016 Inflation Adjustment Was Incorrect

1. Even if EPCA's text leaves some doubt about whether the CAFE penalty is a "civil monetary penalty" subject to the Improvements Act, the Court should afford appropriate deference to NHTSA's interpretation. NHTSA's interpretation of EPCA's penalty provisions "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *In re WorldCom, Inc.*, 723 F.3d 346, 357 (2d Cir. 2013) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *see Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

Here, Congress gave NHTSA the responsibility to identify penalties within its own authorities. Congress authorized "the head of each agency" to determine whether there is a "civil monetary penalty provided by law within the jurisdiction of the Federal agency." 28 U.S.C. § 2461 note sec. 4(a). Congress further directed the "head of an agency" to proceed with the first adjustment through "an interim final rulemaking," *id.* sec. 4(b)(1)(A), a process that also authorizes an agency to produce "any revisions" and "possible modification[s]" afterward. *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996). NHTSA's interpretation, based on this "explicit Congressional delegation of legislative authority" through rulemaking, is "entitled to significant deference" under *Chevron*. *Cassidy v. Chertoff*, 471 F.3d 67, 84 (2d Cir. 2006); *see Sai Kwan Wong v. Doar*, 571 F.3d 247, 259 (2d Cir. 2009) (similar). This Court in *NRDC* thus reserved the possibility that NHTSA could "identif[y] a section of EPCA that presents any relevant ambiguity on the question of its statutory authority." 894 F.3d at 112 n.10.

The relevant ambiguity involves a component of EPCA itself. As discussed, the relevant question is how much of the clause following "civil penalty of" in 49 U.S.C. § 32912(b) comprises the CAFE penalty: either the $5.50 figure or the entire formula. Environmental Petitioners suggest (Br. 16) that "NHTSA receives no deference for its interpretations of the [Improvements Act]," but that is a red herring. Congress authorized two inquiries: while OMB was responsible for issuing guidance concerning the Improvements Act, *see* 28 U.S.C. § 2461 note sec. 7(a), the "head of each agency" remained responsible for the statutes "within [its] jurisdiction," *id.* sec. 4(a). NHTSA has thus appropriately stayed within its "narrowly defined delegation" and has not ventured "beyond the statute's specific grants of authority." *Gonzales v. Oregon*, 546 U.S.

243, 264-65 (2006); *see Collins v. NTSB*, 351 F.3d 1246, 1253 (D.C. Cir. 2003) (finding *Chevron* deference where "agencies have mutually exclusive authority over separate sets" of determinations). And Congress confirmed that it would *further* the Improvements Act for each agency to resolve ambiguities involving their own statutes, and NHTSA therefore has also not inappropriately interpreted its own "statute in a way that limits the work of a second statute" that "it does not administer." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018).

For the reasons stated, NHTSA's determination that the $5.50 base amount "is an input in a formula that is used to calculate a penalty" rather than itself a penalty subject to the Improvements Act and that the related $10 cap only applies to that amount and not to the penalty itself, 84 Fed. Reg. 36,015 (SA9), "is supported by a reasoned explanation" and "is not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Catskill III*, 846 F.3d at 507 (quoting *Chevron*, 467 U.S. at 844). The "complex and highly technical [CAFE] regulatory program," moreover, only demonstrates that NHTSA's "identification" of the CAFE penalty is reasonable because it "necessarily require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991); *see Henley v. FDA*, 77 F.3d 616, 620 (2d Cir. 1996) (confirming that court "cannot substitute its judgment for that of the agency" (quotation omitted)).

2. NHTSA also reasonably explained its change in position on the 2016 inflation adjustment. When an agency "changes prior policy," there is neither a "heightened standard" that applies nor a requirement for "a more substantial explanation" than is typically needed. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). The Supreme Court has repeatedly instructed that *Chevron* deference applies even if the agency's statutory construction "is inconsistent with positions taken by the [agency] in the past." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *see, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *Chevron*, 467 U.S. at 862. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

That requirement is satisfied here. NHTSA "expressly acknowledged" that the 2019 Final Rule "reflects a change in NHTSA's position on this issue." 84 Fed. Reg. at 36,013 (SA7) (quotation omitted). NHTSA explained, however, that it previously proceeded "without analysis of the statutory interpretation and policy issues considered in this rulemaking." *Id.* (quotation omitted). NHTSA was therefore "correcting an erroneous legal interpretation of a statute to align its practice with what Congress required." *Id.* at 36,014 (SA8); *see Rust*, 500 U.S. at 187 (approving explanation that "the new regulations are more in keeping with the original intent of the statute"). NHTSA, moreover, properly addressed the "single comment" asserting that the change implicated reliance interests of automakers who planned on selling credits based on the new $14 base amount. 84 Fed. Reg. at 36,014 (SA8). NHTSA reasonably explained that reversing the 2016 inflation adjustment would limit negative economic consequences across the industry, *id.*; *infra* at 41-50, and any reliance interests are reduced here where

NHTSA has, since April 2018, announced that it was reconsidering that adjustment. *See* 83 Fed. Reg. 13,904 (Apr. 2, 2018).

In all events, OMB has also reasonably concluded that NHTSA's interpretation is correct in connection with its statutory role to provide uniform guidance under the Improvements Act, *see* 28 U.S.C. § 2461 note sec. 7(a), and deference is especially appropriate "given the 'specialized experience and broader investigations and information' available to the agenc[ies]" and "the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead*, 533 U.S. at 234 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). The "appropriate level of deference" under *Skidmore* "depends on the interpretation's power to persuade," which is based on "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Catskill III*, 846 F.3d at 509 (quotation omitted).

OMB explained that its concurrence was based on "a combination of several statutory provisions" in the Improvements Act, "contemporaneous evidence about the scope of" that statute, and "the unique statutory structure" under the CAFE program that NHTSA administers. OMB Non-Applicability Letter 4 (JA929). Indeed, the presidential council preceding the enactment of the "civil monetary penalty" definition did not identify the CAFE penalty. *See* 1988 Presidential Report 2, 4 (JA5, 7). And since the Improvements Act, OMB has consistently clarified that inflation "adjustment[s] will apply only to penalties with a dollar amount, and will not apply to penalties *written as functions* of violations." 2016 OMB Guidance 2 (JA680) (emphasis added). The 2019 Final Rule is not inconsistent with that interpretation, and as OMB explained, the CAFE "penalty itself is indeterminate" because the resulting "*penalty* is a function not only" of the $5.50 base amount, "but also a manufacturer's average fuel economy, the number of cars it manufactures, and credits the manufacturer earns, may earn in the future, purchases from third parties, and chooses to apply." OMB Non-Applicability Letter 4 (JA929).

The fact that OMB in 1991 and NHTSA in 1997 believed that the definition of "civil monetary penalty" reached the CAFE penalty is not dispositive, especially where the 1997 adjustment was expressly "limited to the adoption of the statutory language, without interpretation." 62 Fed. Reg. at 5,168; *see* 1991 OMB Report (JA38). Neither OMB nor NHTSA identified the $10 cap as a "maximum amount" under that definition. And as NHTSA has explained, it implemented the first adjustment under the Improvements Act under significant time constraints and without consulting the Department of Transportation's general counsel or OMB, as recommended. 84 Fed. Reg. at 36,011 (SA5); *see* 28 U.S.C. § 2461 note secs. 4(a), 7(a) (requiring first adjustment about four months after OMB guidance).

C. Petitioners' Arguments Are Without Merit

1. State Petitioners incorrectly contend (Br. 26-30) that this Court's decision in *NRDC* forecloses the 2019 Final Rule. They misread *NRDC* to have held that the Improvements Act is "unambiguous" that the CAFE penalty is subject to inflation adjustments. *See* State Br. 26-27 (citing *NRDC*, 894 F.3d at 112 n.10, 113). This Court in *NRDC*, however, only held that the statutory "deadlines" were "unambiguous" and "clear and mandatory." 894 F.3d at 109, 112 n.10, 113. The Court merely supposed that the Improvements Act applied because NHTSA had itself previously made that (unexplained) determination. *NRDC* thus made clear that the only question before the Court was whether, based on the agency's premise that inflation adjustments were required, "NHTSA exceeded its statutory authority in indefinitely delaying the [2016 inflation adjustment] and failed to follow the requirements of the APA when it did so." *Id.* at 107-08. Nothing in the decision purports to address EPCA's text, which would have been necessary to hold that the Improvements Act's definition was satisfied. Indeed, following the government's contention that the separate issues in the 2019 Final Rule rulemaking (commenced 10 days before oral argument) were not presented in that case, the Court left open the possibility that NHTSA could "identif[y] a section of EPCA that presents any relevant ambiguity." *Id.* at 112 n.10; *see* Gov't Br. 1-2, 37-38, *NRDC*, *supra* (Mar. 29, 2018), Doc. 168.

This case is therefore controlled by this Court's decision in *Catskill III*. In the *Catskill* litigation, the Court had twice confirmed that New York City's conduct was unlawful under the "plain meaning" and "ordinary meaning" of a Clean Water Act provision that prohibited "the 'addition' of a 'pollutant' from a 'point source' to a 'navigable water.'" *Catskill III*, 846 F.3d at 510-11 (ellipsis and footnote omitted); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*"). In *Catskill I* and *Catskill II*, however, the Court had only interpreted the word "addition." *See Catskill I*, 273 73 F.3d at 489, 492-94; *Catskill II*, 451 F.3d at 82-85. Following an agency's rule that defined the broader phrase "addition … to *navigable waters*" in a contrary manner, *Catskill III* concluded that the new interpretation was not foreclosed, both because the Court had not in its prior decisions addressed the term "navigable waters" and because the Court had recognized that the agency might locate a statutory ambiguity. *See* 846 F.3d at 511-12 (emphasis added); *see also id.* at 512-32 (deferring to agency interpretation). The logic of *Catskill III* applies with greater force here, where the Improvements Act's definition was a separate inquiry not even before the Court in *NRDC* and where *NRDC* did not analyze the CAFE penalty under the relevant definition but instead reserved the possibility of an ambiguity in EPCA.

State Petitioners' reliance on instances where courts of appeals have rejected an agency's departure from the *same* statutory language that had been found unambiguous are inapposite. *See* Br. 28 (citing *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380 (5th Cir.

2014); *Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007) (per curiam)). And State Petitioners' discussion (Br. 29) of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), only highlights their "incorrect" reasoning that an agency's interpretation is "foreclosed by the conflicting construction of the [statute] adopted in" a prior judicial decision. 545 U.S. at 982; *see, e.g.*, *Chevron*, 467 U.S. at 864 (deferring to agency even though "the Court of Appeals [had] read the statute inflexibly to command a [contrary] definition"). State Petitioners' insistence (Br. 29-30) that NHTSA should have surfaced these issues in *NRDC* is, in any event, impossible to square with their own concession that NHTSA is "allowed to reconsider" the 2016 inflation adjustment and that the only question "before [the] Court is the delay." Oral Arg. 25:44-54, *NRDC*, *supra* (Apr. 12, 2018).

2. Petitioners' textual arguments highlight EPCA's ambiguity as to whether the CAFE penalty is the $5.50 figure or the entire formula. Environmental Petitioners concede (Br. 26) that "it is common to refer to either" the $5.50 base amount or the result of the statutory formula as '"the penalty."' State Petitioners contend (Br. 39-40) that EPCA "refers to the $5[.50] figure as both the 'penalty' and the 'penalty amount'" used in the formula. Even if those admissions do not end this Court's inquiry, Petitioners' repeated reference to "the $5.50 penalty" simply ignores the remainder of the statutory clause that defines the actual penalty. *E.g.*, Envtl. Br. 18-19; State Br. 33.

Petitioners point to the EPCA mechanism that permits the Secretary to raise the $5.50 base amount figure to a "higher amount" after deciding that an "increase in the penalty" satisfies certain statutory factors. 49 U.S.C. § 32912(c)(1)(A); *see* Envtl. Br. 26; State Br. 39-40. But this does not mean that the $5.50 figure *is* "the penalty." EPCA merely confirms as a matter of basic math that raising the $5.50 *base amount* in the formula also increases the resulting *penalty*. And Petitioner's conflation of the two concepts overlooks the numerous situations in which a "higher amount" would not result in an "increase in the penalty"—*e.g.*, were production to decrease, were the CAFE standard to revert, were automaker performance to increase, or were more credits to become available.

Petitioners also misconstrue EPCA as imposing a $5.50 penalty "per increment of noncompliance," State Br. 32, 36, or "per infraction" based on the "number of infractions," Envtl. Br. 25, 27. EPCA instead provides that a single "violation" may occur after the average fuel economy for an automaker's fleet is measured each model year—not "increments" or "infractions" within that violation. An automaker "commits *a violation* if [it] fails to comply with an applicable [CAFE] standard" for that year. 49 U.S.C. § 32911(b) (emphasis added). The relevant "violation" is thus *any* shortfall after accounting for credits. *Id.* As NHTSA explained, once a violation happens, the actual CAFE penalty is then determined based on multiple variables, not merely the $5.50 base amount: the CAFE standard, the automaker's performance, the number of vehicles, and the number of credits. *See* 84 Fed. Reg. at 36,015 (SA9). Indeed, amicus curiae Institute for Policy Integrity's comparison (Br. 10) to the penalty in EPCA's neighboring subsection demonstrates that Congress understood how to provide for multiple, "separate violation[s]" and to establish a monetary amount per "separate violation" in the manner that Petitioners envision. 49 U.S.C. § 32912(a).

Petitioners' examples of other penalty regimes bear little resemblance to the CAFE penalty. *See* Envtl. Br. 25 & 26 n.9; State Br. 37 n.19. A number of those statutes do not identify a single "violation," and thus the penalty's indefinite character inheres in the indeterminate nature of the violation rather than the unspecified amount of the monetary sanction. *E.g.*, 29 U.S.C. § 1059(b) (providing that "failure occurs" "with respect to" "each employee"); 33 U.S.C. § 1321(b)(7)(A) (setting amounts for "day[s] of violation"); 46 U.S.C. § 55111(c)(2) (requiring blanket "liability" "[i]n addition to the penalties" "based on the tonnage of each towed vessel"). NHTSA and OMB thus properly rejected Petitioners' "per violation and/or per day" penalties that involved "a simple multiplier" as inapt comparisons, 84 Fed. Reg. at 36,018-19 (SA12-13), as there is not "another penalty scheme with the unique features of the CAFE penalty." OMB Non-Applicability Letter 8 (JA933). Petitioners, moreover, provide no argument that, absent these misinterpretations of the $5.50 base amount, the related $10 cap is a maximum for the CAFE penalty. *See* Envtl. Br. 29-30; State Br. 46-47, 52-53.

Petitioners ultimately resort to an atextual reading of the Improvements Act itself. Petitioners contend that the statute broadly covers penalties "with" or "based on" dollar figures. Envtl. Br. 23-25; State Br. 33-36. But the Improvements Act's definition only includes a penalty that "is for a specific monetary amount" or that "has a maximum amount." 28 U.S.C. § 2461 note sec. 3(2). Had Congress sought to sweep in all statutory monetary references, it could have done so more concisely by using Petitioners' language. Indeed, a definition that included penalties "with" dollar figures would subsume *both* categories in the current definition, rendering Congress's present drafting choice redundant. *See Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019) (favoring "interpretation [that] would avoid redundancy" over one that "would cause some redundancy"). And OMB's guidance that "adjustment[s] will apply *only* to penalties with a dollar amount" does not mean that *all* penalties "with" a dollar amount are civil monetary penalties. 2016 OMB Guidance 2 (JA680) (emphasis added).

3. Petitioners' remaining arguments regarding legislative purpose and regulatory history are insufficient "to muddy clear statutory language," let alone to provide an unambiguous interpretation in their favor. *Allina*, 139 S. Ct. at 1814. Petitioners contend that Congress's sought to maintain the deterrence value of penalties and to ensure compliance with the law. *See* Envtl. Br. 18-20; State Br. 33-36; *General Motors Corp. v. NHTSA*, 898 F.2d 165, 173 (D.C. Cir. 1990) (noting CAFE penalty is intended to "assure compliance"). But NHTSA reasonably explained that "the stringency of CAFE civil penalties is maintained over time" through increases in the CAFE standard—"not just through inflation adjustments"—and the program provides "incentive[s] [to] further invest in greater fuel efficiency." 84 Fed. Reg. at 36,026 (SA20).

Mere deterrence and compliance, moreover, do not precisely reflect the CAFE program's purposes. Another key component is fuel-efficiency innovation. *See supra* at

20-22; Tesla Amicus Br. 7-10. NHTSA reasonably was concerned here that, in connection with CAFE standards that have also increased in the past few years, a "higher civil penalty amount" may backfire by "result[ing] in reduced investment in fuel saving technology" where consumers are unwilling to pay the premium for that technology and where automakers simply bear the cost of additional penalties instead. 84 Fed. Reg. at 36,031 (SA25).

Petitioners also place unjustifiable weight on prior (inconsistent) administrative practice. *See* Envtl. Br. 20-23; State Br. 47-52. Congress enacted the "civil monetary penalty" definition in 1990 in the Inflation Adjustment Act, and that definition has remained unchanged. Though the Executive Branch did not locate the CAFE penalty under that definition *before* its enactment, Petitioners observe that *following* that statute, OMB identified the CAFE penalty's base amount under the statutory definition. *See* 1991 OMB Report, Exh. 1 at 25, Exh. 2 at 25, Exh. 3 at 28 (JA82, 114, 149). Even if OMB's 1991 interpretation (and not the pre-enactment presidential council interpretation) is the relevant "substantially contemporaneous construction" of the statute, "neither antiquity nor contemporaneity with [a] statute" diminishes the current interpretation's validity. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54-55 (2011) (quotations omitted).

Petitioners' reliance on Congress's inaction—in failing to change the relevant definition in subsequent statutes—is similarly misguided. *See* Envtl. Br. 21-22 (citing 1996 Amendments and Improvements Act); State Br. 47-48, 50 (same). Petitioners observe that NHTSA and other agencies had, in the decades prior to the Improvements Act, identified the CAFE penalty for inflation adjustment. *See* Envtl. Br 21-22; State Br. 49. But the Improvements Act did not alter the statutory definition, and "legislative silence" does not "ratif[y]" post-enactment administrative interpretations of a definition when Congress never "touch[es] the original phraseology." *United States v. Wells*, 519 U.S. 482, 495-96, (1997) (finding reliance on "congressional silence" "at best treacherous" (quotation omitted)). Petitioners note that Congress enacted exceptions for other statutes and for other adjustments that do not carve out EPCA, but those exceptions are irrelevant to the predicate question of whether the CAFE penalty is a "civil monetary penalty" in the first place. *See* 28 U.S.C. § 2461 note sec. 4(a)(1), (d).

II. In the Alternative, NHTSA Has Satisfied the Improvements Act's "Negative Economic Impact" Exception

A. NHTSA Properly Exercised Its Authority to Invoke the "Negative Economic Impact" Exception

1. Even if the Improvements Act requires inflation adjustments for the CAFE penalty, NHTSA properly invoked the statute's exception to the first adjustment, which raised the $5.50 base amount to $14. The Improvements Act provides both that NHTSA must issue "the first adjustment … through an interim final rulemaking" "[n]ot later than July 1, 2016" and that "the adjustment shall take effect not later than August 1, 2016." 28 U.S.C. § 2461 note sec. 4(a), (b)(1). Those requirements, however, are made "subject to" the statute's exceptions. *Id.* sec. 4(a) (referencing 28 U.S.C. § 2461 note sec. 4(c) and (d)).

The exception for "the first adjustment" provides that "the head of an agency may adjust the amount of a civil monetary penalty by less than the otherwise required amount" in two situations. 28 U.S.C. § 2461 note sec. 4(c). "[A]fter publishing a notice of proposed rulemaking and providing an opportunity for comment," the agency may "determine[] in a final rule" either that the increase "will have a negative economic impact" or that "the social costs" of the increase "outweigh the benefits." *Id.* sec. 4(c)(1). OMB must also concur in the determination. *Id.* sec. 4(c)(2).

NHTSA properly concluded that the "negative economic impact" exception permitted it to determine through rulemaking whether to maintain the first adjustment. *See* 84 Fed. Reg. at 36,014 (SA8). NHTSA also reasonably observed that "there is no separate statutory deadline for when agencies needed to invoke the 'negative economic impact' exception." *Id.* at 36,021 (SA15). The Improvements Act imposes a statutory deadline for the first adjustment's "interim final rulemaking" and for its "effective date." *See* 28 U.S.C. § 2461 note sec. 4(a), (b)(1). But nothing in the statute imposes a deadline on any final rule *following* further comments or consideration in that interim final rule-making. The term "interim" indeed signifies that the first adjustment's "intended duration" is during the pendency of comments or further consideration, and that designation "contemplate[s] a possible modification of those rules" and "any revisions" *after* the various deadlines. *Career Coll.*, 74 F.3d at 1268. Congress, moreover, indicated the deadlines do not limit the "negative economic impact" exception because the first-adjustment provisions are "subject to" the exception, 28 U.S.C. § 2461 note sec. 4(a), and the exception nowhere provides its own deadline, *see id.* sec. 4(c).

Here, NHTSA published an interim final rule that made the first adjustment in July 2016, and that interim rule satisfied (albeit four days late) the deadlines for the first adjustment and for its effective date. *See* 81 Fed. Reg. 43,524 (JA660). And consistent with the Improvements Act's "interim" designation, NHTSA in the final rule confirming the first adjustment made "revisions" after those deadlines, ensuring that the increase to a $14 base amount would apply beginning only with model year 2019. *Career Coll.*, 74 F.3d at 1268; *see* 81 Fed. Reg. at 95,490-91 (JA685-86). Nothing in the Improvements Act implies deadlines for the categories of changes that follow the interim rule—neither that final rule that further considered the first adjustment nor for the exception for the first adjustment here.

NHTSA also properly explained that a deadline for invoking the exception is not a "coherent and consistent" interpretation of "the statutory scheme." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quotation omitted); *see* 84 Fed. Reg. at 36,021 (SA15). The Improvements Act required OMB to issue guidance by February 29, 2016 and agencies to publish interim rules by July 1, 2016—about four months later. *See* 28 U.S.C. § 2461 note secs. 4(a), 7(a). Reading the statute to require agencies across the government—*i.e.*, determining that the definition applies, issuing a proposed rule for the "negative economic impact" exception, soliciting comments on that proposal, "determin[ing] in a final rule" that the exception is satisfied, and obtaining OMB's concurrence—in that short period is implausible. And if agencies could have accomplished that much in four months, there would have been no reason for Congress to expedite the first adjustment itself through an interim final rulemaking.

2. Petitioners' arguments incorrectly presume that, when an agency misses a deadline, the agency's subsequent actions are unauthorized or unlawful. *See* Envtl. Br. 31-35; State Br. 54-59. The Supreme Court has repeatedly instructed that Congress's deadline "does not deprive a … public official of the power to take the action to which the deadline applies if the deadline is missed." *Dolan v. United States*, 560 U.S. 605, 611 (2010) (citing *Brock v. Pierce County,* 476 U.S. 253, 266 (1986); *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 171-72 (2003)). Nor does the Improvements Act otherwise "specify a consequence for noncompliance with statutory timing provisions," such that this Court could vacate the 2019 Final Rule on that basis. *Peabody Coal*, 537 U.S. at 159 (quotation omitted). NHTSA indeed published the interim final rule itself late (on July 5 and not on July 1, 2016), and a contrary rule would mean that, because the deadline had passed, the first adjustment has been void from the start.

Petitioners' contention that *NRDC* overcomes well-established Supreme Court precedents is thus a feebler reprise of the argument (*see supra* at 28-30) that the decision forecloses NHTSA's interpretation of EPCA. *See* Envtl. Br. 31-35; State Br. 54-59. Petitioners are wrong that the Court held that the Improvements Act's deadlines are "clear and mandatory" with respect to the statute's exception rather than its first adjustment. *See NRDC*, 894 F.3d at 109. The Court instead confirmed that the Improvements Act "preserve[s] … a narrow window of discretion for agencies regarding the amount of the initial catch-up adjustment." *Id.* Though the Court also observed that the "exception regards the *amount* of the initial catch-up adjustment, not the timing," the Court did not conclude that the exception also contained a deadline or that missing that deadline precluded the exception. *Id.* Nor could *NRDC* have, because the exception similarly was not at issue, and this case remains controlled by *Catskill III* in each respect. *See* 846 F.3d at 511-12.

In all events, Petitioners' inability to agree on when NHTSA needed to invoke the exception underscores that a deadline does not exist. In their view, NHTSA should have either finished the "negative economic impact" rulemaking before the first adjustment's effective date (in August 2016), *see* State Br. 55, or done so by the interim final rule (July 2016) or, perhaps, by the final rule (December 2016), *see* Envtl. Br. 32. The answer is simpler: the text of the exception provides no deadline.

Petitioners contend that Congress *implied* both a deadline and consequences for missing the deadline because the Improvements Act is "an unusually precise and directive statute." *NRDC*, 894 F.3d at 113 n.12; *see* Envtl. Br. 33-34; State Br. 54-56. But petitioners cannot even pinpoint a deadline for any final rule on the first adjustment (as opposed to the interim final rule), which underscores that there could not be one for the exception to the first adjustment. Environmental Petitioners' citation (Br. 33) to *New Jersey v. EPA* highlights that the Court may restrict the agency's authority only when the agency disregards the "mechanism" that "Congress has provided," which is not the case when NHTSA invokes an express statutory exception. 517 F.3d 574, 583 (D.C. Cir. 2008) (quotation omitted).

Petitioners' remaining points do not undermine the agency's basic authority. First, Petitioners conflate NHTSA's discussion of its "inherent powers," *see* Envtl. Br. 32-33; State Br. 55-56, with NHTSA's separate decision to "invok[e] the 'negative economic impact' exception" authorized by Congress. 84 Fed. Reg. at 36,014 (SA8). The Court's decisions rejecting an agency's inherent power to revisit rules, moreover, confirm that the statute itself must introduce those limits. *See, e.g.*, *NRDC*, 894 F.3d at 111-13 (where "interim final rulemaking" authorizes revisions in final rule and not through separate rule that delays implementation); *NRDC v. Abraham*, 355 F.3d 179, 198-99, 202-04 (2d Cir. 2004) (where statute provides for "timely-initiated" reconsideration and not other forms of reconsideration). Second, Petitioners dispute NHTSA's point that the first adjustment "had no practical effect before 2020—the earliest that CAFE civil penalties could be assessed for noncompliance in [model year] 2019." 84 Fed. Reg. at 36,022 (SA16); *see* Envtl. Br. 34-35; State Br. 58-59. But it is plainly correct that NHTSA cannot assess penalties until after model year 2019, and the question whether there are other limitations to NHTSA's ability to increase or decrease penalties for completed conduct, or preexisting violations, does not bear on NHTSA's fundamental authority under a statutory exception.

B. NHTSA Reasonably Determined That Increasing the CAFE Penalty Would Have a Negative Economic Impact

1. NHTSA properly considered an array of factors and based its determination on substantial evidence.

NHTSA also reasonably "determine[d]" that "increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact." 28 U.S.C. § 2461 note sec. 4(c)(1)(A). NHTSA engaged in a thorough analysis of multiple factors—including the effect on unemployment, competition, imports, and the automotive industry—before finding a negative economic impact. *See* 84 Fed. Reg. at 36,021-29 (SA15-23). Based on its economic model, NHTSA found that the additional penalties would amount to hundreds of millions of dollars each year and potentially more than one billion dollars for some years. *See id.* at 36,033 app. A, tbls. 1, 2 (SA27). OMB concurred in that assessment, finding that it was "not aware of any other civil monetary penalty having the same or greater magnitude of impact as the initial adjustment to the CAFE penalty rate would have." OMB Negative Economic Impact Letter 5 (JA938).

NHTSA first properly observed that the Improvements Act "does not define 'negative economic impact.'" 84 Fed. Reg. at 36,022 (SA16). But as NHTSA realized, the neighboring statutory exception for the first adjustment applies where "the social costs of increasing the civil monetary penalty by the otherwise required amount *outweigh the benefits*." 28 U.S.C. § 2461 note sec. 4(c)(1)(B) (emphasis added). NHTSA thus reasoned that a negative economic impact "must mean something different" and that agencies could "consider the economic harms that would likely be caused … without needing to compare them to any potential benefits." 84 Fed. Reg. at 36,023 (SA17). Indeed, courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [that] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. ICE*, 543 U.S. 335, 341 (2005) (finding exception to one subsection inapplicable to separate subsection).

NHTSA's holistic consideration is reasonable. NHTSA looked first to the economic factors—unemployment, competition, and imports—specified in the EPCA mechanism for raising the $5.50 base amount. *See* 84 Fed. Reg. at 36,023-26 (SA17-20); *see also* 49 U.S.C. § 32912(c)(1)(A), (C). But even if those considerations were precluded, however, NHTSA found billions of dollars of negative consequences for the subject of the CAFE penalty—automakers—and determined that it would not raise the $5.50 base amount on that independent basis. *See* 84 Fed. Reg. at 36,026-30 (SA20-24). Petitioners do not meaningfully dispute that NHTSA's findings are supported by substantial evidence, meaning "more than a mere scintilla" and "only … such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quotation omitted). Nor could they.

First, NHTSA relied on a peer-reviewed study that more stringent CAFE standards—which also raise the resulting CAFE penalty—would "result in short-term macroeconomic losses, including job losses," that would "hit Illinois, Indiana, Michigan, Ohio, and Wisconsin particularly hard" and which could result in "Arkansas, Louisiana, Oklahoma, and Texas never fully recover[ing]" from the impact. 84 Fed. Reg. at 36,024 (SA18). Second, NHTSA considered that the increase would upset the competitive market by requiring "higher prices," resulting in "restricted product offerings" and "reduced profitability." *Id.* at 36,026 (SA20) (quotation omitted). Third, NHTSA explained that "the import passenger car fleet … has an advantage over the domestic passenger car fleet, now almost a full mile per gallon difference," meaning that the American automakers would bear the brunt of the CAFE penalty. *Id.*

Last, independent of those findings, NHTSA relied on its own CAFE model—also used by Intervenor Alliance for Automotive Innovation and amicus Policy Integrity—to estimate that the costs of the adjustment could be over one billion dollars for some model years and, depending on pending changes to the CAFE standard, between $2.8 and $7.2 billion through model year 2026. *See* 84 Fed. Reg. at 36,027-28, 36,033 app. A, tbls. 1, 2 (SA21-22, 27). NHTSA explained that the "additional penalties are on top of any increased costs manufacturers would incur in making technological or design changes to reduce their shortfalls—costs that would likely be passed along to consumers." *Id.* at 36,028 (SA22). OMB then compared other penalty regimes, finding that this "annual average of approximately $350 to $900 million in projected incremental penalties under this [NHTSA] action far exceed the revenue *all* adjusted penalties" that the Improvements Act was expected to provide. OMB Negative Economic Impact Letter 5 (JA938).

2. NHTSA's consideration of the relevant factors was not arbitrary and capricious.

a. NHTSA recognized in the 2019 Final Rule that "the Secretary has the burden of demonstrating economic harm," 84 Fed. Reg. at 36,017 (SA11), and repeated more than a dozen times that it was deciding whether the adjustment "will have" or "would have" a negative economic impact, *e.g.*, *id.* at 36,008-11, 36,021-23, 36,026-28 (SA2-5, 15-17, 20-22). Petitioners are thus incorrect that NHTSA inappropriately relied merely on an "absence" of evidence that no economic harm would occur. *See* Envtl. Br. 35-39; State Br. 60-63. Petitioners seize on one reference to "the absence of persuasive evidence" to the contrary, 84 Fed. Reg. at 36,009 (SA3), but NHTSA simply "explain[ed] the evidence which is available." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). And contrary to Petitioners' demand for more evidence concerning the unemployment and competition factors, *see* Envtl. Br. 38-39; State Br. 62-63, it "is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment" based on "facts and probabilities on the record." *State Farm*, 463 U.S. at 52.

Petitioners suggest that consideration of EPCA factors was improper. *See* Envtl. Br. 37-38 (pointing to "different factfinding regimes"); State Br. 61-62 (objecting to "EPCA's decades-old (and never utilized) scheme"). But Petitioners fail to explain how considering obvious economic concepts such as employment, competition, and imports could be inconsistent with Congress's "negative economic impact" language. They admonish that agencies "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination" when the statutes pertain to different actions, but nothing in the Improvements Act precludes consideration of particular negative economic harms as to the CAFE penalty. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (quotation omitted); Envtl. Br. 37 (quoting *Gross*); State Br. 60 (same).

Environmental Petitioners argue (Br. 39-40) that NHTSA's reliance on the CAFE model (also used by Intervenor and amicus Policy Integrity) was arbitrary and capricious because NHTSA has since proposed different CAFE standards. *See* 83 Fed. Reg. 42,986 (JA913). But NHTSA analyzed a range of projected penalties under both the old and proposed CAFE standards, and considered the costs under the proposed standards: for instance, the inflation adjustment would cause over $750 million in penalties in model year 2019 alone and $2.75 billion through 2026. *See* 84 Fed. Reg. at 36,028, 36,033 app. A, tbl. 2 (SA22, 27).

b. Petitioners assume that the Improvements Act requires NHTSA to weigh economic costs against economic benefits, despite the contrary statutory text. *See* Envtl. Br. 42-47; State Br. 67-68. They further contend that NHTSA should have engaged in a free-floating inquiry into the statutory purposes of deterrence and compliance, *see* 28 U.S.C. § 2461 note sec. 2(b), yet ignore that NHTSA considered whether the 2019 Final

Rule "runs counter" to those purposes and found otherwise given the unique nature of the CAFE penalty framework, 84 Fed. Reg. 36,017-18, 36,029 (SA11-12, 23). *See* Envtl. Br. 46; State Br. 63-65. Environmental Petitioners assert (Br. 46-47) that NHTSA's interpretation is "illogical" because "*any* increased cost (no matter how small) to *any* automaker" would suffice. But *this* inflation adjustment—which would exceed the revenue from all adjusted penalties across the government—does not dictate whether there could, in another case, be a de minimis impact. *See generally Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 233 (2014) (explaining "the doctrine *de minimis non curat lex* (the law does not take account of trifles)").

Petitioners' insistence that agencies "ordinarily" will "consider the relative costs and benefits of a regulation as part of reasoned decisionmaking" only underscores that Congress would have understood how to incorporate that routine requirement into the Improvements Act. *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 67 (2d Cir. 2018). Indeed, Environmental Petitioners' recourse (Br. 45-47) to "established administrative practice" is based on statutory schemes that invite either open-ended inquiries or consideration of both costs and benefits. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015) ("appropriate and necessary"); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) ("best technology available"); *Cooling Water Intake Structure*, 905 F.3d 49 (same); *Gas Appliance Mfrs. Ass'n v. Department of Energy*, 998 F.2d 1041, 1044 (D.C. Cir. 1993) ("economic cost and benefit"); *NRDC v. EPA*, 937 F.2d 641, 643 (D.C. Cir. 1991) ("as determined … by the Administrator"); *see also Small Refiner Lead Phase-Down Task*

Force v. EPA., 705 F.2d 506, 526 & n.42 (D.C. Cir. 1983) (where "all parties agree" on interpretation).

c. In any event, Petitioners fail to acknowledge that NHTSA addressed the inflation adjustment's potential positive effects but simply found the evidence unpersuasive. First, NHTSA sensibly explained that evidence of "job growth" pertained to increases in the CAFE standard without "quantitative[] estimate[s]" and "[w]ithout any sense of magnitude or location" of that growth. 84 Fed. Reg. at 36,024 (SA18) (quotation omitted). Second, regarding the competitive market, NHTSA explained that there were few "corresponding benefits to consumers" both because the adjustment would result in "higher prices" and "restricted product offerings" and because consumers who "value access to fuel-efficient vehicles" could already prioritize those offerings. *Id.* at 36,025-26 (SA19-20). Third, NHTSA considered whether the adjustment enhances the position of "domestic manufacturers" vis-à-vis "foreign manufacturers," but disagreed because domestic automakers generally have a lesser fuel economy and face "heavier statutory burdens" in other respects. *Id.* at 36,026 (SA20). Last, NHTSA properly considered whether beneficial "technological or design changes" could result, but determined that the "increased costs" and any "additional penalties" then "would likely be passed along to consumers." *Id.* at 36,028 (SA22).

Petitioners nonetheless argue that NHTSA failed to address contrary findings in one document: a 2016 report unassociated with the 2016 inflation adjustment. *See* Envtl. Br. 40-42; State Br. 65-66; *see also* 2016 Draft Technical Assessment Report

(JA524). Petitioners argue that NHTSA failed to provide "a reasoned explanation … for disregarding facts and circumstances that underlay … the prior policy," *Fox*, 556 U.S. at 516, yet fail to mention that the prior inflation adjustment did not rely on that report. *See* 81 Fed. Reg. 43,526 (JA662); 81 Fed. Reg. 95,489 (JA684). Nor is this an instance where NHTSA "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Petitioners' selective quotation of the 2016 report to suggest that the "employment impact" of the inflation adjustment is "expected to be positive" pertains to the impact of changes to the CAFE standard on the *vehicle-parts* sector; that assessment, moreover, itself depends on whether "demand for these parts increases" and whether the output of new vehicles increases, for which the government did "not predict a magnitude or direction." 2016 Draft Technical Assessment Report 7-12, -14 (JA550, 552); *see* Envtl. Br. 41; State Br. 66. Even if the report's conclusions regarding the CAFE standards' general social benefits were relevant, *see* 2016 Draft Technical Assessment Report 13-102 to -103 (JA656-67), NHTSA properly explained that the government had "reconsidered" those findings because they "are based on outdated information" and that "more recent information suggests that the current standards may be too stringent." 84 Fed. Reg. 36,027 (SA21) (quotation omitted).

3. NHTSA's consideration of a lesser inflation adjustment was proper.

Petitioners contend that, assuming the "negative economic impact" exception is satisfied, NHTSA failed to consider a smaller reduction of the inflation adjustment. *See*

Envtl. Br. 47-49; State Br. 68-69. The Improvements Act's exception permits NHTSA to "adjust the amount of a civil monetary penalty by less than the otherwise required amount" of "the first adjustment." 28 U.S.C. § 2461 note sec. 4(c). Though Petitioners asserts that NHTSA failed to "identify the standard" that this exception provides, *see* Envtl. Br. 48; State Br. 68, NHTSA properly explained that "neither the statute nor OMB guidance establish any standards that the agency must use in determining how much less than the otherwise required amount to make the adjustment." 84 Fed. Reg. at 36,022 n.160 (SA16). NHTSA also recognized that "alternatives," such as raising the $5.50 amount to "even just $10, would have had economic impacts." *Id.* at 36,030 (SA24). And under NHTSA's economic model, even one quarter of the first adjustment could result in over one hundred million dollars of additional annual penalties. *See id.* at 36,033 app. A, tbls. 1, 2 (SA27). In that context, NHTSA reasonably "made an adequate showing that any increase in the CAFE civil penalty rate would have a 'negative economic impact' for the reasons detailed" above. *Id.* at 36,022 n.160 (SA16).

Petitioners implausibly contend that the term "adjust" does not permit NHTSA to revert the entire inflation adjustment. *See* Envtl. Br. 47-48; State Br. 68. They cannot reconcile how, if an increase from $5.50 to $14 is "the first adjustment," a change from $14 to $5.50 would not also be an "adjust[ment]." 28 U.S.C. § 2461 note sec. 4(c). Environmental Petitioners' reliance on this Court's decision in *Adams v. Holder*, 692 F.3d 91 (2d Cir. 2012), reinforces that an "adjustment" can denote a fundamental change (there, a change to "lawful permanent resident" status). Petitioners' desire for NHTSA to analyze each potential dollar amount "between $5.50 and $14," Envtl. Br. 49; State Br. 68, has no bearing on the "relevant question" for this Court, which is "whether the agency's [chosen] numbers are within a zone of reasonableness." *National Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (quoting *WorldCom, Inc. v. FCC,* 238 F.3d 449, 462 (D.C. Cir. 2001)). Here, where the economic costs are on the order of billions of dollars and where Petitioners submitted no evidence supporting a different amount, NHTSA reasonably decided against hazarding an unsupported alternative.

III. NHTSA Complied with the Procedural Requirements of the National Environmental Policy Act

1. Last, NHTSA complied with the procedures required under NEPA. NEPA requires "a detailed statement" known as an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). To determine if an EIS is required, the relevant regulations permit a more limited Environmental Assessment first, which is "a concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact" ("FONSI"). 40 C.F.R. § 1508.9(a)(1). That FONSI must "briefly present[] the reasons why an action … will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." *Id.* § 1508.13. NEPA, however, does not mandate "particular results" and "simply prescribes the necessary process" to ensure that agencies take a "hard look" at environmental consequences. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Where an agency decides that a FONSI is appropriate, the "decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *DOT v. Public Citizen*, 541 U.S. 752, 763 (2004) (quoting 5 U.S.C. § 706(2)(A)).[1] "[I]nherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Id.* at 767 (quotation omitted). Courts have "repeatedly refused to flyspeck the agency's findings in search of any deficiency no matter how minor." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322-23 (D.C. Cir. 2015) (quotation omitted).

NHTSA amply satisfied NEPA's procedural requirements. NHTSA prepared an Environmental Assessment in connection with the 2019 Final Rule. *See* 84 Fed. Reg. at 36,031-32 (SA25-26). NHTSA explained that in recent CAFE standard rulemakings the agency had prepared a final EIS and a draft EIS documenting the environmental impacts related to the CAFE program, which were 824- and 500-page documents,

[1] *Public Citizen*'s clarification that there is "only" arbitrary-and-capricious review, 541 U.S. at 763, supersedes this Court's prior two-step approach of first requiring a hard look and then engaging in arbitrary-and-capricious review, *see National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). Whether the agency's process demonstrates a hard look at the environmental consequences is solely a consideration in that review. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013).

respectively. *See id.* at 36,032 (SA26); *see also* 2012 CAFE Standard Final EIS (July 2012) (JA279); 2018 CAFE Standard Draft EIS (July 2018) (JA855). There is nothing unusual about an "Environmental Assessment [that] incorporate[s] the assumptions drawn in [a prior] EIS" and that "independently consider[s] only new requirements and impacts not addressed in [the prior] EIS." *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1085 (9th Cir. 2004). The NEPA regulations indeed permit agencies to "incorporat[e] by reference the general discussions" in a prior "environmental impact statement on a specific action" and to "concentrat[e] solely on the issues specific to" the subsequent action. 40 C.F.R. § 1508.28 (defining "tiering").

NHTSA's Environmental Assessment also elaborates that the potential environmental impact from the CAFE penalty change depends on the degree that an inflation adjustment "could encourage manufacturers to improve the average fuel economy" under the CAFE standard that had already been set—that is, the level of compliance. 84 Fed. Reg. at 36,031 (SA25). On this specific issue, NHTSA explained that, because fuel-saving technology is "increasingly less cost-effective," some consumers would not pay the premium for it, "especially … when gas prices are low." *Id.* NHTSA considered how this dynamic could result in either the automaker's "reduced investment in fuel saving technology" or the costs being "passed on to the consumer" without "a corresponding fuel economy benefit." *Id.* at 36,031-32 (SA25-26). NHTSA reasonably determined that the inflation adjustment "could result, at most, in relatively small differences in levels of compliance." *Id.* at 36,032 (SA26).

NHTSA more broadly recognized that "fuel economy is associated with reductions in fuel consumption and greenhouse gas … emissions." 84 Fed. Reg. 36,032 (SA26). Those emissions are in turn "associated with climate change." *Id.* Based on the recent final EIS and draft EIS that thoroughly examined those areas, NHTSA quantified that increases in CAFE standards—which also increase the CAFE penalty—"would result in reductions of global mean surface temperature increases of no more than 0.016°C by 2100." *Id.* NHTSA further quantified that, while CAFE standard changes could save over 1,500 billion gallons of fuel (through 2060), the available evidence demonstrated that the inflation adjustment could be projected to save only 54 billion gallons (through 2032). *Id.* Based on those documented figures, NHTSA explained that the inflation adjustment would produce proportionally a "very small" impact on fuel economy and on the environment, *id.*, and issued a FONSI, *id.* at 36,032-33 (SA26-27). NEPA's procedural requirements that NHTSA "[b]riefly provide sufficient evidence and analysis" and "briefly present[] the reasons" that concern the environmental impact are satisfied. 40 C.F.R. §§ 1508.9, 1508.13.

2. Petitioners contend that it was arbitrary and capricious for NHTSA to have decided against an EIS and issued a FONSI without quantifying the amount of greenhouse-gas emissions. *See* Envtl. Br. 50-51; State Br. 70-71. But this objection reduces to the assertion that NHTSA needed to provide a different unit for the same measurement—instead of the volume of fuel saved, the volume of emissions from consuming that fuel. *Cf.* Policy Integrity Amicus Br. 23 n.11 (providing example of unit conversion). In all events, NHTSA discussed the environmental impact on global mean temperature, *see* 84 Fed. Reg. 36,032 (SA26), and the agency's final EIS and draft EIS spend over two hundred pages documenting greenhouse-gas emissions and their effects under the CAFE program in minute detail. *See* 2012 CAFE Standard Final EIS 5-1 to -213 (JA301-513); 2018 CAFE Standard Draft EIS 5-1 to -47 (JA866-912). Petitioners altogether fail to address these findings.

Petitioners principally rely on the D.C. Circuit's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), for the proposition that a "concise" Environmental Assessment nonetheless requires the agency to quantify greenhouse-gas emissions, but *Sierra Club* addressed only whether a "detailed" EIS (not an Environmental Assessment) requires that degree of detail. *See id.* at 1374 (holding that the EIS should have "given a quantitative estimate of the downstream greenhouse emissions"); *see also* Envtl. Br. 51; State Br. 70-71. There is also no inflexible rule about quantifying emissions, and this case is far more similar to *Sierra Club v. U.S. Department of Energy*, 867 F.3d 189 (D.C. Cir. 2017), where the agency permissibly did *not* quantify certain greenhouse-gas emissions because a separate agency report provided "the information [the challenger] seeks." *Id.* at 202. Nor do Petitioners' cases address the situation where the agency has both quantified the direct result of the proposed action (fuel savings) and also pointed to relevant information on the downstream environmental consequences (climate change). *See Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1223 (9th Cir. 2008) (where Environmental Assessment "does not discuss the potential impact of such emissions on climate change"); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 70-71 (D.D.C. 2019) (similar); *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1244-45 (D.N.M. 2018) (similar).

Petitioners' argument that NHTSA unreasonably relied on the final EIS and draft EIS underscores their basic error. *See* Envtl. Br. 51-52; State Br. 71-72. NEPA permits the agency to assess "usefulness of *any new potential information* to the decisionmaking process." *Public Citizen*, 541 U.S. at 754 (emphasis added); *see* 40 C.F.R. § 1508.28 (providing, where an EIS exists, agency may "concentrat[e] solely on the issues specific to" the present action). That the Environmental Assessment here compared the environmental impact of the inflation adjustment with that of changes to the CAFE standard is a natural consequence of NHTSA's role in continuing to assess the CAFE program. And Petitioners' argument that the other EIS documents addressed only the benefits of raising CAFE standard misunderstands that increases in the standard also increase the penalty. *See* Envtl. Br. 51-52; State Br. 72.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32.1 (a)(4)(A) because it contains 13,997 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Dennis Fan
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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Dennis Fan
DENNIS FAN

STATUTORY ADDENDUM

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Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990".

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that—

(A) (i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. Within 6 months after the date of the enactment of this Act, and on January 1 of each fifth calendar year thereafter, the President shall submit a report on civil monetary penalty inflation adjustment to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives. Such report shall include—

(1) each civil monetary penalty as defined under section 3(2);

(2) the date each civil monetary penalty was most recently set pursuant to law;

(3) the maximum amount of each civil monetary penalty or, if applicable, the range of the minimum and maximum amounts of each civil monetary penalty in effect on the date of the submission of such report;

(4) the amount of each civil monetary penalty described under paragraph (3) other than any such penalty for which inflation adjustment is provided by law, if each such penalty is increased by the adjustment described under section 5; and

(5) a listing of the modifications to Federal law that would be required to—

(A) increase each penalty described in paragraph (1) by the adjustments described under section 5, excluding any penalty for which inflation adjustment is provided by law or that has been increased within the 5-year period immediately preceding the date of the submission of such report; and

(B) provide that any increase in any civil monetary penalty shall apply only to violations which occur after the date any such increase takes effect.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The adjustment described under paragraphs (4) and (5)(A) of section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.—For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. No later than January 1 of each year, the President shall submit a report on civil monetary penalties to the Congress which shall include—

(1) to the extent possible, the number and amount of civil monetary penalties imposed pursuant to each provision of law providing for such civil monetary penalties, during the complete fiscal year preceding the submission of such report;

(2) to the extent possible, the number and amount of such civil penalties collected during such fiscal year; and

(3) any recommendations that the President determines appropriate to—

(A) eliminate obsolete civil monetary penalties;

(B) modify the amount of any civil monetary penalty; or

(C) make any other legislative modifications concerning civil monetary penalties.

Debt Collection Improvement Act of 1996,
Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321–373

(s) (1) IN GENERAL.—The Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101-410, 104 Stat. 890; 28 U.S.C. 2461 note) is amended—

(A) by amending section 4 to read as follows:

"SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996, and at least once every 4 years thereafter—

"(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986, the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, or the Social Security Act, by the inflation adjustment described under section 5 of this Act; and

"(2) publish each such regulation in the Federal Register.";

(B) in section 5(a), by striking "The adjustment described under paragraphs (4) and (5)(A) of section 4" and inserting "The inflation adjustment under section 4"; and

(C) by adding at the end the following new section:

"SEC. 7. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.".

(2) LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty made pursuant to the amendment made by paragraph (1) may not exceed 10 percent of such penalty.

Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599, 599-601

SEC. 701. CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS.

(a) SHORT TITLE.—This section may be cited as the "Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015".

(b) AMENDMENTS.—The Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) is amended—

(1) in section 4—

(A) by striking the matter preceding paragraph (1) and inserting the following:

"(a) IN GENERAL.-Not later than July 1, 2016, and not later than January 15 of every year thereafter, and subject to subsections (c) and (d), the head of each agency shall—";

(B) in paragraph (1)—

(i) by striking "by regulation adjust" and inserting "in accordance with subsection (b), adjust"; and

(ii) by striking ", the Tariff Act of 1930, the Occupational Safety and Health Act of 1970, or the Social Security Act" and inserting "or the Tariff Act of 1930";

(C) in paragraph (2), by striking "such regulation" and inserting "such adjustment"; and

(D) by adding at the end the following:

"(b) PROCEDURES FOR ADJUSTMENTS.—

"(1) CATCH UP ADJUSTMENT.—For the first adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015—

"(A) the head of an agency shall adjust civil monetary penalties through an interim final rulemaking; and

"(B) the adjustment shall take effect not later than August 1, 2016.

"(2) SUBSEQUENT AMENDMENTS.—For the second adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and each adjustment thereafter, the head of an agency shall adjust civil monetary penalties and shall make the adjustment notwithstanding section 553 of title 5, United States Code.

"(c) EXCEPTION.-For the first adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the head of an agency may adjust the amount of a civil monetary penalty by less than the otherwise required amount if—

"(1) the head of the agency, after publishing a notice of proposed rulemaking and providing an opportunity for comment, determines in a final rule that—

"(A) increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact; or

"(B) the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits; and

"(2) the Director of the Office of Management and Budget concurs with the determination of the head of the agency under paragraph (1).

"(d) OTHER ADJUSTMENTS MADE.-If a civil monetary penalty subject to a cost-of-living adjustment under this Act is, during the 12 months preceding a required cost-of-living adjustment, increased by an amount greater than the amount of the adjustment required under subsection (a), the head of the agency is not required to make the cost-of-living adjustment for that civil monetary penalty in that year.";

(2) in section 5—

(A) in subsection (a), by striking "to the nearest—" and all that follows through the end of subsection (a) and inserting "to the nearest multiple of $1."; and

(B) by amending subsection (b) to read as follows:

"(b) DEFINITION.—

"(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of subsection (a), the term 'cost-of-living adjustment' means the percentage (if any) for each civil monetary penalty by which—

"(A) the Consumer Price Index for the month of October preceding the date of the adjustment, exceeds

"(B) the Consumer Price Index for the month of October 1 year before the month of October referred to in subparagraph (A).

"(2) INITIAL ADJUSTMENT.—

"(A) IN GENERAL.-Subject to subparagraph (C), for the first inflation adjustment under section 4 made by an agency after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the term 'cost-of-living adjustment' means the percentage (if any) for each civil monetary penalty by which the Consumer Price Index for the month of October, 2015 exceeds the Consumer Price Index for the month of October of the calendar year during which the amount of such civil monetary penalty was established or adjusted under a provision of law other than this Act.

"(B) APPLICATION OF ADJUSTMENT.-The cost-of-living adjustment described in subparagraph (A) shall be applied to the amount of the civil monetary penalty as it was most recently established or adjusted under a provision of law other than this Act.

"(C) MAXIMUM ADJUSTMENT.-The amount of the increase in a civil monetary penalty under subparagraph (A) shall not exceed 150 percent of the amount of that civil monetary penalty on the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.";

(3) in section 6, by striking "violations which occur" and inserting "civil monetary penalties, including those whose associated violation predated such increase, which are assessed"; and

(4) by adding at the end the following:

"SEC. 7. IMPLEMENTATION AND OVERSIGHT ENHANCEMENTS.

"(a) OMB GUIDANCE.—Not later than February 29, 2016, not later than December 15, 2016, and December 15 of every year thereafter, the Director of the Office of Management and Budget shall issue guidance to agencies on implementing the inflation adjustments required under this Act.

"(b) AGENCY FINANCIAL REPORTS.—The head of each agency shall include in the Agency Financial Report submitted under OMB Circular A-136, or any successor thereto, information about the civil monetary penalties within the jurisdiction of the agency, including the adjustment of the civil monetary penalties by the head of the agency under this Act.

"(c) GAO REVIEW.—The Comptroller General of the United States shall annually submit to Congress a report assessing the compliance of agencies with the inflation adjustments required under this Act, which may be included as part of another report submitted to Congress.".

(c) REPEAL.—Section 31001(s) of the Debt Collection Improvement Act of 1996 (28 U.S.C. 2461 note) is amended by striking paragraph (2).

28 U.S.C. § 2461 note

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

Pub. L. 101-410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub. L. 104-134, title III, § 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321-373; Pub. L. 105-362, title XIII, § 1301(a), Nov. 10, 1998, 112 Stat. 3293; Pub. L. 114-74, title VII, § 701(b), Nov. 2, 2015, 129 Stat. 599, provided that:

SHORT TITLE

SECTION 1. This Act may be cited as the 'Federal Civil Penalties Inflation Adjustment Act of 1990'.

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) 'agency' means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) 'civil monetary penalty' means any penalty, fine, or other sanction that—

(A) (i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) 'Consumer Price Index' means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. (a) IN GENERAL.—Not later than July 1, 2016, and not later than January 15 of every year thereafter, and subject to subsections (c) and (d), the head of each agency shall—

(1) in accordance with subsection (b), adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.] or the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such adjustment in the Federal Register.

(b) PROCEDURES FOR ADJUSTMENT.—

(1) CATCH UP ADJUSTMENT.—For the first adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 [Nov. 2, 2015]—

(A) the head of an agency shall adjust civil monetary penalties through an interim final rulemaking; and

(B) the adjustment shall take effect not later than August 1, 2016.

(2) SUBSEQUENT ADJUSTMENTS.—For the second adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and each adjustment thereafter, the head of an agency shall adjust civil monetary penalties and shall make the adjustment notwithstanding section 553 of title 5, United States Code.

(c) EXCEPTION.—For the first adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the head of an agency may adjust the amount of a civil monetary penalty by less than the otherwise required amount if—

(1) the head of the agency, after publishing a notice of proposed rulemaking and providing an opportunity for comment, determines in a final rule that—

(A) increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact; or

(B) the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits; and

(2) the Director of the Office of Management and Budget concurs with the determination of the head of the agency under paragraph (1).

(d) OTHER ADJUSTMENTS MADE.—If a civil monetary penalty subject to a cost-of-living adjustment under this Act is, during the 12 months preceding a required cost-of-living adjustment, increased by an amount greater than the amount of the adjustment required under subsection (a), the head of the agency is not required to make the cost-of-living adjustment for that civil monetary penalty in that year.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest multiple of $1.

(b) DEFINITION.—

(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of subsection (a), the term 'cost-of-living adjustment' means the percentage (if any) for each civil monetary penalty by which—

(A) the Consumer Price Index for the month of October preceding the date of the adjustment, exceeds

(B) the Consumer Price Index for the month of October 1 year before the month of October referred to in subparagraph (A).

(2) INITIAL ADJUSTMENT.—

(A) IN GENERAL.—Subject to subparagraph (C), for the first inflation adjustment under section 4 made by an agency after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 [Nov. 2, 2015], the term 'cost-of-living adjustment' means the percentage (if any) for each civil monetary penalty by which the Consumer Price Index for the month of October, 2015 exceeds the Consumer Price Index for the month of October of the calendar year during which the amount of such civil monetary penalty was established or adjusted under a provision of law other than this Act.

(B) APPLICATION OF ADJUSTMENT.—The cost-of-living adjustment described in subparagraph (A) shall be applied to the amount of the civil monetary penalty as it was most recently established or adjusted under a provision of law other than this Act.

(C) MAXIMUM ADJUSTMENT.—The amount of the increase in a civil monetary penalty under subparagraph (A) shall not exceed 150 percent of the amount of that civil monetary penalty on the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.

SEC. 7. IMPLEMENTATION AND OVERSIGHT ENHANCEMENTS

(a) OMB GUIDANCE.—Not later than February 29, 2016, not later than December 15, 2016, and December 15 of every year thereafter, the Director of the Office of Management and Budget shall issue guidance to agencies on implementing the inflation adjustments required under this Act.

(b) AGENCY FINANCIAL REPORTS.—The head of each agency shall include in the Agency Financial Report submitted under OMB Circular A–136, or any successor thereto, information about the civil monetary penalties within the jurisdiction of the agency, including the adjustment of the civil monetary penalties by the head of the agency under this Act.

(c) GAO REVIEW.—The Comptroller General of the United States shall annually submit to Congress a report assessing the compliance of agencies with the inflation adjustments required under this Act, which may be included as part of another report submitted to Congress."

49 U.S.C. § 32912

§ 32912. Civil penalties

(a) General Penalty—

A person that violates section 32911(a) of this title is liable to the United States Government for a civil penalty of not more than $10,000 for each violation. A separate violation occurs for each day the violation continues.

(b) Penalty for Manufacturer Violations of Fuel Economy Standards.—Except as provided in subsection (c) of this section, a manufacturer that violates a standard prescribed for a model year under section 32902 of this title is liable to the Government for a civil penalty of $5 multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

(1) calculated under section 32904(a)(1)(A) or (B) of this title for automobiles to which the standard applies manufactured by the manufacturer during the model year;

(2) multiplied by the number of those automobiles; and

(3) reduced by the credits available to the manufacturer under section 32903 of this title for the model year.

(c) Higher Penalty Amounts.—

(1)

(A) The Secretary of Transportation shall prescribe by regulation a higher amount for each .1 of a mile a gallon to be used in calculating a civil penalty under subsection (b) of this section, if the Secretary decides that the increase in the penalty—

(i) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed; and

(ii) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.

(B) The amount prescribed under subparagraph (A) of this paragraph may not be more than $10 for each .1 of a mile a gallon.

(C) The Secretary may make a decision under subparagraph (A)(ii) of this paragraph only when the Secretary decides that it is likely that the increase in the penalty will not—

(i) cause a significant increase in unemployment in a State or a region of a State;

(ii) adversely affect competition; or

(iii) cause a significant increase in automobile imports.

(D) A higher amount prescribed under subparagraph (A) of this paragraph is effective for the model year beginning at least 18 months after the regulation stating the higher amount becomes final.

(2) The Secretary shall publish in the Federal Register a proposed regulation under this subsection and a statement of the basis for the regulation and provide each manufacturer of automobiles a copy of the proposed regulation and the statement. The Secretary shall provide a period of at least 45 days for written public comments on the proposed regulation. The Secretary shall submit a copy of the proposed regulation to the Federal Trade Commission and request the Commission to comment on the proposed regulation within that period. After that period, the Secretary shall give interested persons and the Commission an opportunity at a public hearing to present oral information, views, and arguments and to direct questions about disputed issues of material fact to—

(A) other interested persons making oral presentations;

(B) employees and contractors of the Government that made written comments or an oral presentation or participated in the development or consideration of the proposed regulation; and

(C) experts and consultants that provided information to a person that the person includes, or refers to, in an oral presentation.

(3) The Secretary may restrict the questions of an interested person and the Commission when the Secretary decides that the questions are duplicative or not likely to result in a timely and effective resolution of the issues. A transcript shall be kept of a public hearing under this subsection. A copy of the transcript and written comments shall be available to the public at the cost of reproduction.

(4) The Secretary shall publish a regulation prescribed under this subsection in the Federal Register with the decisions required under paragraph (1) of this subsection.

(5) An officer or employee of a department, agency, or instrumentality of the Government violates section 1905 of title 18 by disclosing, except in an in camera proceeding by the Secretary or a court, information—

(A) provided to the Secretary or the court during consideration or review of a regulation prescribed under this subsection; and

(B) decided by the Secretary to be confidential under section 11(d) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796(d)).

(d) Written Notice Requirement.—

The Secretary shall impose a penalty under this section by written notice.

(e) Use of Civil Penalties.—For fiscal year 2008 and each fiscal year thereafter, from the total amount deposited in the general fund of the Treasury during the preceding fiscal year from fines, penalties, and other funds obtained through enforcement actions conducted pursuant to this section (including funds obtained under consent decrees), the Secretary of the Treasury, subject to the availability of appropriations, shall—

(1) transfer 50 percent of such total amount to the account providing appropriations to the Secretary of Transportation for the administration of this chapter, which shall be used by the Secretary to support rulemaking under this chapter; and

(2) transfer 50 percent of such total amount to the account providing appropriations to the Secretary of Transportation for the administration of this chapter, which shall be used by the Secretary to carry out a program to make grants to manufacturers for retooling, reequipping, or expanding existing manufacturing facilities in the United States to produce advanced technology vehicles and components.