19-2395(L)

19-2508(CON)

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, NATIONAL 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 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 REPLY BRIEF FOR STATE PETITIONERS

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PRELIMINARY STATEMENT

In 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act ("Improvements Act"), directing all federal agencies to combat the erosive effects of inflation by increasing civil monetary penalties that are based on nominal dollar figures. This Court previously held that the National Highway Traffic Safety Administration (NHTSA) violated this statutory requirement when it attempted to delay the inflation adjustment required by the Act for the statutory civil penalty that applies to automobile manufacturers that violate corporate average fuel efficiency (CAFE) standards. *NRDC v. NHTSA*, 894 F.3d 95 (2d Cir. 2018). As the States explained in their opening brief, NHTSA violated its statutory obligations again when it took the even more extreme position that the Improvements Act did not apply to the CAFE penalty *at all* and reverted the penalty to its 1997 level.

NHTSA's attempts to defend its action are meritless. Neither NHTSA nor intervenor Alliance for Automotive Innovation ("Alliance") has offered a coherent explanation for why Congress would have exempted the CAFE penalty from the Improvements Act's mandate. To the

contrary, as NHTSA essentially concedes, the Improvements Act's predecessors *did* apply to the CAFE penalty, and the Improvements Act uses the same statutory language to address the same problem as these previous enactments. That understanding is confirmed by the uniform view repeatedly expressed by Congress, NHTSA, and several other federal agencies that the CAFE penalty urgently required adjustment to preserve its deterrent effect.

NHTSA's alternative argument based on the Improvements Act's negative-economic-impact exception also fails. As this Court previously held, the Act unambiguously required that exception to be invoked for the initial catch-up adjustment that had to be implemented nearly four years ago. NHTSA's contention that it can still invoke the exception now cannot be squared with the Improvements Act's highly circumscribed schedule. And NHTSA's finding of negative economic impact is arbitrary and capricious in any event.

Finally, NHTSA failed to comply with the National Environmental Policy Act (NEPA). There is no dispute that NHTSA failed to conduct an Environmental Assessment that specifically analyzed the impact of its reversal of the CAFE penalty increase. NHTSA's reliance on

Environmental Impact Statements conducted for other regulatory changes is inadequate.

ARGUMENT

POINT I

THE CORPORATE AVERAGE FUEL EFFICIENCY (CAFE) PENALTY IS A CIVIL MONETARY PENALTY SUBJECT TO THE IMPROVEMENTS ACT

A. The National Highway Traffic Safety Administration's (NHTSA) Interpretation of the Improvements Act Is Foreclosed by This Court's Ruling in *NRDC*.

As the States have explained (Final Br. for State Pet'rs. (States Br.) 26-30), this Court concluded in *NRDC* that the Improvements Act unambiguously prohibited NHTSA from delaying the Act's mandatory increase to the CAFE penalty beyond the statutory deadline of August 2016. *See* 894 F.3d at 109. But NHTSA claims that this Court left open the threshold question of whether the Improvements Act applies to the CAFE penalty at all. (Final Br. for Resp'ts (NHTSA Br.) 28.)

Nothing in *NRDC* supports NHTSA's characterization. This Court explicitly held that the Improvements Act's mandate "applies to all agencies"; it directly found that NHTSA had "no discretion . . . regarding the timing of adjustments" to the CAFE penalty; and it held that NHTSA

had violated the Act in merely suspending the CAFE penalty's mandatory increase. *NRDC*, 894 F.3d at 112, 113 & n.12. NHTSA's current argument—that it has authority to entirely *disregard* the Improvements Act—strictly conflicts with this Court's prior ruling.[1]

NHTSA contends that, notwithstanding *NRDC*, it is entitled to press its more radical challenge to the Improvements Act's threshold applicability now because it merely noted but did not fully brief this specific argument in *NRDC*. (NHTSA Br. 28; *see also* Br. of Intervenor Alliance (Alliance Br.) 32-35). But there is no question that the Improvements Act's applicability to the CAFE penalty was squarely at issue in *NRDC*: state petitioners argued that NHTSA had exceeded its statutory authority by suspending a CAFE penalty increase, and this Court agreed.[2] NHTSA's failure to pursue a specific legal argument on a

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[1] NHTSA is wrong to assert that this Court's discussion of the Improvements Act's applicability did not "address EPCA's text." (NHTSA Br. 28.) In concluding that an increase in the CAFE penalty was "mandated by the Improvements Act," this Court explicitly reasoned that "[n]othing in EPCA contradicts or undermines that mandate." *NRDC*, 894 F.3d at 112.

[2] *See* Br. for State Pet'rs 33-34, *NRDC*, 894 F.3d 95 (No. 17-2780), ECF No. 139; Reply Br. for State Pet'rs 12-15, *NRDC*, 894 F.3d 95 (No. 17-2780), ECF No. 179.

dispositive statutory issue does not diminish either the precedential or persuasive value of this Court's prior ruling.[3]

NHTSA also mischaracterizes footnote ten of the *NRDC* decision as suggesting that the Court specifically "left open the possibility that NHTSA" could later find an ambiguity in the Energy Policy and Conservation Act (EPCA) that would justify evading the Improvements Act's mandate. (NHTSA Br. 28; *see also* Alliance Br. 34-36). NHTSA's selective quotation of that footnote omits what this Court actually said, which is that NHTSA *could not* identify any ambiguity in EPCA that supported its reading of the Improvements Act: "NHTSA does not argue that we owe its interpretation of EPCA any deference, nor could it, because it has not identified a section of EPCA that presents any relevant

[3] NHTSA misstates the record when it contends that counsel for state petitioners conceded at the *NRDC* argument that NHTSA had discretion to decide whether to apply the Improvements Act. (NHTSA Br. 30.) To the contrary, counsel made clear that there were a "number of problems" with "the suggestion that the Inflation Adjustment Act does not apply to the CAFE civil penalty rate." Oral Arg. 31:11-20, *NRDC* (Apr. 12, 2018). Counsel's observations "that NHTSA is 'allowed to reconsider' the 2016 inflation adjustment" and that only "the delay" was at issue in *NRDC* (Br. 30) were simply making the uncontroversial point that the only final agency action under review was the suspension, and that state petitioners were not seeking to prevent NHTSA from continuing the *process* of reconsideration.

ambiguity on the question of its statutory authority to publish the Suspension Rule." *NRDC*, 894 F.3d at 112 n.10.

NHTSA is similarly wrong to contend (Br. 28-29) that its departure from this Court's holding in *NRDC* is supported by *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492 (2d Cir. 2017) ("*Catskill III*"), *cert. denied* 138 S. Ct. 1164 (2018). That decision sustained the Environmental Protection Agency's (EPA) regulatory interpretation of a provision of the Clean Water Act (CWA) despite earlier court rulings that had read the provision differently. *See* 846 F.3d at 507. But *Catskill III* recognized that the prior rulings had *not* found the relevant CWA provision unambiguous and that EPA thus retained the authority to interpret that provision. *See id.* at 508. By contrast, this Court in *NRDC* found the Improvements Act's mandatory penalty increases "unambiguous" and expressly rejected any deference to NHTSA's contrary interpretation. 894 F.3d at 112 n.10, 113 & n.12. This holding leaves "no room" for NHTSA to disregard this Court's prior decision. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

B. In Any Event, the Improvements Act Unambiguously Applies to the CAFE Penalty.

1. Congress plainly intended to increase the CAFE penalty to preserve its deterrent effect.

NHTSA does not dispute that the CAFE penalty relies on a specific dollar figure ($5 as originally enacted), the real value of which has been seriously eroded by inflation. Congress addressed this specific problem—to "maintain the deterrent effect of civil monetary penalties" despite inflation—through the Improvements Act and earlier statutes. 28 U.S.C. § 2461 note sec. 2(b)(1)-(3); *see also NRDC*, 894 F.3d at 109-10. NHTSA's arguments to the contrary ignore the overwhelming evidence that Congress intended not only to preserve the effectiveness of civil monetary penalties generally, but sought even more specifically to make adjustments to the CAFE penalty—among the largest sources of civil penalties collected by the federal government.

NHTSA dismisses "legislative purpose and regulatory history" as irrelevant to the interpretation of the Improvements Act's text (Br. 33). But, as the States have explained (States Br. 9-14, 47-52), the relevant history here demonstrates a nearly three-decades-long understanding by Congress, NHTSA, and other federal agencies that the relevant statutory

language encompasses the CAFE penalty as a "civil monetary penalty" requiring inflation adjustment.

For example, when Congress enacted the Inflation Adjustment Act in 1990—directing federal agencies to identify "civil monetary penalties" whose impact had been "diminished due to the effect of inflation," Pub. L. No. 101-410, 104 Stat. 890, 890 (1990)—OMB responded by identifying the CAFE penalty as a civil monetary penalty that required adjustment. (Joint Appendix (J.A.) 82, 114.) In 1996, when Congress amended the Inflation Adjustment Act to require agencies to "adjust each civil monetary penalty" for inflation, *see* Pub. L. No. 104-134, 110 Stat. 1321, 1321-373 (1996), NHTSA complied by increasing the CAFE penalty to $5.50, *see* Civil Penalties, 62 Fed. Reg. 5167, 5168-69 (Feb. 4, 1997)—the same amount that the rule here seeks to reinstate, *see* 84 Fed. Reg. 36,007, 36,007 (2019) ("Repeal Rule") (Special Appendix (S.A.) 1). And in four separate reports over the next two decades, the U.S. General Accounting Office and the Congressional Research Service, in consultation with NHTSA, specifically identified the CAFE penalty as one of the "civil monetary penalties" that required further adjustment to account for inflation, and urged Congress to again amend the Inflation Adjustment

Act to address this problem. (States Br. 11-14.) Congress enacted the Improvements Act in 2015 to respond to these concerns.[4] *See NRDC*, 894 F.3d at 111.

NHTSA has no answer for why Congress would have silently exempted the CAFE penalty from the Improvements Act's mandate in light of the overwhelming support—including from NHTSA itself—for adjusting this specific penalty to counter inflation.[5] To the contrary, NHTSA implicitly concedes that the 1996 amendments to the Inflation Adjustment Act *did* apply to the CAFE penalty, since the $5.50 penalty

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[4] Contrary to the Alliance's argument (Br. 29 n.4), petitioners were not required to separately preserve arguments based on legislative history in light of their undisputed preservation of the statutory argument under the Improvements Act. *See, e.g.*, *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998). In any event, this argument is fairly encompassed by comments from state Attorneys General arguing that Congress had ratified "the Highway Administration's previous conclusion that the Inflation Amendments applied to the CAFE standard." (J.A. 737.)

[5] In light of this history, NHTSA is wrong to suggest that federal agencies have been "inconsistent" on whether the CAFE penalty is a civil monetary penalty. (NHTSA Br. 7.) The only support NHTSA has offered for this characterization is a 1988 report that omitted reference to the CAFE penalty. (*Id.* (citing J.A. 1-37).) But that report predates the 1990 enactment of the Inflation Adjustment Act. And NHTSA cites nothing in the three decades following that report to counter the uniform view that the CAFE penalty is a civil monetary penalty.

that the Repeal Rule seeks to reinstate was the result of an increase mandated by the 1996 amendments. See *supra* at 8. The 1996 amendments' applicability turned on the same definition of "civil monetary penalty" that continues to govern today—namely, any penalty that "is for a specific monetary amount" or "has a maximum amount provided for by Federal law." 28 U.S.C. § 2461 note sec. 3(2)(A) (1997). NHTSA has never explained why the 1996 amendments' mandatory increase for inflation applies to the CAFE penalty, while the Improvements Act's identical language to address the same problem does not.

2. NHTSA's contrary interpretation of the Improvements Act is meritless.

Even ignoring this fundamental inconsistency, and setting aside the overwhelming evidence of Congress's intent, NHTSA's textual arguments are unpersuasive.

First, NHTSA asserts that the CAFE penalty is not "for a specific monetary amount" because the $5.50 figure is merely "one variable in the statutory formula that produces the [overall] penalty." (NHTSA Br. 18-19.) But as the States have pointed out (Br. 36-39 & n.19), many civil monetary penalties use a base figure expressed in nominal dollars as part

of a formula to calculate an overall penalty amount. These penalties are indisputably subject to the Improvements Act because they suffer directly from the effects of inflation—as the real value of the nominal dollar figure diminishes, the overall penalty calculated based on that nominal dollar figure loses its deterrent effect. The Act's mandatory increases to these base figures thus directly address the erosive effect of inflation.

NHTSA complains (Br. 32-33) that this understanding of "specific monetary amount" would "sweep in all statutory monetary references." But NHTSA fails to explain the problem with this conclusion. Nothing in the Improvements Act or earlier enactments suggests that Congress intended to address only *some* of the civil monetary penalties that are eroded by inflation because they contain nominal dollar amounts (both "specific" amounts and ranges with "maximum" amounts). As this Court explained in *NRDC*, "[t]he goal of the Improvements Act was to increase compliance with *all* federal regulatory programs, not just the CAFE standards." 894 F.3d at 112 (emphasis added). And although Congress provided express exemptions for various monetary penalties in the Improvements Act and its predecessors, it has never exempted the CAFE penalty. (States Br. 11, 16-17.)

What Congress did intend to exclude from the scope of the Improvements Act were penalties that are *not* vulnerable to inflation because they are based on metrics other than nominal dollar figures, like actual damages or costs incurred. (*See* States Br. 33-36.) OMB has previously asserted this very understanding, drawing a distinction between penalties (like the CAFE penalty) "with a dollar amount" and penalties "written as functions of violations." (*E.g.*, J.A. 515.) That distinction sensibly focuses the Improvements Act on civil monetary penalties that are diminished by inflation, while excluding penalties that are not so affected. NHTSA's interpretation, by contrast, would exempt the CAFE penalty from the Act's requirements despite the penalty's undisputed diminution due to inflation. There is no evidence that Congress intended to draw such an illogical line.

Second, NHTSA purports to identify an inconsistency in the States' interpretation as sometimes construing the CAFE "penalty" in EPCA to be the $5 (or $5.50) base figure and at other times to be the total sum a manufacturer owes. (NHTSA Br. 18-19; *see also* Alliance Br. 28.) But there is no inconsistency here because of the straightforward connection between the base figure and that total sum. That direct relationship

explains why EPCA and NHTSA itself have used the term "penalty" to refer both to (1) the total sum a violator owes and (2) the specific dollar amount to be assessed per unit of noncompliance. (States Br. 39-40 & nn.20-21.) There is no inconsistency for purposes of this analysis in using the term "penalty" in these two closely related ways.

Third, NHTSA argues (Br. 20, 33-34) that Congress would not have intended for the CAFE penalty to be adjusted for inflation because increases in the underlying CAFE standards effectively accomplish the same goal. This argument conflates the distinct functions of substantive compliance standards (what automakers should achieve) with penalties for noncompliance (how to compel compliance). Every civil monetary penalty is based on compliance standards, which represent the substantive requirements that regulated entities must meet. When, as here, a civil penalty is based on increments of noncompliance, an agency's separate decision to make the underlying standard more stringent will necessarily increase the overall penalty of a regulated entity that does not comply.[6]

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[6] In mandating that CAFE standards be set at "feasible" levels, *see* 49 U.S.C. § 32902(c), (f), Congress anticipated that automakers would be able to meet any newly updated standards. Automakers that refuse to upgrade their fleets with technologically and economically feasible

But adjusting the penalty still serves a distinct purpose from modifying the underlying standard because the penalty increase provides a greater financial incentive to comply with any given standard. *See NRDC*, 894 F.3d at 109. And it is that distinct "deterrent effect" that Congress sought to restore with the Improvements Act and its predecessors. *See* 28 U.S.C. § 2461 note sec. 2(b); *NRDC*, 894 F.3d at 109-10.

NHTSA's argument that stricter CAFE standards can take the place of inflation adjustments to the CAFE penalty also fails on a factual level. The CAFE standards have *not* been subject to continuous and regular increases. To the contrary, between 1990 and 2010, CAFE standards did not increase at all, and the standards have actually declined in the past. *See* 49 C.F.R. § 531.5. And going forward, NHTSA and EPA have proposed a rule that would continue to stagnate CAFE standards for model years 2021-2026, reversing and replacing existing standards that require progressive fuel efficiency improvements.[7] *See* 83

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equipment should pay higher total penalty sums to the extent their fleets increasingly underperform the standards.

[7] Between the time the initial CAFE standard was set in 1978 and the time of the Improvements Act catch-up adjustment in 2016, the cumulative rate of inflation increased by over 250 percent. *See* U.S.

Fed. Reg. 42,986, 42,987 (Aug. 24, 2018) (J.A. 914). Given NHTSA's current refusal to make the CAFE standards more stringent, it is perverse for the agency to invoke the hypothetical benefits of stricter standards to justify watering down the CAFE penalty's deterrent effect.

Fourth, NHTSA asserts (Br. 20-21) that applying the Improvements Act to the CAFE penalty would be inconsistent with Congress's goals under EPCA of encouraging "fuel-economy innovation," including through "alternative compliance mechanisms, such as credits." This argument makes no sense. A major problem with the pre-adjustment CAFE penalty was that manufacturers could ignore the CAFE standards and treat the $5.50 civil monetary penalty as a not-very-onerous cost of doing business. (States Br. 13.) Adjusting the CAFE penalty to account for inflation restores the teeth of this monetary sanction and incentivizes manufacturers to comply with CAFE standards—including by investing in "fuel-economy innovation." By contrast, as Tesla's amicus brief explains, the Repeal Rule will "diminish this incentive to innovate," in part because

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Bureau of Labor Statistics, *CPI Inflation Calculator* (internet). By comparison, the CAFE standard's increase in stringency for domestic passenger vehicles was only 103 percent (18 mpg to 36.5 mpg) (J.A. 997), an increase well under half the rate of inflation.

lowering the penalty will also lower the price of CAFE credits, thereby reducing the profit that technological innovators can gain from generating and trading credits. (Br. of Amicus Curiae Tesla, Inc. in Supp. of Pet'rs. 7-13.)

Finally, NHTSA errs when it characterizes the CAFE penalty as "unique" because EPCA contains a "standalone mechanism" for increasing the penalty. (NHTSA Br. 21-22; *see also* Alliance Br. 24-26.) To the contrary, many other statutes also contain "standalone mechanism[s]" for an agency to increase a penalty that it administers, but agencies have consistently applied the Improvements Act to their penalties nonetheless. For example, the Bureau of Ocean and Energy Management has adjusted the civil monetary penalty for violations of the Outer Continental Shelf Lands Act even though Congress separately provided that the Secretary of the Interior must adjust the same penalty every three years to account for inflation. *See* 43 U.S.C. § 1350(b)(1) (penalty); 85 Fed. Reg. 7218, 7219 (Feb. 7, 2020) (annual adjustment under the Improvements Act).

Congress was well aware of these statutes when it enacted the Improvements Act. Indeed, the Act expressly exempts civil monetary penalties that had *already* been increased under preexisting authority

"by an amount greater than the amount of the adjustment required" by the Improvements Act "during the 12 months preceding a required cost-of-living adjustment."[8] 28 U.S.C. § 2461 note sec. 4(d). There is thus no indication that Congress deemed the mere existence of separate penalty-increasing authority to be incompatible with the Improvements Act. To the contrary, Congress mandated inflation adjustments in the Improvements Act in part *because* agencies had not responsibly utilized these "standalone mechanism[s]" to ensure that their penalties kept pace with inflation. *See* 28 U.S.C. § 2461 note sec. 2; *NRDC*, 894 F.3d 109. Allowing NHTSA to rely on its never-exercised authority under EPCA to avoid Congress's "unusually precise and directive" mandate in the Improvements Act, *NRDC*, 894 F.3d at 113 n.12, would thus be directly

[8] Congress's express exemption of penalties under the Internal Revenue Code, *see* 28 U.S.C. § 2461 note sec. 4(a)(1), many of which contain their own mechanisms to increase penalties, *see, e.g.*, 26 U.S.C. § 6721(f), confirms that Congress knew how to exempt penalties subject to more specific increase provisions but consciously chose not to do so for the CAFE penalty.

contrary to Congress's intent to compel action in an area where agencies had failed to act on their own.[9]

3. NHTSA is not entitled to deference for its interpretation of the Improvements Act.

NHTSA argues that its interpretation of the applicability of the Improvements Act to the CAFE penalty is entitled to deference (Br. 22-27). But this Court has already rejected that argument, holding that "deference [to NHTSA] is clearly not warranted" under the Improvements Act because "NHTSA has no special expertise in interpreting its language." *NRDC*, 894 F.3d at 112 n.10.

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[9] The Alliance separately argues (Br. 26-27) that Congress did not intend for the Improvements Act to apply to the CAFE penalty because of the disparity between the Congressional Budget Office's (CBO) estimate of the Act's revenue effects, and the increase in penalty payments that NHTSA had asserted. But it is not clear that there is any disparity here: as explained below (*infra* at 29), NHTSA's projection that a $14 penalty could result in over one billion dollars in additional penalty obligations did not account for credits and thus did not accurately reflect the net revenue effects of the adjustment. In any event, any error in CBO's analysis does not bear on Congress's intent here. *See, e.g.*, *Sharp v. United States*, 580 F.3d 1234, 1239 (Fed. Cir. 2009); *Laumann v. National Hockey League*, 56 F. Supp. 3d 280, 297 (S.D.N.Y. 2014) ("[A] CBO cost estimate is not persuasive evidence of congressional intent.").

NHTSA attempts to avoid this holding by claiming that it is exercising interpretive authority under EPCA. (NHTSA Br. 22-24.) But that argument too is foreclosed by *NRDC*, which squarely held that NHTSA's obligation to adjust the CAFE penalty for inflation is driven by the Improvements Act, not EPCA. "In implementing the Improvements Act, Congress articulated purposes that transcended the confines of any given agency's regulatory functions," and "EPCA does not contravene this government-wide policy." *NRDC*, 894 F.3d at 112.

NHTSA mischaracterizes the Improvements Act when it asserts that the Act contains an "explicit Congressional delegation of legislative authority" to agencies to determine whether penalties under their own statutes are subject to inflation adjustment. (NHTSA Br. at 23 (quotation marks omitted)). While the Act does refer to federal agencies' authority over civil monetary penalties that they administer, it does so only to *compel* them to make the inflation adjustments required by the Act: Congress dictated that "the head of each agency *shall* . . . adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency." 28 U.S.C. § 2461 note sec. 4(a)(1) (emphasis added). An express

mandate that agencies make inflation adjustments does not delegate authority to them to disregard that mandate altogether.

The Alliance errs in its separate contention (Br. 18-20) that OMB's interpretation of the Improvements Act is entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). NHTSA itself does not invoke such deference (Br. 26)—and for good reason, because OMB's opinion was expressed in a series of informal letters that did not undergo the type of notice-and-comment rulemaking that is generally required to merit such deference.[10] (J.A. 926-941.) *See, e.g.*, *Buffalo Transp., Inc. v. United States*, 844 F.3d 381, 385 (2d Cir. 2016).

NHTSA also errs in arguing that OMB's interpretation is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). No deference of any sort applies when, as here, the language of the applicable statute is unambiguous. And OMB's reasoning lacks persuasive force in any event. OMB rejects *NRDC*'s conclusion that the Improvements Act applies to the CAFE penalty by summarily describing this Court's

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[10] The Alliance's reliance (Br. 19) on *Prime Time International Co. v. Vilsack* is misplaced because that case involved OMB guidelines issued pursuant to notice-and-comment procedures. *See* 599 F.3d 678, 681-85 (D.C. Cir. 2010).

reasoning as "incorrect and dicta." (J.A. 932.) OMB issued its opinion letter at NHTSA's request following the decision in *NRDC* and when it was certain that petitioners would also challenge the Repeal Rule. (J.A. 730-748, 926, 934.) This Court has already held that such "an interpretation advanced in contemplation of litigation" is not entitled to deference. *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004) (collecting cases). And OMB's opinion letter reflects a sharp change in its own position, since OMB had previously concluded that the CAFE penalty *was* subject to adjustment under the Inflation Adjustment Act. (J.A. 82, 114.) Such inconsistency in an agency's position severely diminishes any persuasive force it otherwise might have had. *See Buffalo Transp.,* 844 F.3d at 385.

POINT II

NHTSA CANNOT REDUCE THE CAFE PENALTY BASED ON A BELATED FINDING OF NEGATIVE ECONOMIC IMPACT

A. It Is Too Late to Invoke the Improvements Act's Negative-Economic-Impact Exception.

As the States explained in their opening brief (at 54-55), and as *NRDC* held, the Improvements Act's "highly circumscribed schedule," 894 F.3d at 109 (quotation marks omitted), governs both the initial catch-up adjustment *and* any discretionary change in the amount of the catch-up adjustment under the Act's negative-economic-impact exception. Although the Act left agencies some discretion regarding "the *amount* of the initial catch-up adjustment," it provided agencies with "no . . . discretion regarding the *timing*." *Id.* (emphasis added). NHTSA's attempt to invoke the exception now to avoid the inflation adjustment mandated by the Act is thus years too late.

NHTSA's argument to this Court boils down to the absurd proposition that the Improvements Act imposes no timeline *at all* for

invoking the negative-economic-impact exception.[11] (NHTSA Br. 36-37.) This Court held to the contrary in *NRDC*, recognizing that the Act sets a strict and mandatory deadline for the initial catch-up adjustment, and that the exception applies only to that adjustment. *See* 894 F.3d at 109; 28 U.S.C. § 2461 note sec. 4(c)(1)(A). Here, NHTSA previously finalized that initial catch-up adjustment in 2016—as required by the Act—and declined to invoke the exception. *See* Civil Penalties Rule, 81 Fed. Reg. 95,489, 95,490 (Dec. 28, 2016) (J.A. 685). And since that time, agencies were required under the Act to make four more annual adjustments to their penalties. *See* 28 U.S.C. § 2461 note sec. 4(a), (b)(2) (requiring "[s]ubsequent adjustments" "not later than January 15 of every year"). Nothing in the Improvements Act contemplates that NHTSA would now, years later, be able to invoke an exception that even NHTSA acknowledges "is part of making the initial catch-up adjustment." 84 Fed. Reg. at 36,021 (S.A. 15.)

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[11] Even the Alliance disagrees with this argument, recognizing that the Improvements Act contains a "deadline . . . for the determination of the 'catch-up' adjustment." (Alliance Br. 51.)

NHTSA attempts to score a point by saying that petitioners do not agree on precisely "when NHTSA needed to invoke the exception" (NHTSA Br. 39), but it simply misconstrues petitioners' argument. Petitioners merely pointed out that there were multiple opportunities for NHTSA to make a negative-economic-impact finding under the Act—but *all of them* were in connection with the initial catch-up adjustment, which was finalized in 2016. There is no support for NHTSA's illogical leap that any perceived flexibility for the initial adjustment implies that there is "no deadline" at all to invoke the exception—even three years later.

NHTSA is also wrong to suggest (Br. 37-38) that it would have been impossible for an agency to finalize the negative-economic-impact exception by the Act's deadlines for agencies to make the initial catch-up adjustment. For one thing, OMB itself disagreed and outlined procedures to meet that deadline, directing agencies to submit requests for reduced catch-up adjustments "no later than May 2, 2016." (J.A. 516.) In addition, there is no indication that NHTSA had difficulty under the Act's schedule to make the decision that it did—namely, that there was no negative economic impact that would warrant a reduced inflation adjustment.

Finally, NHTSA errs in asserting that the States "presume that when an agency misses a deadline, the agency's subsequent actions are unauthorized or unlawful." (NHTSA Br. 38.) This case is not just about a missed deadline. Rather, NHTSA here actually finalized the Improvements Act's mandatory adjustment to the CAFE penalty in December 2016 and declined to invoke the negative-economic-impact exception despite ample opportunity to do so. The question here is thus whether NHTSA has authority to *reverse* that final agency action on the basis of an exception that the Act required to be invoked four years ago.

NHTSA has no such authority. NHTSA itself has acknowledged that the Improvements Act is a "one-way ratchet" that limits the negative-economic-impact exception to only the initial catch-up adjustment, and requires subsequent annual adjustments for which the exception is not available. 84 Fed. Reg. at 36,021 (S.A. 15). This design functions like the anti-backsliding provision in *Abraham*, which prevented an agency from reversing an adjustment after it had become final. As in *Abraham*, NHTSA's claim here of "unlimited discretion to revisit and amend" the initial adjustment would "eviscerate" Congress's highly calibrated schedule. *See* 355 F.3d at 200.

B. NHTSA's Application of the Negative-Economic-Impact Exception Was Fatally Flawed in Any Event.

Even if it were authorized, NHTSA's invocation of the negative-economic-impact exception would fail for a separate reason: NHTSA failed to "cogently explain" the basis for applying the exception or show that its decision "was the product of reasoned decisionmaking." *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 52 (1983).

1. NHTSA's reliance on EPCA was inappropriate and fails to justify the exception.

When NHTSA invoked the Improvements Act's negative-economic-impact exception, it relied on the statutory factors governing a penalty increase under EPCA. As the States have explained (Br. 59-63), the two frameworks are fundamentally different—EPCA carries a strong presumption against a penalty increase, while the Improvements Act mandates an inflation adjustment absent extraordinary circumstances. By importing the EPCA standard, NHTSA improperly lowered its burden to justify an exception to the Act's presumptively mandatory inflation adjustment. NHTSA now appears to concede that this approach was

flawed, disclaiming its reliance on the EPCA presumption.[12] (NHTSA Br. 44.)

Notwithstanding this concession, NHTSA now asserts (Br. 42-44) that the EPCA factors are still relevant to the negative-economic-impact inquiry. That argument is wrong for several reasons. First, NHTSA never concluded in the Repeal Rule that maintaining the penalty at $14 would *actually* cause harm to employment, competition, or domestic manufacturers, as NHTSA now contends. (NHTSA Br. 42-43.) Rather, its analysis under the inapposite EPCA framework primarily concluded that it could not *rule out* the possibility that a $14 penalty would cause such harm. 84 Fed. Reg. 36,023-26 (S.A. 17-20); *see also, e.g.*, *id.* at 36,024 (S.A. 18) (NHTSA "does not have the evidence" to rule out adverse employment effects). That analysis cannot substitute for the affirmative findings of economic harm that the Improvements Act requires, nor can NHTSA now engage in post hoc reasoning under the proper Improvements Act framework. *See State Farm*, 463 U.S. at 50.

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[12] In light of NHTSA's abandonment of this argument, the Alliance's attempts (Br. 38-42) to defend it are inapposite. *See Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990).

Second, NHTSA's analysis of the EPCA factors was fundamentally flawed. As just one example, the very evidence on which NHTSA relied contradicts its claim (Br. 42-43) that domestic manufacturers are particularly disadvantaged by a $14 penalty. Rather, the data shows that the domestic fleet has outperformed the import fleet when judged against their respective CAFE standards. (J.A. 997-1001 (showing the domestic fleet exceeded the CAFE standard by 0.8 mpg for model year 2016 whereas the import fleet exceeded the CAFE standard by 0.7 mpg).)

2. NHTSA failed to consider relevant factors.

NHTSA also asserts that the increased financial burden on manufacturers from a $14 penalty independently supports a negative economic impact. (NHTSA Br. 43-44.) But as the States have explained (Br. 63-67), an increase in penalties on violators cannot constitute evidence of a negative economic impact standing alone; otherwise, nearly every penalty that is not essentially de minimis would merit the exception.[13] (NHTSA Br. 45-46.)

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[13] The Alliance argues (Br. 46) that potential abuse of the exception is "'purely hypothetical'" because, to date, no other agency has attempted to invoke it. But the Alliance does not dispute that, under NHTSA's

In any event, NHTSA overstates the magnitude of the additional penalties automakers are likely to pay. The model NHTSA used to project potential penalties did not account for manufacturers' use of credits, and thus does not accurately reflect the out-of-pocket payments automakers will have to make. *See, e.g.*, 84 Fed. Reg. 36,033 (S.A. 27 (noting that "[p]rojected penalties could be offset by the application of credits")). NHTSA's own data shows that manufacturers avoided paying between ninety and one hundred percent of penalties through credits for model years 2012 through 2016. (J.A. 925.) There is also no reason to assume, as NHTSA did, that an increase in penalties—even one that exceeds a billion dollars annually—would have any substantial economic effect on automakers whose collective annual revenues vastly exceed that amount.[14] (*See, e.g.*, J.A. 810 (estimating penalty costs at roughly 0.2 percent of industry's annual revenue).)

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interpretation, the exception would be available for nearly every penalty, and that an agency would have unlimited time to invoke it.

[14] The projected cost increase of the penalty would be only one-tenth of one percent of the average price of a new car. *See* 84 Fed. Reg. at 36,033 (Table 1) (S.A. 27) (approximately $900 million in penalties per year divided by 17 million vehicles).

NHTSA separately errs (Br. 45-46) in interpreting the Improvements Act to preclude consideration of the economic benefits that a penalty adjustment will create. As the States have already explained (States Br. 66-67), there is no such prohibition in the statute. Nor would it make sense for Congress to have enacted such a prohibition, which would empower an agency to avoid even overwhelmingly beneficial adjustments based solely on predictions of minor adverse impacts. There is no indication that Congress implicitly intended agencies to so easily evade its goal of "tackl[ing] the recurring issue of stagnant civil monetary penalties" across all programs and all federal agencies. *See NRDC*, 894 F.3d at 111.

3. NHTSA improperly failed to consider applying smaller catch-up adjustments.

NHTSA still offers no valid explanation for its failure to consider a smaller adjustment than a full reversion to the $5.50 penalty that was put into place in 1997. As the States explained, that reversion cannot be squared with the plain text of the Improvements Act, which mandates *some* increase in the CAFE penalty in order to invoke the Act's exception,

even if the increase is less than the presumptively mandatory catch-up adjustment. (States Br. 67-68.)

Rather than reconcile its argument with the text and purpose of the Improvements Act, NHTSA resorts to mischaracterization, asserting that petitioners demanded that it analyze "each potential dollar amount" between $5.50 and $14. (NHTSA Br. 49-50.) But state petitioners never made such a request. Rather, they only pointed out that it was incumbent on NHTSA to consider whether a there was some middle ground between the required amount ($14) and no adjustment at all. (States Br. 68-69.) But NHTSA failed to consider *any* alternative.

NHTSA now asserts that "even one quarter of the first adjustment [from $5.50 to $14] could result in over one hundred million dollars of additional annual penalties." (NHTSA Br. 49.) But the Repeal Rule itself did not analyze a "one quarter" increase, and so NHTSA may not rely on that justification now. *See State Farm*, 463 U.S. at 50. NHTSA's math is wrong in any event. The CAFE Model that NHTSA used for its projections in the Repeal Rule is a complex tool designed to predict how manufacturers comply with CAFE standards based on various inputs, including

CAFE standards and fuel prices.[15] It does not employ a simple, linear function to generate penalty data based on changing penalty amounts. Thus, NHTSA's post hoc assertion (Br. 49) that one may simply divide by four to derive the total penalty sums owed under a "one quarter" increase does not come close to approximating how the model works.

POINT III

NHTSA VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

As the States have explained, NHTSA did not take the required "hard look" at the environmental consequences of the Repeal Rule because it made no attempt to quantify the greenhouse gas emissions that will result from the reversion of the penalty from $14 to $5.50, or the resulting impact those emissions will have on climate change and public health. (States Br. 70-72.)

NHTSA does not dispute that its Environmental Assessment failed to analyze the emissions effects of the Repeal Rule, or that it was feasible to undertake that analysis. Instead, NHTSA insists that it was simply

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[15] *See* NHTSA, U.S. Dep't of Transp., *Compliance and Effects Modeling System* (internet).

more efficient to rely on a 2018 draft Environmental Impact Statement (EIS) and a 2012 EIS, which were produced in connection with changes to the CAFE standards and did not specifically consider a change in the penalty. (NHTSA Br. 51-56.) But an agency may not rely on convenience to evade NEPA's requirements. NEPA requires agencies to consider the impacts of the *specific* action at issue—here, decreasing the CAFE penalty from $14 to $5.50. *See, e.g.*, *Protect Our Cmtys. Found. v. LaCounte*, 939 F.3d 1029, 1039 (9th Cir. 2019). NHTSA indisputably failed to conduct such analysis here.

NHTSA argues that "[t]here is nothing unusual" about an Environmental Assessment that incorporates "the assumptions" of a prior EIS. (NHTSA Br. 52 (quotation marks omitted).) But the cases in which courts have sanctioned that approach are fundamentally different. For example, in *Ground Zero Center For Non-Violent Action v. United States Department of Navy*, the Navy's Environmental Assessment relied on assumptions from a prior EIS that addressed the *same project*. *See* 383 F.3d 1082, 1085 (9th Cir. 2004). And even then the newer Environmental Assessment still analyzed the "new requirements and impacts not

addressed in the [prior] EIS."[16] *Id.* at 1085. Here, neither the 2012 EIS nor the 2018 draft EIS looked at the impacts of a change in the CAFE penalty by any amount, much less the specific change made by the Repeal Rule. Nor did NHTSA analyze the "new requirements and impacts not addressed" in its prior EIS. *See id.*

NHTSA's post hoc suggestion that its Environmental Assessment here was properly "tier[ed]" to its earlier EISes misses the mark. (NHTSA Br. 52 (quotation marks omitted).) As the NEPA regulations explain, "[t]iering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements)." 40 C.F.R. § 1508.28. But the Repeal Rule is not a "narrower" project that builds on or implements the same "program, plan, or policy" analyzed in a prior EIS. *See id.* § 1508.28(a). The 2012 and 2018 EISes addressed changes to the substantive CAFE standards but did not analyze

[16] In any event, the court never ruled on the adequacy of the Environmental Assessment because it determined that NEPA did not apply. *Ground Zero Ctr.*, 383 F.3d at 1087-88.

the effect of a direct change to the civil monetary penalty itself. In any event, even if tiering were appropriate, NHTSA was still required to analyze the incremental impact of the Repeal Rule—and it did not do so.[17] *See Oregon Nat. Res. Council v. United States Bureau of Land Mgmt.*, 470 F.3d 818, 823 (9th Cir. 2006).

[17] NHTSA's reliance (Br. 54-55) on *Sierra Club v. United States Dep't of Energy*, is misplaced. *See* 867 F.3d 189 (D.C. Cir. 2017). Although the agency's EIS in that case did not disclose the amount of emissions the project would generate, that information *was* provided in a different agency's supplemental environmental report for the same project. *See id.* at 195, 202.

CONCLUSION

The Court should vacate NHTSA's reversal of the 2016 CAFE penalty inflation adjustments.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,755 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

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