

# 19-2395(L)

19-2508 (Con)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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

v.

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

*Respondents,*

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

*Intervenors.*

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

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**BRIEF OF *AMICUS CURIAE* TESLA, INC.  
IN SUPPORT OF PETITIONERS**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), *Amicus Curiae* Tesla, Inc. (Tesla) hereby submits the following corporate disclosure statement:

Tesla is a publicly traded corporation (TSLA), incorporated in the State of Delaware on July 1, 2003, with headquarters located at 3500 Deer Creek Road, Palo Alto, CA 94304.

Tesla designs, develops, manufactures, and sells high-performance, fully electric vehicles and designs, manufactures, installs, and sells solar energy generation and energy storage products.

Tesla does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

Respectfully Submitted,  
/s/ Joseph Mendelson III

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## INTEREST OF *AMICUS CURIAE*

Tesla's mission is to accelerate the world's transition to sustainable energy. Moreover, Tesla agrees with the scientific consensus that the world will not be able to solve the climate change crisis without directly reducing air pollutant emissions—including greenhouse gases—from the transportation and power sectors.<sup>1</sup>

To accomplish its mission, Tesla designs, develops, manufactures, and sells high-performance, fully electric vehicles, solar energy products, and advanced battery storage systems. Tesla currently produces and sells three EVs: the Model S sedan, the Model X sport utility vehicle, and the Model 3 sedan. All Tesla vehicles offer high-performance and functionality, attractive styling, and zero emissions.

Tesla also intends to bring additional all-electric vehicles to market in the future, including the Model Y (crossover SUV), the Tesla semi-truck, Cybertruck (pickup truck), and a new version of the Tesla Roadster. Tesla has invested significantly in the research and development and production of fully electric vehicles that meet consumers' range and performance expectations. This requires substantial design,

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<sup>1</sup> In accordance with 2<sup>nd</sup> Circuit Rule 29.1(b), Tesla makes the following disclosure statements:

Pursuant to Fed. R. App. P. 29(a)(4)(E)(i), no party's counsel authored the brief in whole or in part.

Pursuant to Fed. R. App. P. 29(a)(4)(E)(ii), no party nor party's counsel contributed money that was intended to fund preparing or submitting this brief.

Pursuant to Fed. R. App. P. 29(a)(4)(E)(iii), no person other the *amicus curiae* contributed money that was intended to fund preparing or submitting this brief.

engineering, and integration work on almost every system of our vehicles. Our design and vehicle engineering capabilities, combined with the technical advancements of our powertrain system, have enabled us to manufacture electric vehicles that have been widely accepted in the marketplace and overcome the design, styling, and performance issues that have historically limited broad adoption of electric vehicles

As an automobile manufacturer,<sup>2</sup> Tesla is subject to regulation under National Highway Traffic Safety Administration's ("NHTSA") corporate average fuel economy ("CAFE") program as well as emission reduction performance standards administered by the U.S. Environmental Protection Agency ("EPA") and a number of states.

Tesla strongly supports maintaining the stability and increasing the stringency of these efficiency and emission-reduction performance standards.<sup>3</sup> NHTSA's attempted revocation of the adjustment to the civil penalty rates in the CAFE program undermines the stability of this program, diminishes the value of performance-based incentives that

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<sup>2</sup> See 49 U.S.C. §32901(a)(14) (2018); See also, EPA, NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62624 (Oct. 15, 2012).

<sup>3</sup> See Tesla, *Comments on the proposed "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks,"* 83 Fed. Reg. 42986 (Aug. 24, 2018), (filed Oct. 26, 2018) (opposing reductions in the stringency of the current CAFE standards), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-4186>

electric vehicle manufacturers such as Tesla accrue under the standards, and reduces the inducement for investment in vehicle innovation.<sup>4</sup>

A separate brief filed on behalf of Tesla, Inc. is warranted for the reasons given in Tesla's motion for leave, and because Tesla is unaware of other entities intending to participate as *amici* whose views and interests are substantially similar to those of Tesla.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Improvements Act ("Improvements Act") to ensure that, *inter alia*, civil monetary penalties continued to have a deterrent effect and to promote compliance with laws such as the federal Corporate Average Fuel Economy (CAFE), 49 U.S.C. § 32901, *et seq.*, standards.

Application of the inflation adjusted civil penalty to the CAFE standards creates a stable regulatory environment under which all auto manufacturers can exercise their business judgment on the most advantageous level of investment in technology and innovation. As a leader in automobile innovation, Tesla strongly supports maintaining the stability and increasing the stringency of these efficiency and emission-reduction performance standards, including its enforcement regime.

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<sup>4</sup> See, Tesla, Inc., *SEC Form 10-K* (Feb. 19, 2019) at 48 (discussing continued expectations of earning regulatory compliance credits under federal programs such as CAFE), <https://ir.tesla.com/static-files/15df7636-8cd8-4b18-989b-4badeeda806c>

NHTSA's belated revocation of the Congressionally mandated adjustments to the CAFE civil penalty is arbitrary and capricious. The action undermines the stability of this program, diminishes the value of performance-based incentives that electric vehicle manufacturers, such as Tesla, accrue under the standards, and reduces the inducement for investment in vehicle innovation.

Further, in undertaking its actions to revoke the inflation adjustment, NHTSA ignores the substantial benefits that energy-efficient vehicle manufacturers like Tesla have provided to the American economy.

Maintaining the inflation adjustment to the CAFE civil penalties will not only deter non-compliance but also promote greater vehicle innovation, create jobs, and incent domestic vehicle manufacturers to bring forward technology that will be competitive in the expanding global electric vehicle marketplace.

## **ARGUMENT**

NHTSA's previous and hasty action delaying the application of the Federal Civil Penalties Inflation Adjustment Improvements Act ("Improvements Act"), Pub. L. No. 114-74, § 701, 129 Stat. 599 (2015), to the CAFE program has been subject to this Court's critical review. *Nat. Res. Def. Counsel v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2<sup>nd</sup> Cir. 2018) (striking down NHTSA's action). The agency's final action denying the application of the Improvements Act to the CAFE civil penalty, 84 Fed. Reg. 36007 (July 26, 2019) (JA \_\_), currently under review here, deserves equal scrutiny.

NHTSA's revocation of the Congressionally mandated adjustments to the CAFE civil penalty is arbitrary and capricious. Further, the agency's action undermines the stability of the CAFE program, diminishes the value of performance-based incentives that manufacturers of efficient vehicles accrue under the standards, and reduces the inducement for investment in vehicle innovation.

### **I. Applying the Improvements Act's Inflation Adjustment Preserves the Purpose of the CAFE Program**

In 2015, Congress enacted the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, which contained the Improvements Act directing federal agencies to adjust for inflation the civil monetary penalties provided in existing law excepting only the Internal Revenue Code of 1986 and the Tariff Act of 1930. *Id.* at § 701, § 4. In July 2016, NHTSA implemented the legislation and initially adjusted the civil penalty from \$5.50 to \$14 per tenth of a mile per gallon (mpg) beginning in Model Year (MY) 2019. 81 Fed. Reg. 95489 (Dec. 28, 2019) (JA \_\_\_).

The policy goal of the CAFE civil penalty provision is “clearly to discourage noncompliance.”<sup>5</sup> As directed by Congress, NHTSA's adjustment enhanced the stringency of the EPA and NHTSA jointly finalized regulations implementing the national program of greenhouse gas emissions and fuel economy standards for model year vehicles 2017 thru 2025 by further encouraging manufacturers to comply with the

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<sup>5</sup> See, 81 Fed. Reg. 95489, 95490 (Dec. 28, 2016) (quoting *United States v. General Motors*, 385 F. Supp. 598, 604 (D.D.C. 1974)).

CAFE standards.<sup>6</sup> Consistent with the agreement reached between the federal government, California, and the major automobile manufacturers in setting these CAFE standards, NHTSA's adjustment provided "a reasonable amount of lead time for manufacturers to adjust their plans and products to take into account the substantial change in penalty level."<sup>7</sup> 81 Fed. Reg. at 95941 (JA \_\_\_\_).

Taken together, the existing CAFE standards and adjusted civil penalty created a stable regulatory environment under which all auto manufacturers could exercise their business judgment on the level of investment in the technology and innovation needed for their fleets to meet a CAFE standard equivalent, at the time, of 54.5 miles per gallon by 2025.<sup>8</sup>

When Congress passed the Improvements Act it did so aware that inflation was eroding the incentive for regulated parties under numerous statutes, such as auto manufacturers under the CAFE program, to comply with existing standards because the financial consequences of invoking civil penalties continued to lessen. Application of the Improvements Act adjustment to the CAFE civil penalty, as required by Congress, deters any erosion in the incentive to innovate and comply with standards

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<sup>6</sup> See, 77 Fed. Reg. 62624 (Oct. 15, 2012).

<sup>7</sup> 77 Fed. Reg. at 62768 (describing support from the auto manufacturers and the United Auto Workers to extend the standards through MY 2025).

<sup>8</sup> 77 Fed. Reg. at 62663 ("Due to the relatively long lead time for the later model years in this rule, it is quite possible that innovations may arise that the agencies (and the automobile manufacturers) are not considering today, which may even become commonplace by MY 2025.").

and supports the important energy conservation public policies embodied in the Energy Policy and Conservation Act (EPCA), including “to provide for improved energy efficiency of motor vehicles.”<sup>9</sup> NHTSA’s disregard for Congress’ intent and its current efforts to revoke the 2016 application of the inflation adjustment undermines the continuity of the agency’s well-establish goals annunciated in past rulemakings and creates the undesirable situation where manufacturing innovation in the automotive field is less rewarded and non-compliance with the standards and under performance increasingly becomes a financially-appealing strategy.

## **II. Revoking the Inflation Adjustment to the CAFE Civil Penalty Will Disincentivize Innovation**

Consistent with the policy goals of the innovation incentives embodied in the CAFE standards, in June of 2012, Tesla commenced deliveries of its critically acclaimed, battery-electric Model S sedan and continues to bring to market new, highly efficient, zero emission vehicles like the Model X and Model 3. Through development, manufacture, and sale of the most efficient, electric vehicle in the marketplace, Tesla’s vehicles significantly exceed the average fuel economy of any vehicles in their vehicle category. In MY 2018, NHTSA calculated that Tesla’s fleet would need to meet a fuel economy standard of 37.7 miles per gallon (“mpg”). Tesla’s

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<sup>9</sup> 42 U.S.C. §6201(5) (2018).

innovative application of technology, however, resulted in Tesla having a CAFE fleet value of 416.9 mpg.<sup>10</sup>

Under the CAFE enforcement regime, Tesla and other vehicle manufacturers are rewarded for this efficiency performance by accumulating compliance credits that it can bank, trade, and transfer to under-performing manufacturers as these manufacturers seek to meet their annual compliance with the standards.<sup>11</sup> *See*, 49 U.S.C. § 32903 (2018). The CAFE credits Tesla derived from the performance and ramp up in manufacturing volume for MY 2017, the year Tesla first introduced its Model 3, were the result of years of investment in research and development.<sup>12</sup>

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<sup>10</sup> NHTSA, *Manufacturer Projected Fuel Economy Performance Report* (April 30, 2018), [https://one.nhtsa.gov/CAFE\\_PIC/MY\\_2017\\_and\\_2018\\_Projected\\_Fuel\\_Economy\\_Performance\\_Report.pdf](https://one.nhtsa.gov/CAFE_PIC/MY_2017_and_2018_Projected_Fuel_Economy_Performance_Report.pdf)

<sup>11</sup> *See* Tesla, Inc., *SEC Form 10-K* (Feb. 19, 2019) at 11 (“In connection with the production, delivery, placement into service and ongoing operation of our zero emission vehicles, charging infrastructure and solar systems in global markets, we have earned and will continue to earn various tradable regulatory credits. We have sold these credits, and will continue to sell future credits, to automotive companies and other regulated entities who can use the credits to comply with emission standards and other regulatory requirements.”), <https://ir.tesla.com/static-files/15df7636-8cd8-4b18-989b-4badeeda806c>

<sup>12</sup> *See* Tesla Motors, Inc., *First Quarter 2012 Shareholder Letter* (May 9, 2012) (describing increases in R&D expenses due to increasing investments in Model S manufacturing preparedness, process validation, prototype builds and extensive testing at both the car and component levels), <https://ir.tesla.com/static-files/417d6054-dcf5-405c-84eb-cb90036cbacc>; *See e.g.*, Mike Monticello, *Tesla Builds a 4-Door - New and Future Cars*, Road & Track (Oct. 23, 2008) (discussing Tesla’s announcement of the Model S in 2008 four years before the vehicle reached the market), <https://web.archive.org/web/20100604025652/http://www.roadandtrack.com/future-cars/tesla-builds-a-4-door>

Despite the success story of the CAFE enforcement regime in incentivizing such investment and delivering on innovative vehicle efficiency, NHTSA's rollback of the inflation adjustment to the CAFE program will interrupt and continue to diminish this incentive to innovate as the sanction of the civil penalty faced by technologically-stagnant manufacturers fails to keep pace with inflation.<sup>13</sup> As the Intervenor's Alliance of Automobile Manufacturers and Association of Global Automakers have noted, "the price of credits is connected to the penalty amount."<sup>14</sup> The National Academies of Sciences has acknowledged that prices of transactions for CAFE credits are likely lower than the existing penalty.<sup>15</sup> The rollback of the adjustment back to \$5.50 will lead to a de facto devaluation of these credits, penalizing automakers that have been leaders in deploying technological innovation.

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<sup>13</sup> See Cong. Research Serv., *Adjustment of Civil Monetary Penalties for Inflation* (Feb. 11, 2008) at 4 ("Civil monetary penalties are one way agencies enforce federal laws and regulations. . . . Over time, however, inflation can reduce the original punitive and deterrent value of civil penalty maximums."), [https://www.everycrsreport.com/files/20080211\\_RL34368\\_702e35ad8722d53159055717f3d18471810be77a.pdf](https://www.everycrsreport.com/files/20080211_RL34368_702e35ad8722d53159055717f3d18471810be77a.pdf)

<sup>14</sup> Auto Alliance and Global Automakers, Petition for Partial Reconsideration of the Interim Final Rule on Civil Penalties, NHTSA Docket 2016-0075, 81 Fed. Reg. 43524 (July 5, 2016) (filed Aug. 1, 2016) at 3, <https://www.globalautomakers.org/OldSiteContentAssets/agency-comments/Global-Automakers-and-the-Auto-Alliance-Submit-a-Joint-Petition-for-Reconsideration-of-CAFE-Civil-Penalties-assets/joint-petition-for-reconsideration-cafe-civil-penalties-8-01-16-final-pdf>

<sup>15</sup> See National Research Council, *Cost, Effectiveness, and Deployment of Fuel Economy Technologies for Light-Duty Vehicles* (2015) at 345, <https://www.nap.edu/catalog/21744/cost-effectiveness-and-deployment-of-fuel-economy-technologies-for-light-duty-vehicles>

Indeed, NHTSA itself has stated that applying the full inflation adjustment to the original 1975 CAFE civil penalty of \$5 would result in an adjusted penalty of \$22. 81 Fed. Reg. 43524, 43526 (July 5, 2016). As this exemplifies, reinstating the \$5.50 civil penalty level results in a constant and significant devaluing of the compliance credits earned by manufacturers that invested in designing, engineering, and building vehicles that outperform the standards. It also reveals how a stagnating \$5.50 penalty is inconsistent with the Improvements Act's goal of ensuring that civil penalties continue to serve their deterrent purposes and prevent the erosion of both EPCA's objective of improving motor vehicle energy efficiency and the CAFE statutory framework of rewarding innovation. See *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1205 (9th Cir. 2008) ("[E]nergy conservation is the fundamental purpose of [EPCA] and an explicit statutory factor that NHTSA 'shall' consider."); See also, *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1339 (D.C. Cir. 1986) (describing EPCA as a "technology forcing" statute that contained mandatory fuel economy standards because "market forces . . . may not be strong enough to bring about the necessary fuel conservation which a national energy policy demands."); See also, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 358 (D. Vt. 2007) ("EPCA . . . was a technology-forcing statute").

### **III. Adjusting the CAFE Civil Penalty for Inflation Provides Significant Economic Benefits**

Consistent with the goals of EPCA and the CAFE program, Tesla exemplifies an American auto manufacturer that built a business focused on innovation, engineering, and producing the most efficient vehicles in the marketplace. In its action to revoke the adjustment to the CAFE civil penalty, NHTSA pushes aside the positive economic benefits provided by these innovative technologies that are deployed to meet and exceed the standards and omits any analysis of how adjusting the civil penalty will accelerate delivery of these benefits.

In implementing the current CAFE standards, NHTSA stated:

The agencies anticipate that these final standards will spur the development of a new generation of clean and more fuel-efficient cars and trucks through innovative technologies and manufacturing that will, in turn, *spur economic growth and create high quality domestic jobs*, enhance our energy security, and improve our environment. 77 Fed. Reg. at 62632 (emphasis added).

NHTSA now changes course and suggests ensuring the robust standards, including adjustment of the civil penalty deterrent to non-compliance, does no such thing. See 84 Fed. Reg. at 36023. Rather, NHTSA seeks to pigeonhole belatedly the CAFE civil penalties into a narrow “negative economic impact” exemption as its justification for not increasing the civic penalty. See *NRDC v. NHTSA*, 894 F.3d at 109. In attempting to do so, the agency disregards the Improvements Act’s

requirement that it demonstrate a “negative economic impact” to avoid the mandatory inflation adjustment and instead invokes the purported “heavy burden” that a civil penalty adjustment under EPCA cannot have a “substantial deleterious impact on the economy.” 84 Fed. Reg. 36022; See State Petitioners’ Brief at 60-63.

Even setting aside this sleight of hand and inappropriate burden shifting, NHTSA’s belated invocation of the “negative economic impact” exception is flawed on its face. As Tesla’s success exemplifies, in deterring non-compliance and incentivizing outperforming the CAFE standards, adjusting the civil penalty will yield economic benefits that NHTSA refuses to acknowledge. During the rulemaking, NHTSA dismissed comments from representatives of the electric vehicle industry addressing the benefits associated with adjusting the CAFE penalty.<sup>16</sup> Ignoring these benefits should be fatal to NHTSA’s current action. See, *Center for Biodiversity v. NHTSA*, 538 at 1198 (“[NHTSA] cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards.”); See Environmental Petitioners’ Brief at 42-45.

Tesla generates revenue through automotive sales, automotive leasing, and energy generation and storage sales. This revenue includes that derived from contractual agreements with other manufacturers to purchase compliance credits

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<sup>16</sup> See, e.g., Comments of O. Kevin Vincent, Vice President for Government, Regulatory and Safety Affairs, Workhorse Group, Inc. (Oct. 25, 2017), <https://www.regulations.gov/document?D=NHTSA-2017-0059-0016>

Tesla has earned by over complying with the CAFE standards. Tesla has used this revenue to expand direct investment in its cutting-edge auto manufacturing, to develop innovative new sustainable energy technologies and products, and to invest in new electric vehicle charging and support infrastructure throughout the country. Indeed, Tesla invests between 7 to 12% of its revenue in research and development annually.<sup>17</sup>

Tesla is an example of the economic benefits that can accrue by encouraging innovation in both statutory and enforcement regimes. Contrary to NHTSA's assertions, adjusting the CAFE civil penalty would reestablish a CAFE enforcement regime that incentivizes advanced manufacturing and the employment it creates, breeds greater competition in the automobile markets, and will not result in a significant increase of imported vehicles.

### **1. Strong CAFE Standards and an Adjusted Civil Penalty Create Jobs**

In the U.S., Tesla conducts vehicle manufacturing and assembly operations at its factory in Fremont, CA, and produces electric drive trains and manufacturers advanced battery packs, as well as Tesla's energy storage products, at its Gigafactory 1 in Sparks, NV. It also builds and services highly automated, high-volume manufacturing

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<sup>17</sup> Consistent with Tesla's investment in R & D, the CAFE statute authorizes the Secretary of Transportation to establish a program utilizing 50% of the civil penalties obtained through enforcement actions to support manufacturers in expanding, retooling, and equipping to produce advanced technology vehicles. See 49 U.S.C. §32912(e)(2).

machinery at its facility in Brooklyn Park, MN, and operates a tool and die facility in Grand Rapids, MI. Tesla produces solar energy products at its Gigafactory 2 in Buffalo, NY. Tesla continues to expand this domestic footprint having recently acquired two advanced technology companies Maxwell Technologies, Inc.<sup>18</sup> and Hibar Systems.<sup>19</sup>

Consistent, stringent, and enforceable performance standards are necessary to support continued innovation, to stimulate job growth, to save lives, and to ensure that automakers make investments in a cleaner transportation future for America. The regulatory certainty provided by these standards has contributed to billions of dollars in investments in the U.S. by Tesla and many other companies involved in clean transportation. Arbitrary and capricious refusal to adjust the civil penalty amount to account for inflation creates needless investment uncertainty. This harms Tesla's business by increasing current transaction costs associated with evaluating, planning, and making potential investments in its vehicle development and manufacturing expansion and supporting additional charging infrastructure deployment.<sup>20</sup>

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<sup>18</sup> Acquired on May 16, 2019, Maxwell Technologies, Inc. is an energy storage and power delivery products company.

<sup>19</sup> Hibar Systems is a leader in precision manufacturing of small cell batteries.

<sup>20</sup> See Tesla, Inc., *SEC Form 10-K* at 33 (Feb. 19, 2019) ("We need sufficient capital to fund our ongoing operations, ramp vehicle production, continue research and development projects, establish sales, delivery and service centers, build and deploy Superchargers, expand Gigafactory 1. . . and to make the investments in tooling and manufacturing capital required to introduce new vehicles, energy storage products and solar products."), <https://ir.tesla.com/static-files/15df7636-8cd8-4b18-989b-4badeeda806c>

Since the 2012 implementation of the current CAFE vehicle standards, Tesla's workforce has expanded from just over 1,400 employees to more than 40,000 worldwide, with more than 35,000 jobs in the U.S. Similarly, over that time, Tesla's domestic vehicle manufacturing output has increased from about 2,650 vehicles delivered in all of 2012 to more than 97,000 vehicles delivered just in Q3 2019. Since its introduction in 2017, the Tesla Model 3 has become one of the top selling sedans in the country.<sup>21</sup>

Tesla is the largest manufacturing employer in California and the only automaker building electric vehicles at scale in the state and, further, the only automaker building any kind of passenger vehicle at scale in California. Tesla employs more than 20,000 workers in California. As the recent report "The Economic Contribution of Tesla in California" details, Tesla also supports over 31,000 additional jobs in the state, and the company's economic impact in California goes far beyond that of its immediate employees and includes infusing over \$4 billion into the California economy in 2017 alone.<sup>22</sup>

Tesla's employment impacts are not just seen in California. Since its inception, Tesla has created a supply chain with suppliers and contractors in nearly every state in

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<sup>21</sup> See, e.g., *These 6 vehicles were the hottest-selling cars of 2018: Jeep, Toyota, Tesla make the list*, USA Today, Jan. 3, 2019, <https://www.usatoday.com/story/money/cars/2019/01/03/jeep-honda-toyota-subaru-lincoln-vehicles/2466015002/>

<sup>22</sup> IHS Markit, *The Economic Contribution of Tesla in California* (May 2018), <https://cdn.ihs.com/www/pdf/TeslaEconomicFootprintReport-51518.pdf>

the nation, providing billions of dollars of investment and tens of thousands of jobs across the country. Tesla also invests heavily in expanding electric vehicle charging and service infrastructure and currently operates over 780 supercharger stations, 100 service centers, and 120 stores in the U.S. across almost every state. More recently, this investment includes plans to bring to market new, highly energy-efficient vehicles such as the Model Y cross-over, the Cybertruck pickup truck, and a Class 8 heavy duty semi-truck.

While NHTSA chooses to ignore it, continued stringency in the existing CAFE performance standards, as well as properly adjusted civil penalties that enforce and deter non-compliance with the standards, will continue to create incentives for all innovating vehicle manufacturers to build on the successes demonstrated by Tesla.

## **2. Adjusting the CAFE Civil Penalty Will Have a Positive Effect on Competition**

Tesla's manufacturing provides significant other economic benefits to the country. Just as NHTSA overstates the negative economic benefits associated with adjustments in the civil penalty, the agency also fails to account for the positive economic benefits from modernizing and updating the CAFE compliance regime. Inflation adjusted civil penalties will induce greater investment in innovation that

reduces oil consumption and has the co-benefits of reducing emissions,<sup>23</sup> providing consumers with better vehicles,<sup>24</sup> and improving vehicle safety.<sup>25</sup>

Not only do Tesla vehicles provide significant efficiency gains compared to conventional vehicles, Tesla manufactures vehicles that do not sacrifice performance, and that allow consumers to accrue other significant benefits (such as zero emissions). This is spurring competition to develop better and more efficient vehicles, in particular electric vehicles. The projections for global adoption of electric vehicle technology are significant. For example, the International Energy Agency forecasts 125 million electric vehicles by 2030<sup>26</sup> and Bloomberg New Energy Finance predicts a global fleet of over 540 million electric vehicles in 2040.<sup>27</sup> NHTSA should be ensuring that adjustments to the CAFE civil penalties foster more stability and incentivizes this innovation so domestic manufacturers can continue to lead in this burgeoning

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<sup>23</sup> See, e.g., U.S. Dep't of Energy, *Reducing Pollution with Electric Vehicles*, <https://www.energy.gov/eere/electricvehicles/reducing-pollution-electric-vehicles>

<sup>24</sup> See, e.g., *10 Most Satisfying Cars*, Consumers Report, Jan. 31, 2019 (naming Tesla's Model 3 as the "most satisfying car" on the market), <https://www.consumerreports.org/car-reliability-owner-satisfaction/10-most-satisfying-cars-owner-satisfaction/>

<sup>25</sup> See, e.g., *Tesla Model 3 earns top safety honor from IIHS: It's 'a very safe car,'* USA Today, Sept. 19, 2019, <https://www.usatoday.com/story/money/cars/2019/09/19/tesla-model-3-iihs-top-safety-pick/2354457001/>

<sup>26</sup> Int'l Energy Agency, *Strong policy and falling battery costs drive another record year for electric cars*, (May 30, 2018), <https://www.iea.org/news/strong-policy-and-falling-battery-costs-drive-another-record-year-for-electric-cars>

<sup>27</sup> Bloomberg New Energy Finance, *Electric Vehicle Outlook 2019* (May 2019), <https://about.bnef.com/electric-vehicle-outlook/#toc-viewreport>

worldwide marketplace. NHTSA's attempt to undercut the deterrent effect of the civil penalties, however, reverses this market stability and creates an alternative enforcement policy that is inconsistent with Congressional intent, as well as with the Administration's own manufacturing policy goals of fostering U.S. global leadership in vehicle-related intellectual property, electric vehicle technology, and advanced lithium ion battery development.<sup>28</sup>

### **3. Adjusting the CAFE Civil Penalty Will Not Result in a Significant Increase in Imports**

All Tesla vehicles sold in the U.S. are manufactured in the U.S. and Tesla does not import any vehicles into the country. In fact, Tesla exports its American manufactured electric vehicles across the globe and is out-competing other foreign vehicle manufacturers in their domestic markets. In 2018, the U.S. led the world in exporting electric vehicles accounted for principally by Tesla.<sup>29</sup> Concern over any increase in imports stemming from an adjustment to the CAFE civil penalty is unwarranted.

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<sup>28</sup> See, Office of the United States Trade Representative, *Findings of the Investigation into China's Acts, Policies, and Practices Related To Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974* (Mar. 27, 2018) at 29-32, 139-40, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/section-301-report-chinas-acts>

<sup>29</sup> See Daniel Workman, *Electric Cars Exports by Country* (Nov. 29, 2019), <http://www.worldstopexports.com/electric-cars-exports-by-country/>

As the only U.S.-based manufacturer of electric vehicles that exports its vehicles abroad, Tesla believes maintaining an effective enforcement deterrent in the current performance-based CAFE standards is essential to U.S. manufacturers' ability to compete abroad and build greater export markets. Ensuring updated enforcement mechanisms within the standards will augment the stability and an investment environment that has contributed to Tesla being able to invest continually in technology and to expand manufacturing for both the U.S. and foreign electric vehicle markets.

## **CONCLUSION**

The Improvements Act's directive to adjust civil monetary penalties is applicable to the CAFE program civil penalty provision and NHTSA's belated revocation of the 2016 adjustment is arbitrary and capricious. Application of the inflation adjustment will deter non-compliance as intended by Congress and promote increased innovation in energy-efficient automobile manufacturing that benefits the American economy.

Respectfully Submitted,  
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## ADDENDUM

### 28 U.S.C. §2461: Mode of recovery

Title 28-JUDICIARY AND JUDICIAL PROCEDURE

PART VI-PARTICULAR PROCEEDINGS

CHAPTER 163-FINES, PENALTIES AND FORFEITURES

### §2461. Mode of recovery

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

(c) If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to <sup>1</sup> the Federal Rules of Criminal Procedure and [section 3554 of title 18, United States Code](#). The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of a violation of such Act.

(June 25, 1948, ch. 646, 62 Stat. 974 ; [Pub. L. 106–185, §16, Apr. 25, 2000, 114 Stat. 221](#) ; [Pub. L. 109–177, title IV, §410, Mar. 9, 2006, 120 Stat. 246](#) .)

### HISTORICAL AND REVISION NOTES

Subsection (a) was drafted to clarify a serious ambiguity in existing law and is based upon rulings of the Supreme Court. Numerous sections in the United States Code prescribe civil fines, penalties, and pecuniary forfeitures for violation of certain sections without specifying the mode of recovery or enforcement thereof. See, for example, [section 567 of title 12, U.S.C.](#), 1940 ed., Banks and Banking, [section 64 of title 14, U.S.C.](#), 1940 ed., Coast Guard, and [section 180 of title 25, U.S.C.](#), 1940 ed., Indians. Compare section 1 (21) of title 49, U.S.C., 1940 ed., Transportation.

A civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action. *United States ex rel. Marcus v. Hess et al.*, 1943, 63 S.Ct. 379, 317 U.S. 537, 87 L.Ed. 433, rehearing denied 63 S.Ct. 756, 318 U.S. 799, 87 L.Ed. 1163; *Hepner v. United States*, 1909, 29 S.Ct. 474, 213 U.S. 103, 53 L.Ed. 720, and cases cited therein.

Forfeiture of bail bonds in criminal cases are enforceable by procedure set out in Rule 46 of the Federal Rules of Criminal Procedure.

If the statute contemplates a criminal fine, it can only be recovered in a criminal proceeding under the Federal Rules of Criminal Procedure, after a conviction. The collection of civil fines and penalties, however, may not be had under the Federal Rules of Criminal Procedure, Rule 54(b)(5), but enforcement of a criminal fine imposed in a criminal case may be had by execution on the judgment rendered in such case, as in civil actions. (See [section 569 of title 18, U.S.C.](#),

1940 ed., Crimes and Criminal Procedure, incorporated in section 3565 of H.R. 1600, 80th Congress, for revision of the Criminal Code. See also Rule 69 of Federal Rules of Civil Procedure and Advisory Committee Note thereunder, as to execution in civil actions.)

Subsection (b) was drafted to cover the subject of forfeiture of property generally. Sections in the United States Code specifically providing a mode of enforcement of forfeiture of property for their violation and other procedural matters will, of course, govern and subsection (b) will not affect them. It will only cover cases where no mode of recovery is prescribed.

Words "Unless otherwise provided by enactment of Congress" were inserted at the beginning of subsection (b) to exclude from its application instances where a libel in admiralty is not required. For example, under [sections 1607, 1609, and 1610 of title 19, U.S.C.](#), 1940 ed., Customs Duties, the collector of customs may, by summary procedure, sell at public auction, without previous declaration of forfeiture or libel proceedings, any vessel, etc., under \$1,000 in value in cases where no claim for the same is filed or bond given as required by customs laws.

Rule 81 of the Federal Rules of Civil Procedure makes such rules applicable to the appeals in cases of seizures on land. (See also *443 Cans of Frozen Egg Product v. United States*, 1912, 33 S.Ct. 50, 226 U.S. 172, 57 L.Ed. 174, and *Eureka Productions v. Mulligan*, C.C.A. 1940, 108 F.2d 760.) The proceeding, which resembles a suit in admiralty in that it is begun by a libel, is, strictly speaking, an "action at law" (*The Sarah*, 1823, 8 Wheat. 391, 21 U.S. 391, 5 L.Ed. 644; *Morris's Cotton*, 1869, 8 Wall. 507, 75 U.S. 507, 19 L.Ed. 481; Confiscation cases, 1873, 20 Wall. 92, 87 U.S. 92, 22 L.Ed. 320; *Eureka Productions v. Mulligan*, supra), even though the statute may direct that the proceedings conform to admiralty as near as may be. *In re Graham*, 1870, 10 Wall. 541, 19 L.Ed. 981, and *443 Cans of Frozen Egg Product v. United States*, supra.

Subsection (b) is in conformity with Rule 21 of the Supreme Court Admiralty Rules, which recognizes that a libel may be filed upon seizure for any breach of any enactment of Congress, whether on land or on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States. Such rule also permits an information to be filed, but is rarely, if ever, used at present. Consequently, "information" has been omitted from the text and only "libel" is incorporated.

#### REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in subsec. (c), are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

The Controlled Substances Act, referred to in subsec. (c), is title II of [Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1242](#), as amended, which is classified principally to subchapter I (§801 et seq.) of [chapter 13 of Title 21](#), Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under [section 801 of Title 21](#) and Tables.

#### AMENDMENTS

**2006-**Subsec. (c). Pub. L. 109-177 amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: "If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act ([21 U.S.C. 853](#)), other than subsection (d) of that section."

**2000-**Subsec. (c). Pub. L. 106-185 added subsec. (c).

#### **EFFECTIVE DATE OF 2000 AMENDMENT**

Amendment by Pub. L. 106–185 applicable to any forfeiture proceeding commenced on or after the date that is 120 days after Apr. 25, 2000, see section 21 of Pub. L. 106–185, set out as a note under [section 1324 of Title 8, Aliens and Nationality](#).

#### **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 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 [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."

[ [Pub. L. 104-134, title III, §31001\(s\)\(2\), Apr. 26, 1996, 110 Stat. 1321-373](#), which provided that the first adjustment of a civil monetary penalty made pursuant to the amendment by §31001(s)(1) of Pub. L. 104-134 (amending Pub. L. 101-410, set out above) could not exceed 10 percent of the penalty, was repealed by [Pub. L. 114-74, title VII, §701\(c\), Nov. 2, 2015, 129 Stat. 601](#).]

[For authority of the Director of the Office of Management and Budget to consolidate reports required under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410, set out above, to be submitted between Jan. 1, 1995, and Sept. 30, 1997, or to adjust their frequency and due dates, see section 404 of Pub. L. 103–356, set out as a note under [section 501 of Title 31](#), Money and Finance.]

<sup>1</sup> *So in original.*

## CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rules of Appellate Procedure 29(a)(4)(G), 32(g)(1), and 2<sup>nd</sup> Cir. R. 29.1(c), because it meets the prescribed format requirements and contains 4261 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface with serifs using Microsoft Word in 14-point Garamond.

Respectfully Submitted,

/s/ Joseph Mendelson III

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DATED: December 16, 2019

## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 16th day of December 2019, a true and correct copy of the foregoing brief was filed with the Clerk of the United States Court of Appeals for the 2<sup>nd</sup> Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully Submitted,  
/s/ Joseph Mendelson III

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