17-2780(L)

17-2806(CON)

United States Court of Appeals for the Second Circuit

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, STATE OF CALIFORNIA, STATE OF MARYLAND, STATE OF NEW YORK, STATE OF PENNSYLVANIA, STATE OF VERMONT,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JACK DANIELSON, in his capacity as Acting Deputy Administrator of the National Highway Traffic Safety Administration, UNITED STATES DEPARTMENT OF TRANSPORTATION, ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,

Respondents,

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

Intervenors.

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

BRIEF FOR STATE PETITIONERS

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PRELIMINARY STATEMENT

In 2015, Congress directed federal agencies to update their civil monetary penalties for inflation according to a straightforward formula and set an explicit deadline for that update: agencies had to implement an initial "catch-up" adjustment by August 2016, with subsequent annual adjustments every January thereafter. The National Highway Traffic Safety Administration ("NHTSA") initially complied with this legislative directive by issuing an interim final rule in July 2016 that increased the penalty vehicle manufacturers pay for violations of the corporate average fuel efficiency ("CAFE") standards, followed by a final rule confirming the penalty increase in December 2016. But after the current administration came into office, NHTSA indefinitely suspended that final rule's effective date in July 2017 without notice and comment.

NHTSA's suspension violates two independent principles of administrative law: (1) it exceeds the agency's statutory authority by disregarding Congress's directive to update penalties by August 2016; and (2) it violates the Administrative Procedure Act ("APA") by failing to provide the public with advance notice and the opportunity to provide comment. This Court should vacate the suspension.

The CAFE standards are fleet-wide motor vehicle fuel efficiency standards that are a critical tool in reducing emissions of both conventional pollutants and greenhouse gases. To enforce compliance with these standards, Congress in 1975 imposed a civil penalty for CAFE violations but did not index that penalty to inflation. As a result, the civil penalty—which today is less than a quarter of its original value in real terms—became increasingly toothless, to the point that some manufacturers found it cheaper to pay the penalty than to manufacture CAFE-compliant vehicles. And without an update for inflation, even more manufacturers will likely pay the penalty rather than comply with the CAFE standards since those standards are scheduled to become more stringent in upcoming years.

In 2015, Congress remedied this problem by directing NHTSA to update its civil penalties to account for inflation "not later than August 1, 2016." NHTSA complied with this mandate by promulgating an interim final rule that took effect in August 2016, which nearly tripled the civil penalty rate for CAFE violations—from $5.50 to $14 for every tenth of a mile per gallon ("mpg") that a fleet's average mpg falls below the applicable CAFE standard, multiplied by the number of vehicles in the fleet. When it affirmed the new penalty in a December 28, 2016, final rule

(the "Civil Penalties Rule"), NHTSA found that the updated $14 penalty would encourage manufacturers to apply more fuel-saving technologies to their vehicles to comply with the CAFE standards.

On January 30, 2017, however, only a few weeks after promulgating the Civil Penalties Rule, NHTSA abruptly changed course. Although the $14 penalty was already in effect, the agency announced that it would delay the final Civil Penalties Rule for several temporary periods. Then, on July 12, 2017, NHTSA announced that it was *sua sponte* reconsidering the penalty increase, it indefinitely suspended the final rule's effective date, and it reinstated the outdated $5.50 penalty.

NHTSA's July 2017 suspension action should be set aside for two independent reasons. First, NHTSA lacked any statutory authority to indefinitely delay the Civil Penalties Rule and reinstate the outdated penalty. Congress expressly instructed NHTSA to update its penalties for inflation by August 2016 and to implement subsequent adjustments each year thereafter—statutory mandates that NHTSA's indefinite delay violates. And this Court has already rejected NHTSA's argument that a federal agency has "inherent" authority to suspend a duly promulgated

final rule. *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 202-03 (2d Cir. 2004).

Second, even if NHTSA had authority for such an action (which it did not), the suspension of the Civil Penalties Rule was unlawful because NHTSA failed to comply with the notice-and-comment procedures mandated by the APA. NHTSA claimed that it had "good cause" to dispense with notice and comment because the agency wanted to reconsider the rule and because the rule's effective date was imminent. But in a case involving similar facts, this Court squarely held that such justifications could not constitute good cause to evade notice and comment. *Id.* at 205-06.

NHTSA's abrupt and indefinite suspension of the Civil Penalties Rule is undoubtedly a reflection of the major policy differences between the current administration and the previous one. But whatever those differences may be, "the pivot from one administration's priorities to those of the next [must] be accomplished with at least some fidelity to law and legal process. Otherwise, government becomes a matter of the whim and caprice of the bureaucracy." *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). Because NHTSA's delay action violates a congressional

directive and disregards fundamental notice-and-comment requirements, it should be vacated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this petition pursuant to 49 U.S.C. § 32909(a). As explained in Point III, State Petitioners are "persons" adversely affected by NHTSA's indefinite suspension of the final Civil Penalties Rule. *See* 42 U.S.C. § 6202(2). And the State Petitioners' petition was timely, as it was filed within the 59-day period set forth in 49 U.S.C. § 32909(b).

QUESTIONS PRESENTED

1. Did NHTSA unlawfully disregard Congress's directive that it update its civil penalties when the agency instead indefinitely suspended the effective date of the Civil Penalties Rule and thus reinstated an outdated civil penalty for violations of the CAFE standards?

2. Did NHTSA violate the APA when it suspended the Civil Penalties Rule without providing notice or the opportunity for public comment?

3. Are State Petitioners entitled to maintain this action under the judicial review provisions of the Energy Policy and Conservation Act?

STATEMENT OF THE CASE

A. Congress Establishes the CAFE Standards

In 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA"), a comprehensive response to the energy crisis caused by the oil embargoes of the early 1970s. Among other things, EPCA established CAFE standards for vehicles. *See* 49 U.S.C. §§ 32901-32919; *GMC v. NHTSA*, 898 F.2d 165, 167 (D.C. Cir. 1990). The CAFE standards are fleet-wide fuel economy targets, measured in mpg, that different classes of vehicles must meet. While the standards were initially aimed at reducing the nation's oil consumption, they have had the additional effect of lowering tailpipe emissions of both conventional pollutants and greenhouse gases. *See* 77 Fed. Reg. 62,624, 62,641, 63,060-62 (Oct. 15, 2012). EPCA assigns the responsibility of administering the CAFE program to the Secretary of Transportation, who has delegated this duty to the NHTSA Administrator. 49 U.S.C. § 32902(a); 49 C.F.R. § 1.95(a).

To deter automakers from violating the standards, EPCA imposes a civil penalty for every tenth of a mpg "by which the average fuel economy standard" for a fleet falls below the applicable CAFE standard for that model year, multiplied by the number of vehicles in that fleet. 49 U.S.C. § 32912(b). The penalty was set at $5.00 per tenth of a mpg in 1975. In 1997, NHTSA increased the penalty to $5.50 per tenth of a mpg in response to the 1990 Federal Civil Penalties Inflation Adjustment Act Improvements Act ("Inflation Adjustment Act" or "Act"). The penalty rate sat unchanged for the next two decades.[1] (JA 51.)

While the majority of vehicle manufacturers have built fleets that comply with the CAFE standards, some manufacturers have regularly paid penalties rather than manufacture compliant vehicles, particularly as years of inflation have eroded the deterrent effect of the $5.50 civil

[1] EPCA allows vehicle manufacturers to earn credits for exceeding the established standard for a particular class of vehicles. *See generally* 49 U.S.C. § 32903. Manufacturers can apply those credits to later model years that do not meet the standards or, as of 2007, manufacturers also may sell them to other manufacturers or transfer them between their car and light truck fleets.

penalty.[2] As of July 2017, vehicle manufacturers had paid more than $890 million in civil penalties. (JA 79.)

B. Congress Directs NHTSA and Other Agencies to Update Civil Penalties for Inflation by August 1, 2016

As part of the Bipartisan Budget Act of 2015, Congress addressed the problem of outdated penalties by amending the 1990 Inflation Adjustment Act to restore the deterrent effect of civil monetary penalties and thereby promote compliance with the law. Pub. L. No. 114-74, 129 Stat. 584, § 701 (Nov. 2, 2015), *codified at* 28 U.S.C. § 2461 note ("IAA Amendments"). (*See also* JA 25.) Specifically, Congress required agencies to make an initial "catch-up" adjustment to their penalties by August 1, 2016, to account for inflation. Congress further mandated subsequent annual adjustments to maintain the effectiveness of such penalties against inflation.

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[2] *See* JA 60-74 (NHTSA's CAFE Public Information Center Reports, "Summary of CAFE Civil Penalties Collected"); *see also* JA 13 (noting Government Accountability Office finding that $5.50 penalty was not "a strong enough incentive for manufacturers to comply").

1. The Initial Catch-Up Adjustment

In the IAA Amendments, Congress linked the amount of the initial catch-up adjustment to the change in the Consumer Price Index from the year when "the amount of such civil monetary penalty was established or adjusted under a provision of law other than this Act" through October 2015. 28 U.S.C. § 2461 note, sec. 5(b)(2). The increase was capped at 150 percent of the existing penalty amount. *Id.* sec. 5(b)(2)(C). Congress also directed agencies to apply the initial adjustment expeditiously, through an interim final rulemaking that would "take effect not later than August 1, 2016." *Id.* sec. 4(b)(1)(A)-(B).

The IAA Amendments gave agencies one narrow avenue to impose a catch-up adjustment of "less than the otherwise required amount": if, "after publishing a notice of proposed rulemaking and providing an opportunity for comment," an agency determined either that "increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact" or the "social costs of the penalty increase outweigh the benefits," then the agency could impose a lower catch-up adjustment with the concurrence of the Director of the Office of Management and Budget ("OMB"). *Id.* sec. 4(c)(1)-(2). OMB guidance

directed "[a]gencies seeking a reduced catch-up adjustment determination" to submit notices of proposed rulemaking to OMB "as soon as possible, and no later than May 2, 2016." (JA 17.) OMB cautioned that it expected approval of reduced catch-up determinations "to be rare." (JA 17.)

2. Subsequent Annual Adjustments

Under the IAA Amendments, after implementing the initial catch-up adjustment, agencies are required to make annual adjustments to their civil penalties to account for further inflationary changes in the cost of living, as reflected in the Consumer Price Index. 28 U.S.C. § 2461 note, sec. 4(a), (b)(2). As of the date of this filing, two annual adjustment deadlines—January 2017 and January 2018—have passed. *See id.* sec. 4(a). These cost-of-living adjustments that build on the catch-up adjustment are mandatory, not discretionary, and the statute allows for no administrative process to either disregard or reduce these annual increases.

C. To Comply with Congress's Direction, NHTSA Updates the CAFE Standards Penalty to $14

On July 5, 2016, NHTSA published an interim final rule updating various civil penalty amounts, including the penalty for violating CAFE standards. (JA 27.) Because an adjustment based on the change in the Consumer Price Index since 1975 (when the penalty was first established) would have led to a penalty of $22, NHTSA limited the penalty increase to $14 to comply with the 150% statutory cap established by Congress.[3] (JA 27.) Thus, the new $14 penalty is less than two-thirds the amount, in real terms, of the penalty originally established by Congress under EPCA.[4] (JA 25-26.) The new penalty became effective

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[3] The 2015 amendments indexed the required catch-up increase "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*." 28 U.S.C. § 2461 note, sec. 5(b)(2)(B) (emphasis added). Accordingly, the increase was indexed to the $5 amount established in 1975, rather than the increased $5.50 amount in 1997, which had been an adjustment pursuant to the Act. (Other than the increase in 1997, the penalty had never been adjusted prior to 2015.) The 150% statutory cap, unlike the initial adjustment calculation, was tied to the current penalty amount when the IAA Amendments were enacted, *i.e.*, the $5.50 amount.

[4] NHTSA did not request concurrence from OMB to use a penalty of less than $14 at any time before or after the May 2, 2016 deadline for such requests.

on August 4, 2016—only a few days after the August 1 deadline set by Congress.

On August 1, 2016, two vehicle manufacturer associations, the Alliance of Automobile Manufacturers ("AAM") and the Association of Global Automakers ("AGA"), submitted a petition for partial reconsideration to NHTSA ("Industry Petition"). Although the industry petitioners acknowledged that "NHTSA is not empowered to exempt the CAFE program" from Congress's directive (JA 31), they argued, among other things, that: (1) NHTSA should have found that the penalty increase would have a negative economic impact and imposed a smaller increase; (2) the increase should not apply to model years 2014 through 2016, because it was too late for vehicle manufacturers to make changes to those fleets; and (3) any penalty increase should not be imposed before model year 2019 to allow manufacturers at least eighteen months of lead time to incorporate the higher penalty into their design decisions for future vehicles. (JA 41-42.)

On December 28, 2016, NHTSA published a final rule (the "Civil Penalties Rule"). (JA 51-54.) NHTSA affirmed the new $14 penalty rate established in its interim final rule but, in response to the Industry

Petition, agreed to apply the increased penalty only to model year 2019 and later fleets. Crediting the manufacturers' assertion that design and technology decisions for a given model year are made months or years in advance, NHTSA concluded that applying the penalty only prospectively, to model years 2019 and later, would afford "a reasonable amount of lead time for manufacturers to adjust their plans and products to take into account the substantial change in penalty level." (JA 52-53.) NHTSA "denie[d] the Industry Petition in all other respects." (JA 53.)

The Civil Penalties Rule thus confirmed the updated $14 penalty that had been in effect since August 2016 due to NHTSA's interim final rule. The final rule's sole change to the interim final rule—limiting application of the new penalty amount to exclude model years before 2019—went into effect on January 27, 2017. (JA 51.) As explained in Point I, the penalty in effect for future model years has an immediate effect on manufacturers' ongoing design and production decisions.

On January 30, 2017, NHTSA published a notice stating that it was temporarily delaying the Civil Penalties Rule's effective date for 60 days, until March 28, 2017, in accordance with a general "regulatory freeze" issued by the new Administration. (JA 56.) As a result of two subsequent

temporary delays, NHTSA announced a new effective date for the Civil Penalties Rule of July 10, 2017. (JA 75-76.) During these temporary delays, NHTSA did not modify or suspend the $14 penalty that had become effective in August 2016.

D. NHTSA Indefinitely Suspends the Civil Penalties Rule's Effective Date and Reinstates the $5.50 Penalty

On July 12, 2017, NHTSA published two notices in the Federal Register, one declaring that it "*sua sponte*" was reconsidering the Civil Penalties Rule, and the other announcing that the effective date of the Civil Penalties Rule was "delayed indefinitely pending reconsideration." (JA 77-78, 81.) NHTSA cited no specific provision or statutory language that gave it authority to impose such a suspension, but stated only that its delay action was "consistent with NHTSA's statutory authority to administer the CAFE standards program and its inherent authority to do so efficiently and in the public interest." (JA 78.) In the companion notice announcing its reconsideration, NHTSA explained that the effect of the suspension was a reinstatement of the outdated penalty amount: "During reconsideration, the applicable civil penalty rate is $5.50 per

tenth of a mile per gallon, which was the civil penalty rate prior to NHTSA's inflationary adjustment." (JA 81.)

NHTSA stated that it was suspending the final rule's effective date because it "is reconsidering the final rule" and "is seeking comment on whether $14 per tenth of an mpg is the appropriate penalty level for civil penalties for violations of CAFE standards[.]" (JA 77-78.) Nowhere did NHTSA acknowledge that several deadlines constrained its authority, all of which had already elapsed. Specifically, the deadline for agencies to submit a reduced catch-up determination to OMB had elapsed on May 2, 2016. (JA 17.) The deadline established by Congress for agencies to implement their catch-up adjustments had elapsed on August 1, 2016. And NHTSA was six months overdue in making its first mandatory annual adjustment to the penalty for changes in cost of living. *See* 28 U.S.C. § 2461 note, sec. 4(a).

NHTSA imposed its suspension immediately, without providing the advance notice or opportunity for public comment required by the APA. NHTSA justified its deviation from the APA's ordinary procedures by stating that it had "good cause to implement this delay without notice and comment under 5 U.S.C. 553(b)(B) and 553(d)(3) because those

procedures are impracticable, unnecessary, and contrary to the public interest in these circumstances, where the effective date of the rule is imminent." (JA 78.) NHTSA cited the fact that it was "seeking out public comments on the underlying issues, which may be extensive, and additional time will be required to thoughtfully consider and address those comments before deciding on the appropriate course of regulatory action." (JA 78.) And it stated that "no party will be harmed by the delay" because "the delay will not affect the civil penalty amounts assessed against any manufacturer for violating a CAFE standard prior to the 2019 model year." *Id.* NHTSA set October 10, 2017, as the deadline for receiving comments. (JA 78.) NHTSA has not announced a deadline for the completion of its reconsideration of the Civil Penalties Rule.

On September 8, 2017, the States filed their petition for judicial review challenging NHTSA's suspension of the effective date of the Civil Penalties Rule and the reinstatement of the $5.50 penalty.

STANDARD OF REVIEW

A reviewing court "is obligated to set aside a final agency action" if it is "not in accordance with law" or in excess of the agency's "statutory jurisdiction, authority, or limitations." *National Black Media Coal. v. FCC*, 791 F.2d 1016, 1024 (2d Cir. 1986) (quotation marks omitted); 5 U.S.C. § 706(2)(A), (C). Similarly, courts must invalidate agency action when the agency acts "without observance of procedure required by law," 5 U.S.C. § 706(2)(D)—including when the agency fails to use the notice-and-comment procedures that the APA requires for most rulemakings, *see Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995), *superseded by statute on other grounds as stated in City of New York v. Permanent Mission of India to U.N.*, 618 F.3d 172 (2d Cir. 2010)

SUMMARY OF ARGUMENT

I. The States have standing to bring this Petition. The purpose and effect of the Civil Penalties Rule is to induce manufacturers to comply with the CAFE standards and thereby reduce tailpipe emissions of both conventional pollutants and greenhouse gases. NHTSA's unlawful suspension of the final rule improperly reinstates an outdated penalty,

the effectiveness of which has been severely diminished by inflation. If NHTSA's indefinite delay is allowed to stand, manufacturers will soon commit to design and technology decisions for model year 2019 and later fleets based on the outdated, ineffective penalty—leading them to manufacture higher-polluting vehicles that will travel on our roads and highways, and emit pollutants into our air, for many years.

Increased emissions from these noncompliant vehicles harm the States' proprietary, fiscal, and regulatory interests in several ways. More greenhouse-gas emissions will lead to flooding, erosion, and damage to critical public infrastructure in New York; and harm to state parklands and declining snowpack and water supply in California. And increases in conventional pollutants like particulate-matter will require the States to absorb higher public health-care costs and make it more difficult and costly to meet federal air quality standards. All of these emissions also injure the States' *parens patriae* interests in the health and welfare of their residents. Vacatur of NHTSA's suspension will redress these harms by putting the updated $14 penalty back in place, thereby inducing manufacturers to comply with the CAFE standards in making their immediate design decisions for model years 2019 and beyond.

II. On the merits, NHTSA's suspension flouts both express congressional directives and the APA's procedural requirements. First, NHTSA lacked any statutory authority to indefinitely suspend the effective date of the Civil Penalties Rule. Congress's express mandates in the IAA Amendments required NHTSA to implement a catch-up adjustment "not later than August 1, 2016," and to implement subsequent annual adjustments in January 2017 and 2018. *See* 28 U.S.C. § 2461 note, sec. 4. NHTSA's suspension violates both of those Congressional directives. And although NHTSA claims that it may suspend final rules under its "inherent" authority "to administer the CAFE standards program," (JA 78), this Court has already squarely rejected the proposition that federal agencies possess a generalized "inherent" power to delay a final rule. *Abraham*, 355 F.3d at 202-03; *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

Second, NHTSA violated the APA's core procedural requirements by issuing its suspension without providing notice and the opportunity for public comment. NHTSA relied on the APA's good-cause exception, but this Court in *Abraham* categorically rejected the grounds advanced by NHTSA here—the imminence of a rule's effective date and an agency's

desire to reconsider a rule—as insufficient to establish good cause for dispensing with notice and comment. 355 F.3d at 205.

III. This Court directed briefing on several threshold questions about the States' ability to bring this proceeding under EPCA. The CAFE provisions of EPCA provide that a "person" adversely affected by a regulation may file a petition for review "in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business" "not later than 59 days after the regulation is prescribed." 49 U.S.C. § 32909(a)-(b). Those provisions authorized the States to file their Petition, and the States did so in a timely fashion.

Specifically: (a) EPCA expressly defines "person" to include "any State." Pub. L. No. 94-163, 89 Stat. 874, § 3(2) (Dec. 22, 1975), *codified as amended at* 42 U.S.C. § 6202(2). (b) Neither NHTSA nor intervenors have objected to venue, so any defect in venue has been waived. In any event, venue is proper in the Second Circuit because two of the States—New York and Vermont—are located in the Second Circuit, and the presence of petitioners from outside this circuit does not destroy venue. *See, e.g.*, *Sidney Coal Co. v. Social Sec. Admin.*, 427 F.3d 336, 344-45 (6th Cir. 2005). And (c) the States' petition is timely because it was filed 58

days after NHTSA's indefinite suspension was "prescribed," *i.e.*, published in the Federal Register. As this Court held in *Abraham*, "prescribed" and "published" are "interchangeable" in EPCA. *Abraham*, 355 F.3d at 196 & n.8.

ARGUMENT

POINT I

THE STATES HAVE STANDING TO CHALLENGE NHTSA'S INDEFINITE SUSPENSION OF THE CIVIL PENALTIES RULE

Standing requires (1) injury that is (2) traceable to the defendant's conduct and (3) redressable by a favorable decision. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). "States are not normal litigants" and are entitled to "special solicitude" for purposes of standing, particularly where Congress has expressly given States the right to challenge a federal agency's action. *Id.* at 517-18. Here, the States have a clear procedural right: EPCA's judicial review provision allows "any person"—including States—to bring suit if they are adversely affected by a regulation promulgated under that statute. 49 U.S.C. § 32909(a).

The States have standing to challenge NHTSA's indefinite suspension of the Civil Penalties Rule. As NHTSA and the vehicle

manufacturers have acknowledged, the purpose and effect of a higher civil penalty is to reduce motor-vehicle emissions because manufacturers respond to higher penalties by complying with the CAFE standards—and respond to lower penalties by disregarding those standards and producing vehicles with higher emissions. (*See* JA 52-53.) NTHSA has already found that noncompliance with the CAFE standards will lead to increased pollution that causes severe environmental harms: specifically, emissions of greenhouse gases from motor vehicles contribute to climate change, and emissions of conventional pollutants cause additional harms to public health. 77 Fed. Reg. at 63,060 (climate change), 63,061 (air pollution). Accordingly, the States are directly injured by (1) imminent and irreversible climate change and other air pollution harms that are (2) traceable to violations of the CAFE standards that result from suspension of the higher penalty and that are (3) redressable by vacatur of that suspension.

A. Additional Emissions Will Lead to Climate Change and Conventional Pollution That Will Directly Injure the States.

Injuries to the States' interests caused by climate change. In *Massachusetts v. EPA*, the Supreme Court recognized that Massachusetts' proprietary interests were harmed by climate change that resulted from EPA's failure to regulate the greenhouse gas emissions of new domestic cars because "rising seas have already begun to swallow Massachusetts' coastal land," a substantial portion of which was state-owned. 549 U.S. at 527. Similarly, this Court ruled in *Connecticut v. American Electric Power Co.* that States—including three Petitioners here: New York, California, and Vermont—had standing to sue to limit emissions of greenhouse gases from power plants based on injuries to their proprietary interests:

- Declining water supplies "obviously injure[d] property owned by" California;
- Sea level rise in New York City and other coastal areas would cause more frequent and severe flooding, harming public infrastructure, accelerating beach erosion, and compromising aquifers; and
- Global warming injured state-owned forests.

582 F.3d 309, 341-42 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011) (affirming standing by an equally divided Court).

Industry noncompliance with the CAFE standards will lead to environmental harms that are at least as severe as those the Supreme Court has already recognized are sufficient to confer standing on the States. When NHTSA established the CAFE standards for model years 2017 and later (including model year 2019), it "estimate[d] that total annual carbon dioxide emissions associated with passenger car and light truck use in the U.S. would decline by between 36 million metric tons (mmt) and 38 mmt in 2020," leading to "small but significant reductions in projected changes in the future global climate." 77 Fed. Reg. at 63,060. Without those reductions, the States will face imminent and concrete injury to their proprietary interests.

For example, in its environmental impact statement for the CAFE standards, NHTSA recognized that climate change increases flooding in densely-populated New York City, that flooding would affect critical transportation infrastructure in lower Manhattan, and that the City has

already begun to implement adaptation measures.[5] State funds are used to maintain that transportation infrastructure in lower Manhattan and to implement the adaptation measures. Declaration of A. Belensz, dated March 6, 2018, at ¶¶ 20-22. Sea level rise also accelerates erosion of state-owned land in New York, and state-owned parkland and infrastructure in California. *Id.* at ¶¶ 23-25; Declaration of J. Chamberlin, dated Mar. 6, 2017, at ¶ 7. And climate change increases the frequency and severity of wildfires in western states such as California, forcing those states to expend more public funds to fight those fires. Chamberlin Decl. at ¶ 10.

Climate change also injures the States' *parens patriae* interests in the health and welfare of their residents and environments.[6] NHTSA has

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[5] NHTSA, Final Environmental Impact Statement: CAFE Standards, Passenger Cars and Light Trucks Model Years 2017-2025 ("CAFE 2017-2025 EIS"), §§ 5.5.2.1.3, 5.5.1.5.2, *available at* https://one.nhtsa.gov/staticfiles/rulemaking/pdf/cafe/FINAL_EIS.pdf (last visited Mar. 6, 2018).

[6] The ordinary presumption against *parens patriae* standing in suits against the United States does not apply when, as here, the States are not suing to *prevent* the application of a federal statute, but instead to "'vindicate the Congressional will' by preventing an agency from violating a federal statute" and harming state residents. *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984); *see also Massachusetts*, 549 U.S. at 520 n.17.

found that climate change is likely to decrease dairy production in New York and Vermont; lower crop yield in California; reduce native tree species in Pennsylvania; increase heat-related illnesses and deaths in the Northeast (which includes all Petitioner States except California); reduce coastal land in Maryland; and cause droughts in California, New York, and all of New England. 77 Fed. Reg. at 63,062; CAFE 2017-2025 EIS § 5.5.2.1.

Injuries to the States' interests caused by conventional pollution. The States' interests are also injured by other air pollution caused by emissions from motor vehicles, including fine particulate matter ($PM_{2.5}$). *See* Belensz Decl. at ¶¶ 26-31. NHTSA has found that reductions in $PM_{2.5}$ as a result of the CAFE standards would result in hundreds fewer premature deaths, chronic bronchitis cases, and emergency room visits for asthma. 77 Fed. Reg. at 63,062. Conversely, increased emissions will result in increases to health problems related to air quality. *See* Belensz Decl. at ¶¶ 7, 27-32.

Such health impacts would harm the States' fiscal interests by increasing their health care costs, including Medicaid costs. *See* Belensz Decl. at ¶ 30; *see also Clinton v. City of New York*, 524 U.S. 417, 430-31 (1998) (noting adverse financial effects to governmental entity can provide

basis for standing). They would also harm the States' *parens patriae* interests in the health and welfare of their residents. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (in its capacity as a quasi-sovereign, "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."); *Alfred L. Snapp v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 608 (1982) ("a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general").

Increased $PM_{2.5}$ as a result of motor vehicle emissions will also make it more difficult for the States to comply with the federal National Ambient Air Quality Standards for $PM_{2.5}$, and accordingly require the States to impose additional measures to meet those standards. *See West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). The obligation to impose those additional measures will harm the States as sovereign regulators, *id.*, and injure the States' fiscal interests by increasing the costs and burdens of regulation, Belensz Decl. at ¶ 31.

California's additional injury as a concurrent regulator of automobile emissions. California suffers an additional sovereign injury. When Congress pre-empted state authority to regulate tailpipe emissions, it established a waiver process that authorized California to impose tougher emission standards than EPA.[7] 42 U.S.C. § 7543(a)-(b); Declaration of Joshua M. Cunningham, dated Oct. 23, 2017, at ¶ 3. For model year 2017-2025 light-duty vehicles, however, California accepts a manufacturer's compliance with federal emissions standards as compliance with California's stricter standards. Cunningham Decl. at ¶¶ 6-7. However, reduced compliance with the CAFÉ standards threatens to reduce compliance with federal emissions standards, thereby undermining the agreement California reached with NHTSA and EPA and increasing California's regulatory burden. *Id.* at ¶¶ 18-19, 21. NHTSA's delay accordingly impacts California's distinct sovereign interest in its own emissions reduction program and its participation as a co-regulator of vehicle emissions with NHTSA and EPA, giving California an additional basis for standing. *See*

[7] Section 177 of the Clean Air Act authorizes other states to adopt California's emissions standards, which the other State Petitioners have done.

id. at ¶¶ 6-7. And only one party need have standing to satisfy Article III when that party seeks the same relief as the other parties in the case. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

B. NHTSA's Unlawful Suspension of the Civil Penalties Rule Will Result in Higher Levels of Pollutants That Harm the States.

The injuries resulting from increased greenhouse gases and conventional pollutants are imminent, traceable to NHTSA's action, and redressable by vacatur. As the manufacturers themselves have acknowledged, the civil penalties in effect for model year 2019 and later vehicles affect manufacturers' decisions today about whether, and to what extent, they will comply with the CAFE standards. A lower penalty, with a reduced deterrent effect, means that manufacturers will commit in the near future to produce fewer vehicles compliant with CAFE standards, resulting in greater emissions of greenhouse gases and conventional pollutants from less fuel-efficient vehicles that may be operating on our roads for years, and even decades.

Manufacturers make production decisions well before the commencement of a model year. Because such decisions are difficult (if not impossible) to alter once complete, design and technology choices that

automakers make today will affect the production of fleets a year or more from now. By the same token, establishing future compliance standards for automobiles—and the penalties for noncompliance with those standards—affects design and technology decisions today because manufacturers incorporate those future consequences into their present choices. (*See* JA 52-53.)

Congress understood the direct causal connection between future compliance standards and present design and production decisions: that link is why EPCA's CAFE provisions require NHTSA to provide the industry with at least eighteen months of lead time before the start of a model year when setting a fuel economy standard. 49 U.S.C. § 32902(a). The necessity for such lead time was also the basis for the industry's request in 2016 that NHTSA not apply the enhanced penalty to model years before 2019, since technology and design decisions had already been fully or partially locked in for those fleets. (JA 32, 35, 52-53.)

The production decisions made by manufacturers well in advance of a model year are thus directly influenced by the civil penalty amount in effect for those years. (*See* JA 32, 35 52-53.) As NHTSA has explained, "the purpose of civil penalties for non-compliance is to encourage

manufacturers to comply with the CAFE standards," and a higher penalty will lead to "increased compliance with CAFE standards." (JA 52, 80.) Given the lead time acknowledged by manufacturers and NHTSA, manufacturers are currently locking in design and technology decisions for model year 2019 and later vehicles. The amount of the penalty is critical to manufacturers in determining whether it is cheaper to comply with the CAFE standards or to pay the penalty for vehicles in those model years.

Because manufacturers are basing their decisions on the outdated $5.50 penalty—which NHTSA's unlawful suspension reinstates—some manufacturers are likely to choose to pay penalties instead of complying with the CAFE standards, as they have in the past. To provide a simplified example, assuming an automaker faces a marginal cost of compliance of $10 per tenth of a mpg,[8] a $14 penalty would induce an economically rational automaker to produce vehicles that comply with emissions standards. But with the outdated $5.50 penalty in place instead, that same automaker would find it cheaper to pay the penalty

[8] *See* Declaration of L. Tonachel, dated Oct. 19, 2017 (Environmental Petitioners' Add. 14-22) (estimating marginal costs of compliance).

instead of complying. Although most automakers have complied with the standards in past years, the choice between compliance and penalties is becoming more stark, as "CAFE standards are set to rise at a significant rate" in upcoming model years and certain automakers are already falling behind. (JA 64; *see* JA 52-53, 79.) 77 Fed. Reg. at 62,641 (showing 2017-2021 CAFE standards and the "augural" standards for 2022-2025).

In sum, the civil penalty in place for future model years drives industry production decisions now. Keeping a lower penalty in place for fleets model year 2019 and later—as NHTSA has done by suspending the $14 penalty mandated by Congress and reinstating the outdated $5.50 penalty—will likely reduce compliance with the CAFE standards for those years and increase climate change and air pollution impacts. *See Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) (even an "incremental risk is enough of a threat of injury is enough" to confer standing). Vacating the suspension and restoring the $14 penalty will redress those impacts.

POINT II

NHTSA'S ACTIONS ARE SUBSTANTIVELY AND PROCEDURALLY INVALID AND SHOULD BE VACATED

A. NHTSA Lacked the Authority to Suspend the Civil Penalties Rule's Effective Date and Reinstate the Obsolete Penalty.

NHTSA lacked any statutory authority to indefinitely suspend the Civil Penalties Rule. The suspension cannot be reconciled with the clear deadlines Congress set in the IAA Amendments. And NHTSA's assertion that it had some generalized "inherent" authority to suspend a duly promulgated final rule is without merit. NHTSA's suspension was *ultra vires* and should be vacated. *See* 5 U.S.C. § 706(2)(C).

1. The Suspension Violates Congress's Express Mandates.

NHTSA's indefinite postponement of the Civil Penalties Rule and reinstatement of an obsolete penalty directly conflict with Congress's clear mandates. The 2015 IAA Amendments directed NHTSA to implement catch-up penalties according to a defined statutory formula "not later than August 1, 2016," and required that requests to reduce the catch-up amount had to be submitted to the Office of Management and Budget and approved before that date—not after. *See* 28 U.S.C. § 2461 note, sec. 4.

(JA 17). NHTSA complied with that obligation when it published its interim final rule in July 2016, effective in August 2016. NHTSA's indefinite suspension of the final rule one year later—and reinstatement of the outdated penalty that Congress had directed NHTSA to update—thus defies Congress's explicit command.

The Act also requires subsequent annual adjustments, a mandate that NHTSA's indefinite suspension further violates. Already, deadlines for two annual adjustments—January 15, 2017, and January 15, 2018—have passed without NHTSA making the adjustments that are required by law. *See* 28 U.S.C. § 2461 note, sec. 4(a), 5(a).

Thus, NHTSA's suspension of the Civil Penalties Rule and reinstatement of the $5.50 penalty leave in place an outdated penalty in violation of Congress's clear command that the penalty be initially updated for inflation by August 2016, and updated every year thereafter to account for increases in the cost of living.

2. NHTSA Had No "Inherent" Authority to Take the Actions Challenged Here.

When it issued the suspension, NHTSA nowhere explained how its action conformed to the requirements in the Inflation Adjustment Act.

Instead, NHTSA invoked its "inherent" authority to "administer the CAFE standards program." (JA 78.) As courts have made clear, however, agencies have no inherent authority to delay an already-final rule. Thus, even if NHTSA's action had not directly contravened Congress's statutory timeline in the IAA Amendments, NHTSA's suspension would still violate the APA's requirement that an agency's action be grounded in statutory authority.

It is "axiomatic that administrative agencies may act only pursuant to authority delegated to them by Congress." *Clean Air Council*, 862 F.3d at 9 (D.C. Circ. 2017) (quotation marks omitted); *see also Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (federal agency "is a creature of statute" and has "only those authorities conferred upon it by Congress") (quotation marks and emphasis omitted). Although Congress has authorized agencies to suspend or delay the effective date of certain promulgated regulations in narrowly defined circumstances, it has not given that authority to NHTSA with respect to penalty increases. *Cf.* 42 U.S.C. § 7607(d)(7)(B) (Clean Air Act provision permitting delay of effective date pending reconsideration "for a period not to exceed three months" in

limited circumstances). Indeed, NHTSA has cited no statutory provision that authorized it to suspend the final Civil Penalties Rule.

This Court has already firmly rejected the proposition that, absent express statutory authority, federal agencies nonetheless possess a generalized "inherent" power to suspend a final rule pending reconsideration. *Abraham*, 355 F.3d at 202-03. As the D.C. Circuit likewise held recently when applying *Abraham* to summarily vacate a similar delay of a final rule by EPA, an agency lacks "'inherent authority' to 'issue a brief stay' of a final rule" while the agency "reconsiders it." *Clean Air Council*, 862 F.3d at 9 (citing *Abraham*). Instead, an agency issuing a final rule is "bound by the rule until that rule is amended or revoked." *Id.* (quotation marks omitted). These precedents foreclose NHTSA's attempt to justify its indefinite delay based on its purported general "statutory authority to administer the CAFE standards program." (JA 78.)[9]

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[9] Just as an agency's decision to reconsider a rule does not grant it authority to suspend that rule, reconsideration does not, as the Environmental Petitioners discuss in Part II.C of their brief, obviate an agency's obligation to engage in reasoned decisionmaking. NHTSA has not even attempted to provide good reasons that would justify the suspension as an exercise in substantive rulemaking separate and apart from the reconsideration. Accordingly, even if NHTSA had authority to

NHTSA has asserted that its indefinite suspension is merely a limited, interim, procedural step that maintains the current state of affairs. Dkt No. 107 at 4, 24. But uniform case law confirms that suspensions—even those of limited duration—are effectively revocations of a final rule that are subject to review as exercises of substantive agency rulemaking, and thus must be predicated on authority conferred by Congress. *See Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) ("an 'indefinite suspension' does not differ from a revocation simply because the agency chooses to label it a suspension"); *see also Abraham*, 355 F.3d at 204 (invalidating two-month suspension); *Clean Air Council*, 862 F.3d at 1 (invalidating 90-day suspension). If, by contrast, agencies had free reign to indefinitely suspend the effective date of a final rule, as NHTSA essentially asserts here, "it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982).

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suspend the rule here, its failure to provide any other rationale would render the suspension arbitrary and capricious.

In any event, NHTSA is legally and factually incorrect in categorizing its action as merely maintaining the status quo. When a final rule is duly promulgated, the status quo is that the rule will take effect as planned; by contrast, suspending a final rule disrupts the status quo by "relieving regulated parties of liability they would otherwise face." *Clean Air Council*, 862 F.3d at 7. Here, NHTSA's unlawful suspension disrupted settled expectations: the updated $14 penalty came into effect in August 2016, when (as required by Congress) the interim final rule took effect, and the suspension challenged here revoked that updated penalty and reinstated the outdated $5.50 penalty nearly one year later, in July 2017. NHTSA's action thus upset the status quo by reinstituting a penalty that had been superseded by both law and final regulation. Because no statute expressly authorized this change of course, NHTSA's delay action should be vacated.

B. NHTSA Lacked Good Cause to Forgo Notice and Comment.

NHTSA's indefinite suspension also violates the APA because the agency failed to provide notice and comment, and thereby acted "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). The

suspension of the updated penalty and reinstatement of the outdated penalty are invalid on this independent basis.

The APA generally requires agencies to publish a notice of proposed rulemaking and solicit public comment on all rulemakings. *Id.* § 553. A proposed rule must be published in the Federal Register not less than thirty days before its effective date. *Id.* § 553(d). These requirements apply both when an agency promulgates a rule and when it amends or appeals a rule. *See id.* § 551(5); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015).

It is well established that the APA's notice-and-comment requirements also apply when an agency suspends the effectiveness of a rule. *Environmental Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553" and is "subject to APA notice and comment provisions."); *Natural Res. Def. Council*, 683 F.2d at 761-62 (effective date is "an essential part of any rule" and "material alterations" are subject to APA's rulemaking provisions). Failure to comply with these procedural requirements requires invalidation of an agency's actions. *Abraham*, 355 F.3d at 206.

NHTSA invoked the APA's exception to notice-and-comment procedures "when the agency for good cause finds" that such requirements "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3). But this exception "should be narrowly construed and only reluctantly countenanced." *Zhang*, 55 F.3d at 744; *see also New Jersey Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). And in *Abraham*, this Court categorically rejected the very grounds that NHTSA advances here as insufficient to establish good cause.

That case, like this one, involved an agency's suspension of a final rule following a change in administration. In *Abraham*, the Department of Energy ("DOE") suspended the effective date of a rule establishing new efficiency standards for air conditioners, pending the agency's reconsideration. 355 F.3d at 190. Like NHTSA in this case, DOE had purported to identify good cause to disregard the APA's procedural requirements because DOE wanted to "review and consider[]" the new efficiency standards, and the effective date designated for those standards was imminent." *Id.* at 205 (quotation marks and alterations omitted). This Court squarely rejected those grounds, holding that the imminent

effective date for the new efficiency standards was "an emergency of DOE's own making" that could not "constitute good cause" for failing to provide notice and comment. *Id.*

The reasoning in *Abraham* applies to the identical justifications that NHTSA has given here to avoid notice and comment for its indefinite suspension of the Civil Penalties Rule. As with DOE, NHTSA's invocation of the good-cause exception is based on the imminent effective date of a rule that it now wishes to reconsider. Such a deadline does not constitute a genuine emergency that justifies forgoing notice and comment. Indeed, if the mere imminence of a deadline were a valid basis for invoking the good-cause exception, an agency "could simply wait until the eve of" an effective date and "then raise up the 'good cause' banner and promulgate rules without following APA procedures." *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).[10]

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[10] By contrast, there was good cause for the Federal Aviation Administration to issue operating rules for airplane and helicopter tours without notice and comment in *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995), because there had been a series of fatal crashes that required an immediate response; *see also Mid-Tex Electric Coop, Inc. v. FERC*, 822 F.2d 1123, 1132-33 (D.C. Cir. 1987) (good cause established for agency to issue interim rule without notice and

Moreover, NHTSA had more than enough time to provide notice and comment on the indefinite suspension: the suspension at issue here was preceded by a series of three temporary delays totaling more than five months. *See Environmental Def. Fund*, 716 F.2d at 921 (rejecting agency's claim that impending regulatory deadline forced it to dispense with notice and comment where agency "had expressed its intention to suspend or eliminate" reporting requirements eight months earlier). NHTSA easily could have accommodated a 30-day comment period during that time.

As courts have repeatedly recognized, the good-cause exception "should be limited to emergency situations" and is not an "'escape clause[]' that may arbitrarily be utilized at the agency's whims." *American Fed'n of Govt. Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (good cause exception applies only in cases where delay would do real harm). NHTSA has identified no genuine emergency warranting

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comment to avoid "irremedial financial consequences" and "regulatory confusion").

departure from the APA's normal procedures. To the contrary, in defending its authority to delay the Civil Penalties Rule, NHTSA has taken the position that its suspension—far from being necessary to resolve an emergency—has no practical effect at all. *See* Dkt. No. 107 at 18 ("the interim extension of the effective date would have no practical effect"), *id.* at 19 ("the effective date . . . has no practical impact"). Yet NHTSA simultaneously insists that it was forced to forgo notice and comment because of the practical consequences that would have been triggered if the Civil Penalty Rule had come into effect as scheduled. NHTSA thus has adopted two inconsistent positions: to defend its statutory authority, it argues that the indefinite suspension has no practical effect; yet to excuse its noncompliance with the APA's procedural requirements, NHTSA argues that the Civil Penalties Rule would have had immediate practical impacts that precluded the agency from giving notice and comment before the final rule took effect. NHTSA cannot have it both ways.

POINT III

THE STATES PROPERLY AND TIMELY FILED A PETITION FOR REVIEW WITH THIS COURT

In its order setting an expedited briefing schedule, this Court directed the parties to brief (1) whether States can seek judicial review under EPCA; (2) the appropriate venue to seek such review; and (3) the time limits applicable to such challenges. For the reasons below, all of the State Petitioners are entitled to maintain this timely petition for review in this Court.

A. The States Are Persons Under EPCA.

Under EPCA's fuel economy provisions, any "person" adversely affected by a regulation can file a petition for review. 49 U.S.C. § 32909(a). States are expressly included within EPCA's definition of "person," and are thus proper parties to bring this petition. Pub. L. No. 94-163, 89 Stat. 874, § 3(2) (Dec. 22, 2975) (*codified as amended at* 42 U.S.C. § 6202(2)).

EPCA's definition of "person" as including States applies to all of the provisions of the Act, including the CAFE provisions. A discrepancy in the text of the United States Code may suggest otherwise, but the actual text of the statute enacted by Congress removes any ambiguity on

this score. The enacted statute states that the definitions section applies to "this Act," whereas the Code states that the sections apply only to "this Chapter" (which does not include the CAFE provisions). The "References in Text" following 42 U.S.C. §§ 6201 and 6202 in the United States Code explain the discrepancy, noting that an editorial change was made by the Office of the Law Revision Counsel when compiling the Code, but that Congress intended the definitions to apply to the full act—*i.e.*, all of EPCA. *See* Off. of the Law Revision Counsel, Detailed Guide to the United States Code at I.A, V (describing "Translations" and "References in Text notes," and explaining that a statutory unit listed in the code "may not be a precise translation of the corresponding act unit appearing in the statute"), *available at* http://uscode.house.gov/detailed_guide.xhtml. As the Supreme Court has explained, in the event of divergence between the enacted statute and the Code, the statute has the force of law. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993); *see also, e.g.*, *Colonial Press Int'l, Inc. v. United States*, 113 Fed. Cl. 497, 521 n.20 (2013) (applying same analysis).

B. Venue Is Proper for All State Petitioners.

Under 49 U.S.C. § 32909(a)(2), persons may file a petition for review "in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." Here, no party has objected to venue in this circuit, where New York and Vermont are located. Given the absence of such an objection, any defect in venue has been waived. *Trans World Airlines, Inc. v. C.A.B.*, 339 F.2d 56, 64 (2d Cir. 1964); *Pharmaceuticals Research and Mfrs. of Am. v. Thompson*, 259 F. Supp. 2d 39, 59 (D.D.C. 2003).

In any event, even though California, Maryland, and Pennsylvania do not reside or have a principal place of business in the circuit, venue is nonetheless proper. As courts have widely held in the context of other statutes, the presence of out-of-circuit petitioners does not make venue improper where, as here, several petitioners are located in this circuit and the out-of-circuit parties have petitioned alongside the in-circuit parties. *See, e.g. Sidney Coal Co.*, 427 F.3d at 344-45; *A.J. Taft Coal Co. v. Barnhart*, 291 F. Supp. 2d 1290, 1301-02 (N.D. Ala. 2003); *see also* 14D Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3815, at 342 (4th ed. 2013) ("In any case involving multiple plaintiffs,

venue is proper where any one of them resides."). Courts have adopted this approach in order to avoid a multiplicity of suits, which would otherwise unnecessarily burden the courts as well as federal agencies.

C. The States' Suit Is Timely.

A petition for review under EPCA must be filed "not later than 59 days after the regulation is prescribed." 49 U.S.C. § 32909(a)-(b). In construing another substantially identical judicial review provision in EPCA—under which, as here, the time to file a petition also began to run from when a rule was "prescribed"—this Court held that the clock runs from the date a rule is published, since "prescribed" and "published" are "interchangeable" in EPCA. *Abraham*, 355 F.3d at 196 & n.8. Because the State's petition was filed 58 days after NHTSA's suspension rule was published in the Federal Register, it is timely.

Despite *Abraham*'s direct holding, Intervenor AAM has argued that use of the term "prescribed" indicates that the time to file a petition begins to run from an agency's submission of a rule to the Office of the Federal Register (OFR), which precedes OFR's publication of the final rule. But this Court's contrary conclusion in *Abraham* is supported by every tool of statutory construction.

As an initial matter, this Court's interpretation follows "the general rule that the limitations period begins to run from the date of publication in the Federal Register." *Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997). For example, challenges under the APA must be filed within six years of the date a cause of action "accrues," *see* 28 U.S.C. § 2401(a), which this Court and others have uniformly interpreted to be the date of publication. *United Airlines, Inc. v. Brien*, 588 F.3d 158, 167 (2d Cir. 2009) ("the period of limitations for challenging regulations begins accruing at the time of publication in the Federal Register"); *Polanco v. DEA*, 158 F.3d 647, 652-53 (2d Cir. 1998) (collecting cases). Where Congress intends to set an "unusual" rule that would decouple the time to bring a challenge from the date the agency gives broad public notice of its final action, it uses "clear language in the statute." *See United States v. Benson*, 548 F.2d 42, 44 (2d Cir. 1977). No clear indication of such intent is present here, where Congress used some form of the word "file" eight times in EPCA's judicial review section, but elected not to use that term as the trigger for judicial review. *See* 49 U.S.C. § 32909.

The word Congress actually used—"prescribed"—accords with the default presumption. To "prescribe" is "to lay down a rule." *Merriam-Webster's Collegiate Dictionary*, s.v. prescribe, at 921 (10th ed. 1994). Yet unpublished standards that have merely been filed with OFR have not been finally laid down; such regulations "are only tentatively scheduled for publication because agencies may delay or terminate the action prior to publication."[11] *Accord Zhang*, 55 F.3d at 741, 749 (regulation that was filed with OFR but never published did not become a "final rule" and could thus be withdrawn without formal repeal). OFR makes regulations available on its website for public inspection before final publication, but advises the public that they may include "markup language" and that only the published versions are official and "provide legal notice to the public."[12] *Accord Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) ("the appearance of rules and regulations in the Federal Register gives legal notice of their contents"); 5 U.S.C. § 552(a)(1) (persons cannot

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[11] Off. of the Fed. Register, About Us, *available at* https://www.ofr.gov/AboutUs.aspx (last visited Mar. 6, 2018).

[12] *See* Fed. Register, Public Inspection Issue, *available at* https://www.federalregister.gov/public-inspection/current (last visited March 6, 2018).

"be adversely affected by" matters required to be published that have not been published).[13] It would make little sense for the time to challenge an agency's rule to run from the date OFR posts a version of a regulation that it expressly advises is not final and does not constitute legal notice.

Congress's use of the word "prescribe" elsewhere in EPCA confirms that it intended the word to be synonymous with "publish." Throughout EPCA's fuel economy provisions, the word "prescribe" is used to denote the decisional process that culminates in a final, published regulation. For example, the statute states that the agency "shall prescribe by regulation" such items as fuel efficiency standards and penalties. 49 U.S.C. §§ 32902(a), 32912(c)(1)(A). And manufacturers are liable for violating final standards that have been "prescribed," not merely proposed or filed. *Id.* § 32912(b). As this Court observed in *Abraham*, "Congress considered publication as the terminal act effectuating an amendment" under EPCA. 355 F.3d at 196.

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[13] Regulations also typically do not have effective dates until they are published because an effective date is generally required to be at least thirty days after publication. *See* 5 U.S.C. § 553(d).

The evolution of EPCA's judicial review provisions also confirms that Congress has understood "prescribed" and "published" as interchangeable terms. In an early EPCA amendment, Congress provided that a petition to challenge a modification of a civil penalty could be filed "at any time before the 60th day after the date such rule is *published*." Pub. L. No. 95-619, 92 Stat. 3206, § 402(e)(3)(A) (Nov. 8, 1978) (emphasis added). When Congress in 1994 recodified various transportation laws into a unified Title 49, it consolidated this provision with another CAFE limitations provision that had set the same 59-day review period, but from when a rule was "prescribed." Pub. L. No. 103-272, 108 Stat. 745 (Jul. 5, 1994), *codified at* 49 U.S.C. § 32909(b). The consolidated provision used "prescribed" as the triggering term for judicial review, but Congress expressly stated that its amendments—including its choice of "prescribed" over "published"—were intended merely to reorganize and streamline the statute "without substantive change." *Id.* § 1; S. Rep. No. 103-265, at 1 (1994).[14]

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[14] *See also id.* at 5 ("As in other codification bills enacting titles of the United States Code into positive law, this bill makes no substantive change in the law.").

In other words, Congress saw no difference between "prescribed" and "published," and chose one term over another because they were synonymous—both referred to a rule's official publication as the trigger for the 59-day limitations period.[15] Indeed, the legislative history of the 1994 recodification shows several other instances where Congress used "prescribed" interchangeably with "published" or "promulgated," further confirming the interchangeability of the terms. *See, e.g.*, H.R. Rep. No. 103-180, at 79 (1993) (replacing "take such action as may be necessary to develop and publish" with "prescribe" so as "to eliminate unnecessary words"); *id.* at 169 (replacing "promulgate" with "prescribe," to promote "consistency"); *id.* at 46 (replacing ". . . promulgate final regulations, establishing" with "prescribe regulations establishing").[16]

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[15] Congress took care to preserve substantive differences where they existed, maintaining, for example, the slightly different venue rules set by the two prior judicial review provisions. *See, e.g.*, 49 U.S.C. § 32909(a)(1)-(2).

[16] EPCA's language and history show unequivocally that a regulation has been finally "prescribed" at the point it is published. But even if the statute were ambiguous, NHTSA's regulations also designate publication—not filing with OFR—as the terminal rulemaking act. Once the Administrator adopts a regulation, it "is published in the Federal Register" to consummate the process. 49 C.F.R. § 553.29. *See Horsehead*

AAM has cited the Ninth Circuit's decision in *Public Citizen, Inc. v. Mineta*, 343 F.3d 1159, 1167-68 (9th Cir. 2003), as support for its position that filing, not publication, triggers the time for judicial review. But that case addressed different language ("issued," not "prescribed") in a different statute (the National Traffic and Motor Vehicle Safety Act, not EPCA), and ultimately did not turn on whether filing or publication was the right trigger for judicial review since the petitioners' suit would have been timely under either standard. To the extent that the Ninth Circuit's discussion bears on the issues here, this Court's subsequent holding in *Abraham* provides the more directly applicable (and better explained) rule for this case, which also accords with the well-established presumption that the time for review runs from publication.

Finally, even if this Court were to accept AAM's invitation to overturn the holding of *Abraham*, it should nonetheless allow this action to proceed. The 59-day period to bring suits is a claims-processing rule, not a jurisdictional bar, as it contains "no clear statement" sufficient to

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Res. Dev. Co. v. EPA, 130 F.3d 1090, 1095 (D.C. Cir. 1997) (rejecting definition of "promulgation" that was not synonymous with "publication" in part because agency's rules specified that decisions were final when published).

indicate that it is "the rare statute of limitations that can deprive a court of jurisdiction." *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015); *see also Herr v. United States Forest Serv.*, 803 F.3d 809, 813-18 (6th Cir. 2015) (holding that statute of limitations governing APA challenges is a nonjurisdictional claims-processing rule). Because State Petitioners diligently pursued their rights and relied on this Court's construction of a substantially identical provision in *Abraham*, this Court should equitably toll the limitations period and reach the merits. *See Martinez v. Superintendent of E. Corr. Facility*, 806 F.3d 27, 31 (2d Cir. 2015).

CONCLUSION

For the above reasons, the Court should vacate NHTSA's indefinite suspension of the Civil Penalties Rule's effective date and its reinstatement of the former $5.50 penalty for violations of the CAFE standards.

Dated: New York, NY
March 6, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Max Kober, 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 10,368 words and complies the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Max Kober

Addendum

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Sec. 2461 - Mode of recovery
From the U.S. Government Publishing Office, www.gpo.gov

§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 to [1] 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.

ADD2

"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.—

ADD3

"(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.]

[1] *So in original.*

DECLARATION OF JOSHUA M. CUNNINGHAM

I, Joshua M. Cunningham, declare as follows:

1. My name is Joshua M. Cunningham and I am Chief of the Advanced Clean Cars Branch of the California Air Resources Board (CARB). I make this declaration based upon my knowledge and expertise in the matters within, and upon my review of the relevant rulemakings, reports, and other documents discussed below.

2. My resume is attached as Exhibit A. As Chief of the Advanced Clean Cars Branch since 2015, I am responsible for a broad regulatory program that includes emissions requirements for all new passenger vehicles sold in California. Prior to this work, I have been employed in a range of management and analytic positions at CARB since 2009. I have previously worked as a manager for the University of California at Davis's Institute of Transportation Studies, as a senior systems engineer for the United Technologies Corporations' Transportation Group, and as a product engineer for Delphi Chassis Systems. Additionally, I have broad experience in automotive engineering and policy and in greenhouse gas emissions and air pollutant reduction program design and management. CARB has recognized me with a sustained superior accomplishment award. My technical work has also been recognized with an Outstanding Technical Paper of 2010 by SAE International, formerly known as the Society of Automotive Engineers, an engineering association for transportation fields. I hold a patent for fuel cell technology controls, and have also received fellowships from the U.S. government for my work. I have a Masters of Science in Transportation Technology and Policy from the University of California at Davis and Bachelor of Science in Mechanical Engineering from Michigan State University.

History of Regulation of Vehicle Emissions and CAFE Standards

3. Starting in 1966, prior to the first federal fuel efficiency standards, California became the first state in the country to regulate vehicle emissions. Since 1967, California's emissions standards have been administered by CARB. With the adoption of the 1970 Clean Air Act and the establishment of the United States Environmental Protection Agency (U.S. EPA), the federal government began regulating vehicle emissions at the national level. Importantly, Congress preserved California's ability to adopt its own tougher emissions standards.

4. Starting with the model year (MY) 1978, vehicle manufacturers have been required to comply both with corporate average fuel economy (or "CAFE") standards administered by the National Highway Traffic Safety Administration ("NHTSA"), and with U.S. EPA and CARB emission standards that limit air pollutants from vehicles.

5. More recently, the U.S. EPA and CARB have established greenhouse gas emission standards for passenger, light- and medium-duty motor vehicles.

6. Under the one National Program for vehicle greenhouse gas emission standards, California's greenhouse gas regulations for MY 2017-2025 for light-duty vehicles accept compliance with the federal standards as an option for vehicle manufacturers.[1] CARB committed to this, initially in a letter to the U.S. EPA and then by adopting the so-called "deemed-to-comply" provision that put this decision into effect.[2] Because of California's unique ability under the federal Clean Air Act to adopt its own tougher emissions standards, its decision to participate in the National Program with U.S. EPA gives it an important role in the program and a particular interest in ensuring the program is effective and is not undermined.

[1] Cal. Code Regs., tit. 13, § 1961.3(c).

[2] *See* Air Resources Board Resolution 12-35, November 15, 2012, pp. 3-7, available at https://www.arb.ca.gov/regact/2012/leviiidtc12/res12-35.pdf; see also 76 Fed. Reg. 74854, 74863 (Dec. 1, 2011).

7. The federal greenhouse gas emission standards are harmonized to be consistent with the federal CAFE standards administered by NHTSA.[3] CARB, U.S. EPA and NHTSA recently jointly assessed the performance of the program in a 2016 Technical Assessment Report (TAR). Section 1.3 of the joint agency 2016 TAR further describes the harmonization:[4]

> NHTSA and [U.S.] EPA have conducted two joint rulemakings to establish a National Program for corporate average fuel economy (CAFE) and GHG emissions standards. Together, the two rules established strong and coordinated Federal GHG and fuel economy standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles (hereafter light-duty vehicles or LDVs). Each agency adopted standards covering MYs 2012-2016 in May 2010 and covering MY2017 and beyond in October 2012. The MYs 2012-2016 rule represented the first time [U.S.] EPA established standards for GHG emissions under its Clean Air Act authority. The Federal GHG and fuel economy standards for MY2017 and beyond were developed in a joint effort with CARB. And, subsequent to the adoption of California-specific GHG standards for MYs 2017-2025 and the adoption of the Federal standards for MY2017 and beyond, CARB adopted a "deemed to comply" provision whereby compliance with the Federal GHG standards would be deemed as compliance with California's GHG program in furtherance of a single National Program. The National Program approach, combined with California standards, helps to better ensure that all manufacturers can build a single fleet of vehicles that satisfy all requirements under both federal programs and under California's program, which helps to reduce costs and regulatory complexity for auto manufacturers. In addition, the National Program provides significant environmental and climate benefits, energy security, and consumer savings to the general public. Most stakeholders strongly supported the National Program, including the

[3] See 77 Fed.Reg. 62,624 (Oct. 15, 2012) [EPA and NHTSA jointly issued final rule setting greenhouse gas and fuel economy standards for light-duty vehicles for MY 2017-2025].

[4] U.S. EPA, NHTSA, CARB. July 2016. Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 (footnotes omitted). See https://nepis.epa.gov/Exe/ZyPDF.cgi/P100OXEO.PDF?Dockey=P100OXEO.PDF

auto industry, automotive suppliers, state and local governments, labor unions, NGOs, consumer groups, veterans groups, and others.

8. Although the CAFE and emissions standards are generally complimentary, they are by no means duplicative. Each carries its own specific requirements, and its own penalties for violations. In general, a higher CAFE standard will lead to higher mileage vehicles that emit fewer greenhouse gases for every mile driven. For example, the CAFE standards help incentivize manufacturers to produce hybrid electric vehicles, which have higher mileage figures than non-hybridized vehicles, and reduced greenhouse gas emissions – in some instances, zero emissions. Section 1.2 of the 2016 TAR states:

> The National Program is both needed and possible because the relationship between improving fuel economy and reducing CO2 tailpipe emissions is very direct and close. The amount of those CO2 emissions is essentially constant per gallon combusted of a given type of fuel. Thus, the more fuel efficient a vehicle is, the less fuel it burns to travel a given distance. The less fuel it burns, the less CO2 it emits in traveling that distance. While there are emission control technologies that reduce the pollutants (e.g., carbon monoxide) produced by imperfect combustion of fuel by capturing or converting them to other compounds, there is currently no such technology for CO2. Further, while some of those pollutants can also be reduced by achieving a more complete combustion of fuel, doing so only increases the tailpipe emissions of CO2. Thus, there is a single pool of technologies for addressing these twin problems, i.e., those that reduce fuel consumption and thereby reduce CO2 emissions as well. As noted in the 2012 final rule, the rates of increase in stringency for the CAFE standards are lower than EPA's rates of increase in stringency for GHG standards for purposes of harmonization and in reflection of several statutory constraints on the CAFE program.

NHTSA's Indefinite Delay of the Civil Penalties Rule

9. On July 12, 2017, NHTSA announced that it was delaying indefinitely the effective date of the final rule increasing the penalty for vehicle fleets that do not comply with CAFE standards (Civil Penalties Rule). The Civil Penalties Rule

increased this penalty from $5.50 for every tenth of a mile per gallon (mpg) that an automaker's fleet-wide average mpg falls below the applicable CAFE standard, to $14 per tenth of a mpg. NHTSA explained in its Civil Penalties Rule that this increase was required by a 2015 Act of Congress.

10. Prior to the Civil Penalties Rule, the penalty rate had been $5.50 since 1997. Prior to 1997, the penalty rate had been $5.00, which was the penalty rate first established in the 1970s.

11. When NHTSA announced that it was delaying the Civil Penalties Rule, it stated that it was reinstating the prior penalty rate of $5.50.

12. CAFE standards in place through 2021 and the augural CAFE standards for the years 2022 through 2025 increase each year. For instance, the CAFE standards for passenger cars will increase from 44 mpg today to 47 mpg in 2019, and to 49 mpg in 2020. Similarly, the CAFE standards for light trucks will increase from 36 mpg today to 38 mpg in 2019, and to 39 mpg in 2020. If the penalty rate is too low, automakers will not be adequately incentivized to build fleets that are fuel efficient and meet these increasing standards.

NHTSA's Delay of the Civil Penalties Rule Undermines the National Program

13. The regulatory signals for the fuel economy standards need to be obvious to manufacturers and technology suppliers, and they need to know that the fuel economy and emission standards are stable and will be enforced, to have the confidence to invest the necessary resources to meet the standards.

14. The CAFE standards themselves, associated penalties for violating them, and the competitive advantages to the manufacturers and suppliers that meet them in a level marketplace are necessary to carry out the program directed by Congress to conserve fuel.

15. Based on past practice, and based on the increases in the CAFE standards scheduled for 2019 and 2020, it is reasonable to expect that some vehicle

manufacturers will find it more profitable to pay the $5.50 penalty than to fully comply with the CAFE standards.

16. For example, in 2016, auto industry groups stated to NHTSA (in response to the agency's July 5, 2016 Interim Final Rule) that automakers had already set their CAFE compliance plans for MY 2017 and 2018 based on the former $5.50 penalty rate. NHTSA relied on this statement when it agreed that the Civil Penalties Rule would first apply to MY 2019 fleets.

17. Vehicle development cycles run 3-5 years from product design decisions, through engineering, testing, and manufacturing readiness development. These cycles can be shorter if the new vehicle is largely based on an existing platform, but longer where a new engine and base platform is being developed, leveraging systems and designs that have completed a company's basic research phase. New engines and platforms take time to develop given the complexity of many vehicle systems (e.g. electrical, engine, exhaust after-treatment, body, suspension, etc.). Every element of the vehicle must be individually designed and tested, commonly leveraging contracts with suppliers to do so. Systems and then full vehicles need to be built and tested for durability and performance, followed by crash testing, all of which can lead to design changes along the way. Finally, manufacturing processes and test assembly lines need to be developed, followed by sample cars off the assembly lines to identify errors in the process.[5] I have been a participant in these cycles in the course of my professional career.

18. Based on the observed past practice described above, I believe the automakers are currently in the midst of planning and developing their MY 2019 through 2023 vehicles. Thus, the planning decisions that automakers are making

[5] Edwards, M. et al "How Automakers Plan Their Products: A Primer for Policymakers on Automotive Industry Business Planning," Center for Automotive Research (CAR), July 2007. http://www.cargroup.org/publication/how-automakers-plan-their-products-a-primer-for-policymakers-on-automotive-industry-business-planning/

right now will impact whether or not the MY 2019-23 fleets comply with the CAFE standards. The automakers' decisions are directly impacted by the amount of the penalty rate, i.e., whether it is $14, as set forth in the Civil Penalties Rule, or $5.50, the prior rate that was set twenty years ago. Several companies historically have paid CAFE penalties for non-compliance in lieu of bringing new technologies to market to meet CAFE standards.[6] NHTSA's reinstatement of the older $5.50 penalty creates an incentive for some companies to return to this non-compliant behavior. If NHTSA's delay of the Civil Penalties Rule continues into next year, NHTSA's actions will also impact planning for fleets extending through MY 2024.

19. If the CAFE fines are reduced to levels that may be less expensive than complying through technology, some automakers may choose this path for CAFE compliance, though they would still need to comply with the U.S. EPA and California GHG regulations. However, given that the GHG regulations have flexibility for banking of emissions credits, a potential outcome would be a reduced pace of technology introduction as automakers use banked GHG credits and under-comply with CAFE. This has detrimental effects on California and other states. It slows technology progress, thereby making it harder to comply with future model year regulations, and inhibits cost reductions from mature technology on components for vehicles. This, in turn, affects consumer savings on vehicle prices and sends the wrong signals to automotive suppliers for their long-term investments in manufacturing and development of advanced components.

20. In addition, NHTSA's delay will have a direct impact on consumers. Lower fuel efficiency means that vehicles will use more gasoline, which will cost consumers more overall. The penalty paid by the automakers do not compensate the consumers for reduced fuel savings.

[6] Refer to the NHTSA CAFE Civil Penalties public information site for historic records of manufacturers paying fines: https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html

21. In sum, relaxing CAFE penalties contributes to the weakening of the National Program as a whole, and likely will lead to emissions increases and reduced benefits to consumers.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 23, 2017 at Sacramento, California.

Joshua M. Cunningham

EXHIBIT A

joshua m. **cunningham**

PROFILE

Manager and policy analyst with 17 years of engineering and environmental policy experience in automotive advanced technologies and fuels. Broad experience that includes work in both the private and public sectors. Strong background in collaborative programs, bringing multiple stakeholders together to tackle complex challenges.

EXPERIENCE

California Air Resources Board (CARB), Sacramento, CA (3/2009 – present)

Chief, Advanced Clean Cars Branch (4/2015 – present)

- Managing a broad program that includes the clean vehicle emission standards and electric vehicle requirements of all new cars sold in California
- Program also includes engineering and planning support for hydrogen and electric vehicle charging infrastructure, as well as partnerships to address EV market barriers

Manager, Transportation Systems Planning Section (4/2013 – 3/2015)

- Managing a team focused on analyzing multi-sector strategies to achieve long-term (2030-2050) air quality and greenhouse gas emission reductions
- Developing analytical tools (Vision emission projection model) to evaluate specific strategies, including vehicle technologies, alternative fuels, and travel behavior

Director of Programs, Plug-in Electric Vehicle Collaborative (1/2011 – 3/2013)

- Launched public-private-partnership and developed annual work-plan, managing topic working groups for this multi-stakeholder program focused on fostering the EV market
- Lead coordinator and technical writer for a multi-stakeholder Strategic Plan for California on plug-in electric vehicles: The PEV Collaborative's "Taking Charge"

Air Resources Engineer, ZEV Implementation Section *(3/2009 – 12/2010)*

- Conducted economic and emissions impact analyses of the automotive industry from the Zero Emission Vehicle (ZEV) Regulation (regulation change, January 2012)
- Contributed to the Governor's 2012 Zero Emission Vehicle Executive Order, and subsequent ZEV Action Plan, working on the Governor's Office inter-agency team

Institute of Transportation Studies (UC Davis), Davis, CA (4/2005 – 02/2009)

Program Manager, Sustainable Transportation Energy Pathways (STEPS)

- Coordinated research priorities, developed sponsor relationships, formed research collaborations, led major proposals, and organized program events
- Program budget of $1.3M/yr; 20 public & private sponsors; 40 researchers
- Successfully led the effort to secure a $1M seed grant from the California Clean Energy Fund (CalCEF) to launch the UC Davis Energy Efficiency Center (EEC)

United Technologies Corp (UTC), Fuel Cells Div., South Windsor, CT (9/2002 - 3/2005)

Senior Systems Engineer, Transportation Group

- Analyzed and designed fuel and air systems, and power controls, for the Hyundai Tucson fuel cell vehicle & California Bay Area AC Transit fuel cell bus
- Project team leader, BMW fuel cell system designed for freezing conditions
- Special assignments on Advanced Systems and Intellectual Property Teams

Delphi Chassis Systems (General Motors), Dayton, OH (9/1996 - 8/1998)

Product Engineer, Advanced Suspension Development

- Lead engineer for air compressor in automatic leveling system for production vehicles
- Extensive project management experience leading cross-functional product teams
- Developed component technical specifications and design validation test plans

EDUCATION

Masters of Science (MS) - Transportation Technology and Policy (TTP)
University of California, Davis (Davis, California); Graduated 2001

Bachelor of Science (BS) – Mechanical Engineering
Michigan State University (East Lansing, Michigan); Graduated 1996

National Science Foundation Overseas Study Program
Rheinisch-Westfaelische Technische Hochschule (Aachen, Germany); Completed 1995

AWARDS

- CARB Sustained Superior Accomplishment Award, Long-term emission planning (2016)
- CARB Gold Superior Accomplishment Award, Advanced Clean Cars rulemaking (2011)
- SAE Outstanding Technical Paper of 2010; selected for publication in an SAE international journal for passenger vehicles. Paper 2010-01-2306 (2010)
- Patent award (#8, 124, 290) for fuel cell operation with cryogenic hydrogen storage (developed 2004, final patent awarded in 2012)
- UTC FuelCells Senior Management Achievement Award (2004)
- ENO Transportation Fellow, Center for Transportation Leadership Development (2000)
- U.S. Department of Energy GATE Fellowship for graduate studies (1999-2000)

PUBLICATIONS

- PEV Collaborative, "Taking Charge: Establishing California Leadership in the Plug-in Electric Vehicle Marketplace", UC Davis, December 2010
- Cunningham, J.M., "Achieving an 80% GHG Reduction by 2050 in California's Passenger Vehicle Fleet: Implications for the ZEV Regulation", SAE paper # 2010-01-2306, October 2010
- Cunningham, J.M., et al, "Why Hydrogen and Fuel Cells are Needed to Support California Climate Policy", ITS-Davis, UCD-ITS-RR-08-06, Davis CA (2008)
- Cunningham, J.M., et al, "A Comparison of High Pressure and Low Pressure Operation of PEM Fuel Cell Systems", SAE paper #2001-01-0538 (2001)
- Cunningham, J.M., et al, "Requirements for a Flexible and Realistic Air Supply Model for Incorporation into a Fuel Cell Vehicle System Simulation", SAE paper #1999-01-2912 (1999)

VOLUNTEER SERVICE & ACTIVITIES

- Board member, Valley Climate Action Center: A non-profit corporation in partnership with the City of Davis to develop low-carbon strategies in the community
- Board member, Air & Waste Management Association (AWMA), Sacramento Chapter (2015-2016)
- Habitat for Humanity, Dayton Ohio chapter (1996-1998)
- Operation Crossroads Africa: Volunteer service in Ghana assisting local non-profit organizations with community development (1996)
- Musician (percussion) in competitive Drum and Bugle Corps, as well as Michigan State University marching band drumline (1992-1994)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Natural Resources Defense Council, et al.,

Petitioners,

-against-

No. 17-2780 (L),
No. 17-2806 (Con)

National Highway Traffic Safety Administration, et al.,

Respondents,

Association of Global Automakers, et al.,

Intervenors.

DECLARATION OF ALAN BELENSZ

I, ALAN BELENSZ, pursuant to 28 U.S.C. § 1746, declare as follows:

Overview

1. I am the Chief Scientist in the Office of the New York State Attorney General's Albany Environmental Protection Bureau.

2. I submit this declaration in support of the brief filed in this action by the States of New York, California, Vermont, and Maryland and the Commonwealth of Pennsylvania, challenging the National Highway Traffic Safety Administration's ("NHTSA") indefinite delay of the effective date of a final rule

that increases the penalty charged to vehicle manufacturers for violations of the corporate average fuel economy ("CAFE") standards.

3. Unless otherwise noted, the statements made in this declaration are based on my review of various publicly available records, reports, statements, and data compilations prepared by public agencies of the federal government, the State of New York, or the City of New York, including statements made by NHTSA. I have also reviewed the papers filed in this matter by the State of New York and its co-plaintiffs. In addition, I have reviewed the federal regulation at issue in this litigation.

4. Based on my review and analysis, the State of New York and its residents will be harmed by NTHSA's suspension of the updated $14 penalty.

5. NHTSA has found that increasing the amount of the civil penalty that is imposed on manufacturers whose vehicle fleets do not comply with the CAFE standards is an effective deterrent that induces greater levels of compliance with those standards. Suspending the updated $14 penalty, and reinstating the outdated $5.50 penalty, will thus lead to decreased compliance with the CAFE standards by manufacturers who base compliance decisions on the lower penalty amount.

6. NHTSA has also found that compliance with the 2017-2025 CAFE standards is likely to lead to reductions in carbon dioxide emissions from projected

levels, as well as reductions in emissions of criteria air pollutants.[1] Reduced compliance with CAFE standards—due to NHTSA's suspension of the penalty increase—will therefore lead to increased levels of carbon dioxide and criteria pollutants as compared to a baseline where the updated penalty amount remains in effect.

7. The States, including New York State, will be harmed by the climate and health effects of NHTSA's indefinite suspension. Climate change will erode state-owned coastal property, and cause increased flood damage to critical infrastructure owned, funded, and/or maintained by New York.[3] And increased levels of criteria pollutants will injure the health of New York residents, cause the State to incur increased medical costs, and hamper the State's ability to comply with federal air pollution standards.

[1] The Clean Air Act requires EPA to set National Ambient Air Quality Standards (NAAQS) for six common air pollutants referred to as "criteria air pollutants": ground-level ozone, particulate matter, carbon monoxide, lead, sulfur dioxide, and nitrogen dioxide.

[3] *See generally* New York State Energy Research and Dev. Auth., *Responding to Climate Change in New York State: The ClimAID Integrated Assessment for Effective Climate Change Adaptation* (C. Rosenzweig, et al., eds., 2011); New York State Energy Research and Dev. Auth., *Climate Change in New York State: Updating the 2011 ClimAID Climate Risk Information* (R. Horton, et al., eds. 2014).

Biography

8. Since 2010, I have been the Chief Scientist in the Office of the New York State Attorney General's ("OAG") Albany Environmental Protection Bureau; I also served as an environmental scientist for OAG from 1989 to 2007. My current responsibilities include performing research to provide scientific analysis in criminal, civil, and administrative enforcement actions, legislative initiatives, and formulation of policy positions; reviewing and analyzing legal and scientific documents prepared by others; and preparing scientific reports. I have also developed technology and policy options to promote non-polluting, sustainable energy production. Through these efforts, I develop valuable strategic relationships with scientific and policy experts at the state, national and international level.

9. From 2007-2010, I worked in the New York State Office of Climate Change, where I initially led the Bureau of Climate Science and Technology, and then was subsequently appointed as the Office's Director. My responsibilities in that role included drafting policies for New York State to adapt to and prevent the effects of climate change.

10. I have performed various roles for climate-related organizations, including the United Nations Intergovernmental Panel on Climate Change, the Global Roundtable on Climate Change, the International Energy Agency

Regulators Network on Carbon Capture and Storage, and the United States Climate Change Science Program.

11. I received a Bachelor of Science degree in Environmental Science from Rutgers University and a Master of Science degree in Public Health in environmental science and engineering from the University of North Carolina at Chapel Hill.

NHTSA's Delay of the CAFE Penalties Will Result in Increased Greenhouse Gas and Criteria Air Pollutant Emissions

12. When it published the Civil Penalties Rule, NHTSA found that automakers consider the CAFE penalty amount when they establish their product and compliance plans, that planning is done well before the commencement of a model year, and that the planning is difficult to alter once complete.[4]

13. NHTSA also recognized that some vehicle manufacturers had decided not to comply with the CAFE standards for model years before 2019 based on the former penalty of $5.50 per tenth of a mile per gallon, and that it was too late for them to change their plans for those model years based on the $14 penalty.[5] Because the penalty would thus not fulfill its intended purpose of inducing

[4] JA 52-53.
[5] *Id.*

compliance with the CAFE standards for those model years, NHTSA chose not to impose the $14 penalty on fleets until model year 2019.[6]

14. Similarly, when it announced its reconsideration, NHTSA stated that it "expect[ed] that increasing the level of the CAFE penalty will lead to ... increased compliance with CAFE standards, which would result in greater fuel savings and other benefits."[7] According to the manufacturers' timeline on which NHTSA relied, they were then planning for model years 2019 and later, including determining the technology to use for their fleets.[8]

15. For manufacturers that base their design and production plans on the $5.50 penalty that NHTSA has reinstated—rather than the indefinitely suspended $14 penalty—some are likely to choose, as they have in the past, to pay penalties instead of complying with the CAFE standards.[9] This is especially likely, as NHTSA has acknowledged, given "the fact that CAFE standards are set to rise at a significant rate over the next several years."[10]

16. Reduced compliance with CAFE standards would, according to NHTSA's findings, lead to adverse consequences for the environment and public

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[6] JA 53.
[7] JA 80.
[8] *See* JA 52-53.
[9] *See* JA 32, 35.
[10] JA 79; *see also* 77 Fed. Reg. at 62,641 (showing 2017-2021 CAFE standards and the "augural" standards for 2022-2025).

health. When NHTSA established the CAFE standards for model years 2017 and later (including model year 2019), it "estimate[d] that total annual CO_2 emissions associated with passenger car and light truck use in the U.S. would decline by between 36 million metric tons (MMT) and 38 MMT in 2020 and a cumulative reduction of between 11,641 and 12,832 MMT from 2017 to 2060," leading to "small but significant reductions in projected changes in the future global climate."[11]

17. Reduced compliance with CAFE standards will also result in increased emissions of criteria air pollutants. When it established the CAFE standards for model years 2017 and later, NHTSA projected that the standards would result in significant reductions in particulate matter ($PM_{2.5}$), nitrogen oxides, sulfur oxides, and volatile organic compounds.[12] NHTSA stated that these "reductions in emissions. . . are projected to result in significant declines in the adverse health effects that result from population exposure to these pollutants."[13] As one example, NHTSA predicted that reductions in one class of pollutants—$PM_{2.5}$, or particulate matter 2.5 microns in diameter and smaller—would result in 360 to 1,100 fewer premature deaths per year in the United States by 2040.[14]

[11] 77 Fed. Reg. at 63,060.
[12] 77 Fed. Reg. at 63,061-62.
[13] 77 Fed. Reg. at 63,062.
[14] *Id.*

18. If NHTSA's conclusions regarding the incentive value of penalties for CAFE compliance are correct, reductions in criteria pollutant emissions resulting from delaying those penalties would reduce the health benefits that NHTSA projects.

Increased Greenhouse Gas Emissions Will Harm New York

19. NHTSA found that the 2017-2025 CAFE standards would result in "small but significant reductions in projected changes in the future global climate."[15] Projected future impacts of climate change are extensive and widespread, and as NHTSA has recognized, they are expected to include serious negative impacts to New York State and the other petitioners in this action. Among other impacts, NHTSA found that climate change is likely to decrease dairy production in New York and Vermont, increase flooding in densely-populated New York City, and increase heat-related illnesses and deaths in the Northeast.[16]

20. NHTSA has recognized that climate change increases flooding in densely-populated New York City, that flooding would affect critical

[15] 77 Fed. Reg. at 63,060.

[16] NHTSA, Final Environmental Impact Statement: CAFE Standards, Passenger Cars and Light Trucks Model Years 2017-2025, § 5.5.2 available at https://one.nhtsa.gov/staticfiles/rulemaking/pdf/cafe/FINAL_EIS.pdf (last checked Mar. 6, 2018) ("CAFE 2017-2025 EIS").

transportation infrastructure in lower Manhattan, and that the City has already begun to implement adaptation measures:

> New York City is one of two U.S. cities projected to be among the top 20 cities worldwide in terms of population exposed to coastal flooding (Hanson et al. 2011). New York State has over $2.3 trillion of insured coastal property that is exceptionally vulnerable to sea-level rise and its related impacts. With rising sea levels, the 100-year flood is projected to inundate far larger areas of New York City than today, particularly under higher emissions scenarios. Flooding would affect critical transportation infrastructure in the Battery area of lower Manhattan.[17]

21. New York State and entities it funds maintain or own critical transportation infrastructure in lower Manhattan, including the Hugh L. Carey Tunnel (formerly the Brooklyn-Battery Tunnel),[18] the South Ferry Terminal,[19] and the West Side Highway.[20]

22. New York's Metropolitan Transit Authority (the "MTA") has, especially in the wake of Hurricane Sandy, taken extensive measures to prepare its infrastructure for climate change impacts such as increases in sea-level rise, coastal

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[17] *Id.* at § 5.5.2.1.3.

[18] *See* Metropolitan Transit Authority, *2017 Adopted Budget: February Financial Plan, 2017-2020*, *available at* http://web.mta.info/mta/budget/pdf/MTA%202017%20Adopted%20Budget%20February%20Financial%20Plan%202017-2020.pdf

[19] *Id.* at 106.

[20] New York State Department of Transportation, Real Estate Division, Notice of Appropriation, "Route 9A Reconstruction Project," *available at* http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=FT_1840006500484.

storm surges, extreme winds, average air temperature and heat waves, and heavy precipitation.[21] In 2016, the MTA was engaged in 46 resiliency projects requiring a total expenditure of $750 million, which included federal funding.[22] These projects include:

a. Resiliency measures (e.g., hardening of pump systems, watertight doors, and portal-sealing) designed to improve underground and underwater subway tunnels from flooding from future Category 2 storms, with an additional three-foot safety factor;
b. Redesign of bus depots with interior and exterior flood protections;
c. Elevation of electric substations on the MTA Metro-North Railroad's Hudson Line four feet above projected flood levels; and
d. The installation of flood barriers on each side of the Hugh L. Carey Tunnel.[23]

23. As NHTSA has recognized, "The Northeast includes densely populated coastal areas that are extremely vulnerable to projected increases in the extent and frequency of storm surge, coastal flooding, erosion, property damage,

[21] MTA, *MTA Climate Adaptation Task Force Resiliency Report* at 8, *available at* http://web.mta.info/sustainability/pdf/ResiliencyReport.pdf
[22] *Id.at 12*
[23] *Id.* at 16-27.

and loss of wetlands."[24] Indeed, "[e]xtensive erosion has already been documented across the mid-Atlantic region, New England, and New York."[25]

24. New York State has 1,850 miles of tidal coastline,[26] and the State owns dozens of state parks within New York State's coastal boundary. New York State tidal shoreline property is thus at risk given any amount of sea level rise, and tidal shoreline property in the State held by private landowners is similarly at risk.

25. NHTSA's suspension of updated penalty amounts will exacerbate these harms, as it will reduce compliance with the CAFE standards that NHTSA has found will decrease emissions of greenhouse gases from vehicles.

Increased Criteria Air Pollutants Will Harm New York

26. As NHTSA has recognized, implementing its CAFE standards for model years 2017 and later will likely result in a significant reduction of criteria air pollutant emissions from projected levels.[27] Criteria air pollutants have serious impacts on New Yorkers' health—and thus on New York's budget.

Fine Particulate Matter

27. One such criteria pollutant is particulate matter. NHTSA estimated that the CAFE standards would result in meaningful reductions in $PM_{2.5}$, or fine

[24] CAFE 2017-2025 EIS § 5.5.2.1.3.
[25] *Id.*
[26] U.S. Bureau of the Census, *Statistical Abstract of the United States 1987* at 187 (107th Ed.).
[27] 77 Fed. Reg. at 63,061.

particulate matter 2.5 microns in diameter and smaller. Those reductions are projected to result in 360 to 1,100 fewer premature deaths per year by 2040.[28]

28. As NHTSA notes, the health effects of ambient particulate matter are discussed in detail in EPA's Integrated Science Assessment (ISA) for Particulate Matter. As NHTSA summarizes the ISA's findings,

> The ISA concludes that health effects associated with short-term exposures (hours to days) to ambient $PM_{2.5}$ include mortality, cardiovascular effects, such as altered vasomotor function and hospital admissions and emergency department visits for ischemic heart disease and congestive heart failure, and respiratory effects, such as exacerbation of asthma symptoms in children and hospital admissions and emergency department visits for chronic obstructive pulmonary disease and respiratory infections. The ISA notes that long-term exposure (months to years) to $PM_{2.5}$ is associated with the development/progression of cardiovascular disease, premature mortality, and respiratory effects, including reduced lung function growth, increased respiratory symptoms, and asthma development.[29]

29. In 2011, the New York City Department of Health and Mental Hygiene issued a report providing estimates of the impacts of $PM_{2.5}$ pollution on the health of New York City residents. That report estimates that $PM_{2.5}$ causes over 3000 premature deaths every year in the State. It also attributes to $PM_{2.5}$ exposure

[28] 77 Fed. Reg. at 63,062.
[29] 77 Fed. Reg. at 62,902.

more than 1,200 hospital admissions, and 5,000 asthma-related emergency department visits for children and adults.[30]

30. New York State bears a significant portion of the cost of New Yorkers' asthma-related health issues. As of 2014, New York's $55 billion Medicaid program, which enrolled approximately one in four New Yorkers, was responsible for a major portion of the State's annual asthma costs. An analysis by the Office of the State Comptroller of Medicaid expenditure data found that asthma-related Medicaid costs for recipients diagnosed with the disease exceeded $532 million in State Fiscal Year (SFY) 2012-13, an increase of more than 26 percent from five years earlier.[31]

31. The Clean Air Act requires EPA to set National Ambient Air Quality Standards ("NAAQS") for particulate matter, including $PM_{2.5}$, and New York is currently subject to several standards requiring controlling $PM_{2.5}$. For example, the State is obligated to implement a plan to maintain a $PM_{2.5}$ NAAQS at an average three-year level at or below 12 micrograms per cubic meter of air.[32] Additional

[30] New York City Department of Health and Mental Hygiene, *Air Pollution and the Health of New Yorkers: The Impact of Fine Particles and Ozone* at 16 (2011), *available at* https://www1.nyc.gov/assets/doh/downloads/pdf/eode/eode-air-quality-impact.pdf

[31] New York State Comptroller, *The Prevalence and Cost of Asthma in New York State* at 1 (April 2014), *available at* https://www.osc.state.ny.us/reports/economic/asthma_2014.pdf

[32] 78 Fed. Reg. 3086 (Jan. 15, 2013).

emissions of $PM_{2.5}$ in New York make planning to meet these standards more difficult for New York.

32. In sum, NTHSA's suspension of the updated penalty amount will injure New York and its residents by increasing air pollution, leading to reductions in air quality that will harm the health of New Yorkers and increase the medical costs that are borne, in substantial part, by the State.

I declare under penalty of perjury that I believe the foregoing to be true and correct.

Executed on March 6th, 2018.

Alan Belensz

Alan Belensz, M.S.P.H.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*, Respondents, ASSOCIATION OF GLOBAL AUTOMAKERS, *et al.*, Intervenors.	Case Nos. 17-2780 (L), 17-2806 (Con)

DECLARATION OF JAY CHAMBERLIN

I, Jay Chamberlin, state and declare as follows:

1. I am the Chief of the Natural Resources Division of the California Department of Parks and Recreation ("DPR"), a position I have held since 2010. I have worked in the conservation field for more than twenty years. I received a Masters of Science in Natural Resources and Environment from the University of Michigan in 1998. Prior to my current position, I served as Environmental Program Manager at the California Department of Water Resources from 2008 to

2010, and Deputy Assistant Secretary at the California Natural Resources Agency from 2005 to 2008. I have also worked as a consultant to the Ecosystem Restoration Program for the California Bay-Delta Authority, and as Policy Manager for the Pacific Forest Trust, where my work focused on forest-related climate considerations and policies.

2. I regularly give presentations on climate change and its impacts to the California State Park System, and on policies for addressing those impacts. I have given such presentations to professionals, students and other audiences, including, for example, the California State Assembly's Select Committee on Sea Level Rise and the California Economy. This past January, I gave a presentation on climate change impacts and response measures to the California State Parks and Recreation Commission, the body with authority for guiding policy for the State Park System.

3. DPR manages the California State Park System, which consists of 280 park units and approximately 1.6 million acres of land. Parks are located in every bioregion of California, and the State Park System protects some of the most important natural resources in California, including old growth forests, lakes and reservoirs, rare wildlife, and about twenty-five percent of the California coastline. The State Park System also protects the foremost cultural resources in California, including historic buildings and archaeological sites. The State Park System

receives in excess of 70,000,000 visitors per year, and it is the primary destination for shoreline recreation in California.

4. I am familiar with the scientific models related to global climate change and with evidence of the influence that climate change is having on resources in the State Park System. My knowledge is based on my ongoing review of the current scientific literature, attendance and participation at professional conferences and workshops, and my work for DPR. For years, DPR staff have been engaged in active monitoring and documentation of resource conditions throughout the State Park System. Many changes are attributable, at least in part, to the influence of climate change. Climate-influenced impacts on State Park System resources include but are not limited to coastal erosion, the spread of pests and pathogens (such as bark beetles), changes in phenology (the timing of natural phenomenon such as blooms and animal migrations) and changes to the frequency and severity of wildfires. In the course of my work, I have reviewed information and reports by DPR staff concerning these phenomena.

5. Scientific models of global climate change predict that by the year 2100 the average temperature in California will increase between 2.8 and 8.6 degrees Fahrenheit. These models also predict that by 2100, Mean Sea Levels along the coast will rise between 1 and 3.5 feet, greatly exacerbating the effects of wave run up and storm surges. Due to uncertainty in the model, Actual Mean Sea

Level rise could well exceed the predicted levels by considerable margins. Also, Sea Level rise will vary by location, and certain areas could experience Sea Levels that exceed the predicted Mean Levels.

6. Based upon my professional experience and knowledge of California's State Park System, if the predicted changes in temperatures, annual precipitation and sea level occur, they would have significant adverse and costly impacts on the State Park System.

7. Rising sea levels will drastically reduce the amount of beach available for park visitors, and the available nesting and wintering habitat for threatened shorebirds such as the western snowy plover. In fact, many of California's beaches, including some in the State Park System such as Crystal Cove in Orange County, are narrow bands of sand backed by steep cliffs. If the sea level rises even a few inches, the beaches will not simply move inland, but will completely disappear. Also, even a small rise in sea level will affect the salinity and temperature in California's many lagoons, thereby harming the aquatic life that relies on the lagoons for breeding or rearing. In addition, sea level rise threatens much infrastructure in the State Park System, including numerous campgrounds, trails and roads, and water and waste systems that exist along the ocean's edge.

8. In addition, the California State Park System includes many important cultural resources, including archeological and historic sites, such as old

mission structures, Native American sites, piers, and Civilian Conservation Corps sites. These kinds of resources are irreplaceable, and the salvage and/or protection of cultural resources that would be inundated by a sea level rise would be very expensive. For instance, even a small rise in sea level will affect the Park System's ancient shell middens, which contain remnants from California's earliest human residents, thousands of years ago.

9. Global climate change models also predict that wildfires will increase in frequency and severity. The state's recent experiences concerning wildfires are generally consistent with these predictions. In 2017, California had the highest average summer temperatures in recorded history. Over the last 40 years, California's fire season has increased 78 days—and in some places in the state the fire season is nearly year-round. Eight of the state's most destructive fires have occurred in the last five years.

10. Increases in the frequency and severity of wildfires will have a significant impact on the State Park System. DPR currently expends significant resources to protect park infrastructure and natural and cultural resources from wildfires and to fight these fires. Growing wildfire activity also increases the risk that irreplaceable resources will be lost, including historic structures. Over the last fifteen years, several state parks have been impacted by wildfires, and the increasing frequency of wildfires has become a more important problem for the

State Park System. Most recently, the October 2017 Wine Country fires in Napa and Sonoma Counties burned through several state parks including Trione-Annadel State Park, Sugarloaf Ridge State Park and Robert Louis Stevenson State Historic Park, and threatened Jack London State Historic Park.

11. Global climate change models also predict disruptions to coastal fog. This would have a severe and damaging impact on natural forest types that are dependent upon fog, including Torrey pine, Monterey pine, and Coast redwood. These forest types draw many visitors to the State Park System, and a decline in these forests would result in fewer visitors and a significant loss of revenue to DPR.

12. DPR also manages several parks in winter snow areas, as well as the Sno-Park Program for California. Global climate change models predict reductions in winter/spring snowpack, which would result in fewer visitors and a loss of revenue to DPR.

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I state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on March 6, 2018 in MARSHALL, California.

Jay Chamberlin

JAY CHAMBERLIN