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

REPLY BRIEF FOR STATE PETITIONERS

ERIC T. SCHNEIDERMAN
Attorney General
State of New York

120 Broadway
New York, NY 10271
(212) 416-6197

XAVIER BECERRA
Attorney General
State of California

300 S. Spring St., Suite 1702
Los Angeles, CA 90013
(213) 897-2607

(Counsel listing continues on signature page.)

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PRELIMINARY STATEMENT

As the States established in their opening brief, the National Highway Traffic Safety Administration (NHTSA) violated its statutory obligations and the Administrative Procedure Act's (APA) procedural requirements when it indefinitely stayed a final rule increasing the civil penalty for manufacturers that violate corporate average fuel efficiency (CAFE) standards. Congress could not have been clearer when it directed NHTSA (like other agencies) to update its civil penalties for inflation by August 2016. NHTSA's extraordinary claim that its disregard for this legislative mandate is "legally insubstantial" (Br. for Respondents (NHTSA Br.) 1) cannot be squared with the clarity and specificity of Congress's command. Similarly, NHTSA provides no good cause for forgoing notice and comment when it took nearly six months from its initial temporary suspension of the penalty increase to issue the indefinite delay at issue here.

NHTSA also denigrates the States' challenge to its delay as premature or unimportant (Br. 10) but it is wrong. An agency's prolonged failure to comply with a statutory mandate is hardly unimportant, and there is nothing premature about a lawsuit challenging an improper

delay that has now been in effect for nearly a year, and which, by its terms, will continue indefinitely at NHTSA's discretion—unless this Court intervenes.

Both the delay and the broader legal questions it implicates are of critical importance to the States. By exempting manufacturers from the higher penalty mandated by Congress, NHTSA has removed a critical deterrent that would have led manufacturers to adopt technologies intended to reduce emissions of greenhouse gases and conventional pollutants. The States and their residents face significant injuries from such pollution that would have been avoided if NHTSA had adhered to its statutory obligations. NHTSA's sweeping assertion of agency power to disregard these obligations, as well as its own final regulations, threatens broader harm: under its rationale, there would be no obstacle to any agency putting a final action on hold for an indefinite period solely because it may change its mind. Both the APA and the courts' careful restrictions on untethered agency power prohibit that result.

POINT I

THE STATES HAVE STANDING TO CHALLENGE NHTSA'S ACTION

NHTSA does not dispute that the States are injured by climate change and conventional air pollutants, or that violations of the CAFE standards contribute to those injuries. *See* Br. for State Petitioners (States Br.) 23-29. But NHTSA argues that such injuries are not traceable to its suspension of the penalty increase because manufacturers might not alter their compliance decisions at all in response to changes in the amount and timing of the civil penalty. NHTSA Br. 14, 40; *see also* Br. for Intervenor Alliance of Automobile Manufacturers (AAM Br.) 41. This argument is contradicted by both NHTSA's findings about manufacturers' likely response to the increase and the manufacturers' assertions about the effect of an increase.

In promulgating the final Civil Penalties Rule in December 2016, NHTSA expressly found that the "increased penalty" will "encourage[e] manufacturers to apply more fuel-saving technologies to their vehicles," thereby mitigating the environmental harms caused by vehicle emissions. (JA 52-53.) NHTSA has never repudiated this finding; indeed, when it announced in July 2017 that it was reconsidering the higher

penalty, it reiterated that "increasing the level of the CAFE penalty rate will lead to . . . increased compliance with CAFE standards." (JA 80.)

Intervenors have confirmed that the higher penalty will directly affect manufacturing decisions today, even though the penalty applies to model years 2019 and beyond. Both the Association of Global Automakers (AGA) and the Alliance of Automobile Manufacturers (AAM) represented to NHTSA during the rulemaking process in 2016 that their technology decisions for model years 2017 and 2018 were already "fixed and inalterable"—thus acknowledging that manufacturers make production decisions more than a year in advance of a model year. (JA 52.) And AGA concedes in its brief that its current production decisions for future model years are directly influenced by the civil penalty in effect for those years. AGA Br. 53. Indeed, AGA argues that it was essential for NHTSA to delay the penalty increase because the increase would otherwise have compelled immediate decisions that "cannot be undone once model years are finalized and move towards production." *Id.* at 53-54. The manufacturers' representations—and their demand for an immediate delay of the Civil Penalties Rule—undermine NHTSA's position that reinstating the penalty increase will be of no consequence. *See also* Br.

for Amicus the Institute for Policy Integrity at N.Y.U. School of Law (IPI Br.) 12-15 (discussing the effect of the penalty increase on manufacturers' current decisionmaking).

NHTSA is thus simply wrong to analogize this case (Br. 14) to the "highly attenuated chain of possibilities" that the Supreme Court found insufficient to establish standing in *Clapper v. Amnesty International USA*, 568 U.S. 398, 410 (2013). *Clapper* held that the plaintiffs there did not suffer imminent injury from a statute authorizing interception of foreign communications when they had "no actual knowledge" or other evidence about how multiple independent actors might implement the statute. *Id.* at 411. Here, the States' claim of injury is supported by NHTSA's findings about manufacturers' likely response to the penalty increase, and the relevant independent actors—the vehicle manufacturers—have persistently identified a direct connection between the higher penalty and their current production decisions for future model years. The evidence of injury here thus bears no resemblance to the sparse record in *Clapper*.

It is immaterial that, as NHTSA and AAM point out, manufacturers may be able to reduce or avoid penalties by using credits. NHTSA Br. 14;

AAM Br. 37-38. NHTSA has never considered the availability of credits sufficient to refute its finding that manufacturers take the penalty into account at the production stage; nor do AGA or AAM assert that the credits option leads manufacturers to disregard the higher penalty altogether. To the contrary, AGA concedes that the penalty increase would have a "dramatic" impact on the price of credits, thus influencing planning, even assuming the availability of credits. AGA Br. 19; *see also id.* at 3. Even if the credits option reduces to some degree the impact of the higher penalty on manufacturers' current decisions to comply with the CAFE standards, the States can establish traceable injury so long as the higher penalty is "a small incremental step" in lowering emissions of greenhouse gases and conventional pollutants. *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007). Neither NHTSA nor intervenors contest that the higher penalty would have at least some incremental impact on compliance.

NHTSA also mistakenly argues (Br. at 15) that its pending rulemaking to reduce the civil penalty to $5.50—announced only hours before it filed its brief in this case—makes the States' assertions of injury "even more attenuated and speculative." It is entirely uncertain whether

or when this proposed reduction will come into effect given that it was only just recently proposed, may be revised during the rulemaking process—NHTSA's Notice of Proposed Rulemaking (NPRM) refers repeatedly to the agency's "tentative determination" and "tentative conclusion," 83 Fed. Reg. 13,904, 13,905 (Apr. 2, 2018)—and rests on dubious legal grounds that may lead to its invalidation. See *infra* at 12-15; *see California v. United States Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1126 (N.D. Cal. 2017) (rejecting agency's argument that pending rulemaking rendered vacatur of suspension unnecessary). Manufacturers will likely finalize their production decisions for model years 2019 and even 2020 before the proposed reduction would come into effect. As a result, their decisions will be meaningfully affected by whether the Civil Penalties Rule is in effect or remains suspended when those decisions are being made. *See* States Br. 29-32; *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (requiring only "substantial probability" of injury for standing).

AAM makes several additional arguments against the States' standing, but none have merit. First, AAM argues that it is speculative whether, as the States claim (Br. 26), the suspension of the penalty

increase will make it more difficult for States to meet the national standard for fine particulate matter ($PM_{2.5}$). AAM Br. 41-42. But NHTSA expressly found that compliance with the CAFE standards lowers $PM_{2.5}$, and therefore anything that reduces compliance with the CAFE standards will make it more difficult to meet the $PM_{2.5}$ standard. *See* 77 Fed. Reg. 62,624, 63,062 (Oct. 15, 2012).

Second, AAM argues (Br. 38) that vehicles are subject to greenhouse-gas emissions standards besides the CAFE standards. But AAM has not argued nor has NHTSA found that the emissions standards supplant the CAFE standards. To the contrary, AAM has represented that the higher penalty for violations of the CAFE standards will lead manufacturers to make production decisions that increase the fuel economy of motor vehicles, which lowers greenhouse gas emissions. See *supra* at 4-5.

Third, AAM asserts (Br. 40-41) that any costs the States suffer from conventional air pollutants are comparable to a general decline in tax revenues, which is not a sufficient injury for standing. But the increased health care costs that States will face—including increased Medicaid costs—are a specific expenditure of state funds more comparable to a loss

of specific tax revenues, which is a sufficient injury. *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (decline in tax revenues from extraction and sale of coal); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977) (decline in assessments on apples).

Finally, AAM contests (Br. 42-43) California's sovereign interest as a co-regulator of vehicle emissions. But unlike in *Oregon v. Legal Services Corp.*, 552 F.3d 965, 973 (9th Cir. 2009), where the State challenged restrictions that a *private* legal assistance corporation put on its recipients, California collaborated with NHTSA and EPA to establish a joint program with a single set of harmonized standards, including the CAFE program. By suspending the penalty increase, and weakening the incentive for manufacturers to comply with one component of this program, NHTSA has directly implicated California's interest as a co-regulator of the harmonized program.[1]

[1] NHTSA and AAM argue that the States may not invoke *parens patriae* interests when they challenge federal actions. NHTSA Br. 10 n.4; AAM Br. 41 n.12. A State as *parens patriae* may contest federal action when, as here, it does not seek to invalidate federal law but instead to "assert its rights under federal law." *Massachusetts*, 549 U.S. at 520 n.17. But the Court need not reach this question because the States also rely on proprietary interests, including the loss of state-owned land in New York and California. *See id.* at 527; States Br. 25.

POINT II

NHTSA'S ACTIONS ARE SUBSTANTIVELY AND PROCEDURALLY INVALID

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

1. The suspension violates the Inflation Adjustment Act Amendments.

As the States have explained (Br. 33-34), the 2015 Inflation Adjustment Act (IAA) Amendments mandated that federal agencies update their civil penalties to adjust for inflation according to a defined schedule: agencies were required to establish an initial "[c]atch up adjustment" that "shall take effect not later than August 1, 2016," with subsequent annual adjustments. 28 U.S.C. § 2461 note, sec. 4(a)-(b). NHTSA promulgated the Civil Penalties Rule to comply with this schedule. (JA 26-27.) Its suspension of the Rule thus plainly violates the IAA Amendments by disregarding both the catch-up requirement and two annual adjustments. See States Br. 34.

NHTSA asserts (Br. 37) that the States' arguments under the 2015 IAA Amendments are "premature" because they affect only the merits of the agency's reconsideration of the CAFE penalty rather than its delay of the penalty increase, but that contention makes no sense. The Amendments

dictate not only the *amount* but also the *timing* of any penalty increase. While the States disagree with NHTSA's just-released proposal to reduce the penalty to $5.50, their objection in *this* proceeding focuses on the delay that NHTSA instituted nearly a year ago. And the delay itself is unlawful because it violates the Amendments' "highly circumscribed schedule" for updating the penalty, *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992).

NHTSA also mischaracterizes the Amendments by suggesting (Br. at 37) that they include an "[e]xception" allowing the agency to disregard the mandatory penalty increases at any time based on economic impact. The plain language of the Amendments says otherwise: the "[e]xception" that NHTSA references applies only to "the first adjustment"—i.e., the initial catch up adjustment that was required to come into effect in 2016. 28 U.S.C. § 2461 note, sec. 4(c). Congress thus plainly intended that NHTSA obtain an exception to the scheduled penalty increase well before the 2016 deadline. This reading is confirmed by guidance from the Office of Management and Budget, which is required to approve any exception: that guidance required agencies to submit a notice of proposed rulemaking to seek an exception to OMB "no later than May 2, 2016." (JA 17.)

Nothing in the IAA Amendments can be read to authorize NHTSA to seek an exception now, nearly two years later.

NHTSA notes (Br. 5 n.2) that the NPRM that it filed hours before its brief raises "substantial questions" about whether the 2015 IAA Amendments apply to the CAFE penalty at all. As NHTSA concedes (Br. 28), however, it did not rely on this legal rationale in suspending the penalty increase. This Court should accordingly disregard NHTSA's "post hoc rationalization[]." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *see also Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008).

In any event, the NPRM offers no basis for disputing the applicability of the IAA to the CAFE penalty. The IAA applies to all "civil monetary penalt[ies]," 26 U.S.C. § 2641 note, sec. 4(a), and Congress expressly designated the CAFE penalty as "a civil penalty," 49 U.S.C. § 32912. Indeed, NHTSA previously concluded that an earlier amendment to the IAA, Pub. L. No. 104-134, § 31001, 110 Stat. 1321, 1321-373 (1996), applied to the CAFE penalty and required an increase from $5 to $5.50. *See* 62 Fed. Reg. 5,167, 5,168 (Feb. 4, 1997). There is no basis for NHTSA to take a different position on the applicability of the

2015 Amendments to the same underlying statute. In particular, the NPRM's suggestion that Congress intended to *implicitly* exempt the CAFE penalty from the IAA Amendments cannot be reconciled with the Amendments' *explicit* exemption of other civil penalties—an indication that Congress knew how to craft exemptions when it intended to do so. *See John Wiley & Sons v. DRK Photo*, 882 F.3d 394, 406 (2d Cir. 2018) (applying *expressio unius* canon).

The NPRM also errs in suggesting, 83 Fed. Reg. at 13,909, that the CAFE penalty is not a civil monetary penalty under the IAA Amendments because it does not specify a fixed "maximum amount" in dollar-and-cents terms but instead uses a formula.[2] Again, NHTSA concluded otherwise when it previously applied the earlier IAA amendment to the CAFE penalty. And other agencies have likewise concluded that a penalty set by a formula falls squarely within the

[2] As relevant here, the IAA Amendments define a "civil monetary penalty" as "any penalty, fine, or other sanction" that (i) "is for a specific monetary amount as provided by Federal law," or (ii) "has a maximum amount provided for by Federal law." 28 U.S.C. 2461 note, sec. 3(2).

Amendments' ambit.[3] That result makes sense: a formula will result in a specific dollars-and-cents figure that is just as concrete and specific as a fixed amount. *Cf. United States v. Vera*, 542 F.3d 457, 459 (5th Cir. 2008) (referring to statutory sentencing formula as "calculating the maximum term of supervised release"). And while EPCA permits manufacturers to use credits to reduce the penalty amount they *actually* pay, *see* 49 U.S.C. § 32912(b)(3), that option does not alter the fact that the statutory formula still dictates the *maximum* amount.[4]

The NPRM also incorrectly states, 83 Fed. Reg. 13,910-11, that the IAA Amendments do not apply because they conflict with an alternative, discretionary scheme for calculating penalty increases under EPCA. EPCA permits but does not require NHTSA to increase the CAFE penalty amount. *See* 49 U.S.C. § 32912(c). The IAA Amendments expressly contemplate EPCA's coexistence with such discretionary provisions

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[3] *See, e.g.*, 82 Fed. Reg. 61,140 (Dec. 27, 2017) (applying the 2015 IAA Amendments to the Administrative Fines Program, *see* 11 C.F.R. § 111.43, which uses a multi-factor formula to calculate the penalty).

[4] Several of the penalties that Congress expressly excluded from the Amendments also are based on formulas, a further indication that Congress considered such formula-based penalties to be civil monetary penalties that would otherwise be covered by the Amendments. *See, e.g.*, 26 U.S.C. § 6689 (imposing a civil monetary penalty on taxpayers based on a multifactor formula).

because it provides that an agency need not follow the Amendments if it adopts its own adjustment equal to or greater than the annual adjustment. *See* 28 U.S.C. § 2461 note, sec. 4(d). But when, as here, an agency fails to exercise its discretion to increase a civil penalty, Congress plainly intended the procedure in the Amendments to take precedence.

That result is consistent with the purpose underlying the Amendments. Congress imposed a mandatory rate increase precisely because agencies like NHTSA had failed to use discretionary provisions to increase civil penalties, thereby allowing inflation to erode the penalties' deterrent effects. *See* 28 U.S.C. § 2641 note, sec. 2(a); States Br. 7-8. Because the penalty increases in the Amendments are both mandatory and were enacted more recently, they should be given controlling effect. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982).

2. Past delays do not support NHTSA's suspension of the Civil Penalties Rule.

NHTSA asserts (Br. 32) that the suspension is unexceptional because it is consistent with "scores of instances in which an agency has indefinitely delayed or suspended the effective date of an earlier action."

But NHTSA does not cite a single case that has upheld *any* of these previous delays—let alone one that, as here, was indefinite and implemented without notice and comment.[5] Many of these delays escape judicial review altogether either because they are so brief that no court can realistically act on them, or because the agency ultimately adheres to the underlying regulation after a brief period of reconsideration. *See* Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 Harv. L. & Pol'y Rev. 13, 24 (2018). But when courts have considered the validity of delays, they have uniformly rejected them. See States Br. 34-38; Br. of Environmental Petitioners 3.

These precedents conclusively rebut NHTSA's suggestion (Br. 33) that it has "inherent authority" to "delay[ ] the effective date of an earlier rule where necessary or appropriate to accommodate reconsideration and other factors." Both this Court and the D.C. Circuit have expressly rejected any "inherent authority" to delay a promulgated rule. See States Br. 36 (discussing *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004), and

[5] Many of the examples involved delays of finite duration, *see, e.g.*, 60 Fed. Reg. 26,002 (May 16, 1995) (two months); 54 Fed. Reg. 40,005 (Sept. 29, 1989) (one month), or involved far more explanation than NHTSA provided here, *see, e.g.*, 88 Fed. Reg. 58,633 (Sept. 30, 2015).

Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017)). And NHTSA's argument is further undermined by Congress's schedule for the agency to update its penalties and make annual adjustments. Under analogous circumstances, the D.C. Circuit held in *Reilly* that a "highly circumscribed schedule" precluded EPA from relying on its "general grant of rulemaking authority" to suspend a rule pending reconsideration. 976 F.2d at 41.

NHTSA's attempts to distinguish these precedents are unpersuasive. NHTSA asserts (Br. 35) that *Abraham* turned on a statutory anti-backsliding rule that is not applicable here. But while other holdings in *Abraham* relied on that rule, which prevented the agency from weakening energy-efficiency requirements, this Court did not rely on that prohibition in rejecting the agency's assertion of "inherent" power to delay the effective date of an earlier rule. *See* 355 F.3d at 202-03. Instead it relied only on the absence of express authority—authority that is not only absent here, but expressly precluded by the IAA Amendments.

NHTSA also misses the mark (Br. 36) when it attempts to distinguish *Clean Air Council* by arguing that the decision turned on the

fact that the effective date had already passed when the agency stayed the decision. First, *Clean Air Council* did not rely on any such timing issue, but rather, as in *Abraham*, premised its holding on the fact that EPA could not point to any statute granting it authority to suspend the rule. *See* 862 F.3d at 9. Second, contrary to NHTSA's characterization, its suspension here *did* take place after the effective date of the civil penalty increase, as in *Clean Air Council*. The penalty increase occurred in August 2016, when NHTSA's interim final rule went into effect, as required by the 2015 IAA Amendments. (JA 25.) That increase was thus effective well before the July 12, 2017, suspension. Although NHTSA subsequently promulgated a final rule in December 2016, the only change at that time was to remove any retrospective application of the increased penalty. See States Br. 12-14. Because the prospective application of the higher penalty to model years 2019 and after has been unchanged since August 2016, NHTSA's subsequent decision to suspend that penalty is precisely the type of after-the-fact delay invalidated in *Clean Air Council*.

Finally, there is no merit to NHTSA's implicit suggestion that this Court must grant the agency power to unilaterally delay already-finalized rules without notice and comment to enable it to responsibly

take account of "intervening events" or "different policy views." NHTSA Br. 32. When Congress intends an agency to have such power, it has done so expressly and under narrowly defined circumstances (see States Br. 35-36)—leaving no room for judicially created exceptions to the general rule that an agency is bound by a finalized regulation until it validly amends or revokes it pursuant to the APA. *Clean Air Council*, 862 F.3d at 8-9. And even if there were circumstances where it would be irresponsible for an agency not to impose a short delay of the effective date of a regulation that it is reconsidering, NHTSA's actions here exceed any such equitable leeway: it has now been twenty months since the initial deadline Congress imposed for agencies to enact the catch-up adjustment, and more than fourteen months since this administration, upon entering office, authorized agencies to only "temporarily postpone" the effective dates of published rules for "sixty days" to allow the new administration to review them. 82 Fed. Reg. 8,346 (Jan. 20, 2017). The indulgence that NHTSA asks this Court to grant as a necessary transitional matter cannot be extended to a delay that has already exceeded a quarter of the current administration's term in office.

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

NHTSA's suspension of the Civil Penalties Rule is invalid for the independent reason that it was not effected through notice and comment. NHTSA's attempts to excuse its noncompliance with the APA are meritless.

First, NHTSA invokes (Br. 39) the APA's exception to notice and comment for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). But NHTSA never cited this rationale when it issued the suspension. Instead, the agency based its decision to forgo notice and comment on the APA's "good cause" exception (*see* 5 U.S.C. § 553(b)(B)), rather than the separate exception for procedural rules. (JA 78.) Because "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself," *Motor Vehicle Mfrs.*, 463 U.S. at 50, this Court should decline to consider NHTSA's new justification.

In any event, the exception to notice and comment for procedural rules, which "must be narrowly construed," *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 168 (2d Cir. 2013), is inapplicable to *substantive* agency actions like NHTSA's indefinite suspension of the penalty

increase. Procedural rules do not alter the "rights or interests" of the parties, e.g., a rule eliminating one of several methods for filing an application for agency review. *See James V. Huron Assocs. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (agency's elimination of "face-to-face" submission process was a procedural rule). Although NHTSA characterizes the suspension as "merely an interim procedural step" (Br. 39), "[t]he suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553" and is "subject to APA notice and comment provisions." *Environmental Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see also NRDC v. EPA*, 683 F.2d 752, 761-62 (3rd Cir. 1982) (effective date is "an essential part of any rule" and "material alterations" are subject to APA's notice and comment requirements).

NHTSA's repeated assertion that the suspension is merely part of an "ongoing consideration" (Br. 39) mischaracterizes the nature and effect of what it did here: as explained above (see *supra* at 10-11), NHTSA did not simply alter the course of a pending, not-yet-finalized proposal to increase the penalty, but rather abruptly reversed course on a penalty increase that had been in effect since August 2016. That the suspension

here was substantive and not merely procedural is demonstrated by AGA's statements that, had the $14 penalty remained in effect, it would have begun "driving changes . . . to the market for credits and, potentially, changes to some design and fleet mix" leading to "consequences" that "cannot be undone once model years are finalized and move towards production." AGA Br. 53-54.

Second, NHTSA's attempt to invoke the APA's "good cause" exception fares no better. Like the procedural rule exception, the good cause exception "should be narrowly construed and only reluctantly countenanced," *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) (quotation marks omitted), and is further "limited to emergency situations," *American Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *see also Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (good cause available only where notice and comment "could result in serious harm"); *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (good cause to adopt emergency rules for airplane and helicopter tours in light of recent fatal crashes).

NHTSA has declined to make any finding of such an emergency here. To the contrary, it has asserted that the suspension "would have no immediate practical effect." NHTSA Br. 41; *see also id.* at 44. NHTSA's insistence that the suspension is inconsequential precludes it from asserting that it simultaneously addressed an emergency so pressing as to forgo notice and comment.[6]

NHTSA's remaining arguments are equally flawed. NHTSA argues (Br. 41) that notice and comment were "unnecessary" because the suspension was an "interim" measure, like the administrative action at issue in *Mid-Tex Electric Cooperative, Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) (quotation marks omitted). But in *Mid-Tex Electric*, the court made clear that an agency's designation of a rule as an "interim"

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[6] AGA takes the opposite approach and claims that the Civil Penalties Rule threatened "substantial economic harm" that demonstrated good cause to forgo notice and comment. AGA Br. 52-53. Because NHTSA did not cite AGA's claim as the basis for forgoing notice and comment (JA 78), this Court should not consider it. *See Motor Vehicle Mfrs.*, 463 U.S. at 50. In any event, while AGA is right that leaving the penalty increase in place would have had an immediate effect on design decisions, this positive impact on manufacturer compliance with the CAFE standards does not constitute an "emergency" under 5 U.S.C. § 553(b)(B) because manufacturers cannot claim any cognizable harm from being required to comply with the law. *See Brady v. NFL*, 640 F.3d 785, 795 (8th Cir. 2011) (that a party "must comply with the law . . . does not constitute irreparable harm").

measure "cannot in itself justify a failure to follow notice and comment procedures." 822 F.2d at 1132 (quotation marks omitted). Good cause is still required. *See id.* at 1132-33.

Similarly, NHTSA's decision to seek comments on its reconsideration is irrelevant. NHTSA Br. 43. The reconsideration is a separate rulemaking addressing a different issue: whether to change the penalty, not whether to suspend it. By dispensing with notice and comment for the suspension, NHTSA deprived the States and others of their right to highlight issues unique to the suspension, including the fact that the $14 penalty had been in place since August 2016, and the effect of the reinstated $5.50 penalty on fleet planning for model year 2019, which was already underway. *See also* IPI Br. 12-17 (listing other concerns NHTSA failed to take into account). NHTSA's "post-promulgation notice and comment procedures" on the separate reconsideration proceeding "cannot cure the failure to provide such procedures prior to the promulgation of the rule at issue." *NRDC v. EPA*, 683 F.2d at 768.

POINT III

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

A. The States Are Persons Under EPCA.

The States have explained that EPCA's definition of "person," which includes "any State," expressly applies to all of the provisions of "this Act." States Br. 20, 44-45. NHTSA concedes that "the states' argument appears to be . . . the more natural[] reading of EPCA's general statement of definitions" and thus the question of whether the States are "persons" under EPCA "do[es] not independently warrant dismissal." NHTSA Br. 22-23.

AAM contends that EPCA's definition of "person" does not apply to EPCA's fuel economy provision, but AAM bases its interpretation solely on a House report for a bill that was not enacted. AAM Br. 35-36 & n.11. That report cannot override the language used by Congress in EPCA. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *see also Milner v. Department of Navy*, 562 U.S. 562, 572 (2011) ("We will not . . . allow[] ambiguous legislative history to muddy clear statutory language."). And AAM provides no reason that Congress would have treated States as "persons" in certain portions of EPCA but not others.

B. Venue Is Proper for All State Petitioners.

Neither NHTSA nor intervenors object to venue in this Circuit so long as New York and Vermont have standing here, which they do. NHTSA Br. 24-25; AAM Br. 18 n.5.

C. The States' Suit Is Timely.

1. The time to file petitions for review began running from publication.

NHTSA and AAM argue that the States' suit is untimely because it was not filed within 59 days of July 7, 2017, when the suspension was filed with the Office of the Federal Register (OFR) and made available for public inspection. NHTSA Br. 15-20; AAM Br. 44-57. But this Court already found in *Abraham* that a regulation is "prescribed" under 49 U.S.C. § 32909(a)-(b) when it is published in the Federal Register, which did not occur until July 12. *See* 355 F.3d at 196 & n.8.

NHTSA and AAM argue that the Court's interpretation of the judicial review provision in *Abraham* was *dicta* because the issue there was when an anti-backsliding provision was triggered. NHTSA Br. 18-19; AAM Br. 48. But *Abraham* found that publication in the Federal Register was "the culminating event in the rulemaking process" under

EPCA and thus a rule was final for purposes of *both* the anti-backsliding provision *and* the limitations period for judicial review upon publication. 355 F.3d at 196 & n.8. And this Court's reasoning that "the terms ['publish' and 'prescribe'] are interchangeable" in EPCA, *id.* at 196, was not limited to the provisions it was reviewing there. NHTSA and AAM provide no reason that this Court should abandon a key portion of *Abraham*'s reasoning and decide that rulemaking culminates before publication for purposes of judicial review alone.[7] To the contrary, as discussed in the States' brief (Br. 52 n.16), NHTSA's own regulations treat publication as the terminal act in rulemaking.

NHTSA recognizes that "publication is a significant event in many instances" and concedes that it "may indicate when some rules are 'prescribed,'" but argues that these general principles do not apply here because "the delay decision had immediate legal effect and was made

[7] AAM argues (Br. 53-54) that "prescribe" and "publish" cannot mean the same thing because EPCA provides that a rule that is "prescribed" shall then be "published," but the Court reviewed precisely that language in *Abraham* and found the terms interchangeable, 355 F.3d at 196. The States have also explained that Congress later substituted "prescribed" for "published" in § 32909 as a non-substantive change to make the language in two different judicial review provisions in EPCA consistent. States Br. 51.

available for public inspection promptly for that very reason." NHTSA Br. 19. This argument suggests that different regulations will be subject to different timing rules depending on their content and the agency's intent. Such a scheme would impose enormous burdens on regulated entities, which would be uncertain about when the limitations period begins. In any event, NHTSA's purported basis for distinguishing the suspension here does not distinguish it from any other final rule: the filing date and public inspection date of a rule are typically the same date because OFR does not treat a rule as filed until the rule is available for public inspection. *See* 1 C.F.R. § 17.2(c) (documents "received" by OFR before 2:00 p.m. are "filed for public inspection" two days later).

NHTSA and AAM also argue that the States had "notice" of the suspension in *practice* when it was available for public inspection on the internet (NHTSA Br. 19; AAM Br. 51 n.15), but the Federal Register, not the availability of public inspection, is the recognized source of *legal* notice of a rule to the public under the APA. *See* 5 U.S.C. § 552(a)(1)(D) ("Each agency shall separately state and currently publish [substantive rules of general applicability] in the Federal Register for the guidance of the public."). Indeed, OFR's website cautions that "*[o]nly official editions*

of the Federal Register provide legal notice to the public . . . under 44 U.S.C. 1503 & 1507."[8] *See also Utility Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) ("This court has never found that Internet notice is an acceptable substitute for publication in the Federal Register."). And that principle makes sense: although the internet now makes filings with OFR more easily accessible, such technology has not always been available (and is still not universally accessible to all affected parties).[9] It would be unprecedented for the running of a statute of limitations to depend on the vagaries of technological development.

NHTSA urges (Br. 16-17) the Court to follow *Public Citizen, Inc. v. Mineta*, 343 F.3d 1159, 1167 (9th Cir. 2003), but that case is inapposite. *Mineta* involved a different statute that used different language: "issued" rather than "prescribed." As the Ninth Circuit recognized, the word "issued" means "to send out or distribute officially," and thus could

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[8] OFR, Public Inspection Issue (emphasis in original), *available at* https://www.federalregister.gov/public-inspection/2017/07/07. All websites last visited Apr. 1, 2018.

[9] OFR, Public Inspection Documents (noting that just "[a] few years ago, our public inspection service was quite literally a desktop piled high with paper documents"), *available at* https://www.federalregister.gov/reader-aids/office-of-the-federal-register-blog/2011/11/public-inspection-documents.

encompass a mere filing with OFR. 343 F.3d at 1167 (quotation marks and alterations omitted). But the usual meaning of prescribe is "to lay down a rule," *Merriam-Webster's Ninth New Collegiate Dictionary* 930 (1991), which suggests the culmination of rulemaking, as *Abraham* found. *See* AAM Br. 47 (providing a similar definition).

2. In any event, the time limitations at issue here are not jurisdictional.

Even if the States' petition were untimely, and it was not, the limitations period can and should be tolled because 49 U.S.C. § 39202(b) is a claim-processing rule and not a jurisdictional requirement. *See* States Br. 53-54. NHTSA identifies "no clear statement" in § 39202 indicating that Congress intended it to be one of the "rare" statutory deadlines "that can deprive a court of jurisdiction." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015). Instead, NHTSA argues (Br. 20-21) that § 32909 should be treated as jurisdictional because courts have construed *other* deadlines in *different* statutes as jurisdictional. But the Supreme Court has emphasized that the inquiry must focus on Congress's intent in a particular statute. *See Henderson ex rel. Henderson*

v. Shinseki, 562 U.S. 428, 436-38 (2011). NHTSA has offered no evidence of such intent.

Reviewing statutory deadlines similar to the one at issue here, courts have repeatedly held that the deadline to seek judicial review of administrative action is not jurisdictional. *See, e.g.*, *Corbett v. TSA*, 767 F.3d 1171, 1177-78 (11th Cir. 2014). The cases that NHTSA cites (Br. 20-21) are inapposite. As the Seventh Circuit has explained, the Supreme Court's recent jurisprudence has undermined the reasoning of older cases holding that the deadline in the Hobbs Act is jurisdictional.[10] *See Clean Water Action Council of Ne. Wis. v. EPA*, 765 F.3d 749, 752 (7th Cir. 2014). The two cases that NHTSA cites from this Court—*Ruiz-Martinez v. Mukasey*, 516 F.3d 102 (2d Cir. 2008), and *Malvoisin v. INS*, 268 F.3d 74 (2d Cir. 2001)—involved the deadline for appealing a decision of the Board of Immigration Appeals under 8 U.S.C. § 1252(b)(1), which has clear legislative history demonstrating Congress's intent to create a

[10] Unlike § 39202, the Hobbs Act also contains a separate statutory provision that makes clear that the section of the statute containing the filing deadline, 28 U.S.C. § 2344, is jurisdictional. *See* 28 U.S.C. § 2342 (providing that "jurisdiction is invoked by filing a petition by section 2344 of this title").

jurisdictional deadline, *Stajic v. INS*, 961 F.2d 403, 404 (2d Cir. 1992). There is no similar history here.

NHTSA also argues (Br. 21) that § 32909 should be treated as jurisdictional because that section contains the "sole statutory basis" for jurisdiction. But the Supreme Court has already rejected this logic and explained that a time limitation "we would otherwise classify as nonjurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions."[11] *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013). NHTSA's argument is particularly weak in light of the text and structure of § 32909. Subsection (a)(1), entitled "Filing and venue," establishes the jurisdiction of the Court by specifying that a petition may be brought before an appropriate Court of Appeals. The next subsection—

[11] For similar reasons, this Court should reject AAM's argument (Br. 59) that § 32902 is jurisdictional because an earlier version of that section referred to jurisdiction. In any event, the legislative history also rebuts AAM's argument, because it makes clear that the deleted reference to "jurisdiction" had nothing to do with the filing deadline. Instead, the omitted sentence was originally included to clarify that a reviewing court should follow APA procedures. A later Congress struck the sentence because it was redundant to specify that a court has the power to apply the APA. *See* H.R. Rep. No. 103-180 (1993) (explaining that the relevant sentence was "omitted because 5:ch. 7 applies unless otherwise stated").

entitled "Timing for filing and judicial procedures"—provides the deadline for filing a petition but makes no reference to jurisdiction. 49 U.S.C. § 32909(b). As the Supreme Court held in a similar context, the contrast between two sections in such close proximity "highlights the absence of clear jurisdictional terms" in § 32909(b). *Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012).

D. The Court of Appeals Is the Proper Forum for This Challenge.

AGA argues (Br. 57) that this Court lacks jurisdiction because NHTSA prescribed the Civil Penalties Rule in response to the IAA, and a challenge to such a rule does not fall within EPCA's judicial review provision, 49 U.S.C. § 32909(a). But the States have not challenged the Civil Penalties Rule; they have challenged NHTSA's *indefinite suspension* of the rule's effective date, which NHTSA itself claimed was done pursuant to "NHTSA's statutory authority to administer the CAFE standards program" and § 32902 and § 32912.[12] (JA 78.) Although the States dispute that NHTSA has the authority under EPCA to suspend

[12] Although not at issue here, the States do not concede that a challenge to a penalty adjustment made pursuant to the Inflation Adjustment Act would have to be brought in district court.

the rule, NHTSA's invocation of EPCA makes that statute's judicial-review provisions applicable. This Court held as much in *Abraham*, concluding that it had jurisdiction to consider a challenge to an agency delay of a regulation under EPCA because "the power to [delay] derives, if at all, from Congress's general grant of authority" under EPCA. 355 F.3d at 194.

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.

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Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
DAVID S. FRANKEL
CAROLINE A. OLSEN
Assistant Solicitors General

By: /s/ Monica Wagner
MONICA WAGNER
Deputy Chief
Environmental Protection Bureau

120 Broadway, 26th Floor
New York, NY 10271
(212) 416-6351
monica.wagner@ag.ny.gov

Attorneys for Petitioner
State of New York

XAVIER BECERRA
Attorney General
State of California

DAVID A. ZONANA
Supervising Deputy
Attorney General

By: /s/ David Zaft
DAVID ZAFT
Deputy Attorney General

300 S. Spring St., Suite 1702
Los Angeles, CA 90013
(213) 897-2607
david.zaft@doj.ca.gov

Attorneys for Petitioner
State of California

(Counsel listing continues on following page.)

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

By: /s/ Kyle H. Landis-Marinello
KYLE H. LANDIS-MARINELLO
Assistant Attorney General

109 State Street
Montpelier, VT 05609
(802) 828-3186
kyle.landis-marinello@vermont.gov

Attorneys for Petitioner
State of Vermont

BRIAN E. FROSH
Attorney General
State of Maryland

By: /s/ Steven M. Sullivan
STEVEN M. SULLIVAN
Solicitor General

200 St. Paul Place
Baltimore, MD 21202
(410) 576-6427
ssullivan@oag.state.md.us

Attorneys for Petitioner
State of Maryland

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

By: /s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General

Strawberry Square, 15th Floor
Harrisburg, PA 17120
(717) 787-8058
jgoldman@attorneygeneral.gov

Attorneys for Petitioner
Commonwealth of Pennsylvania

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,845 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Will Sager