Natural Resources Defense Coun v. National Highway Traffic Safet Doc. 178

17-2780(L)

17-2806 (Con)

**IN THE 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 OF ENVIRONMENTAL PETITIONERS

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INTRODUCTION

The National Highway Traffic Safety Administration (the agency or NHTSA) broke three bedrock principles of administrative law when it indefinitely suspended an important final rule that updated the civil penalty for violating fuel-economy standards. The agency identified no statutory authority for its action; it failed to provide notice and an opportunity for comment; and it did not justify suspending the penalty increase, when it could (and should) have left the inflation adjustment in place to deter fuel-economy violations during its reconsideration.

Numerous courts (including this one) have repeatedly struck down similar suspensions on these grounds. And neither Respondents nor Intervenors can identify *any* case supporting what the agency did here.

Respondents and Intervenors instead try primarily to evade this Court's review. But their arguments fail. Petitioners have standing; the petition is timely; and, as in *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004), the case belongs in this Court. Indeed, their arguments also contradict each other: Respondents attempt to question Petitioners' standing by characterizing this case as insignificant, while Intervenors acknowledge that the challenged suspension has altered automakers' current and ongoing compliance decisions.

The challenged suspension leaves in place—indefinitely—an inadequate, decades-old penalty that fails to deter harmful fuel-economy violations and flouts Congress's command for prompt and recurring inflation adjustments. The Court should reject Respondents' untenable arguments and vacate the unlawful suspension.

ARGUMENT

I. The Suspension Rule Does Not Evade This Court's Review

A. Environmental Petitioners have standing

Vehicle fuel consumption, and the production and refining of that fuel, result in emissions of air pollutants that harm human health. *See* 77 Fed. Reg. 62,624, 62,901-07 (Oct. 15, 2012). Fuel-economy violations increase fuel consumption and production and thus injure Petitioners' members who live near busy highways and refineries where the additional pollutants from those increases are emitted. NRDC24-27.[1] These members include Kathleen Woodfield, who suffers from chronic sinusitis and lives only blocks away from one of the nation's most

[1] This reply cites Environmental Petitioners' opening brief as NRDC; the addendum to that brief as ADD; Respondents' brief as RESP; Alliance of Automobile Manufacturers' brief as AAM; Association of Global Automakers' brief as AGA; and Institute for Policy Integrity's amicus brief as IPI.

heavily travelled highways, ADD42-43, as well as Janet Dietzkamei, who lives 1400 feet from a busy highway and suffers from asthma so severe she cannot leave her home without a mask whenever air quality levels drop from good to moderate, ADD54-55. These members' "likely exposure to additional [pollution] in the air where [they live] is certainly an 'injury-in-fact' sufficient to confer standing." *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002).

Alliance of Automobile Manufacturers (Alliance) appears to claim that fuel-economy violations cause no additional air pollution and thus do not harm anyone. AAM18-25. Respondents, notably, do not make that claim, having previously acknowledged that residents near busy roads experience elevated health risks from exposure to vehicle pollutants, 77 Fed. Reg. at 62,907, and that compliance with fuel-economy standards results in significant declines in these adverse health effects, *id.* at 63,062; *see Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) (government statements acknowledging risk of harm "weigh in favor of concluding that standing exists").[2]

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[2] At least one member (ADD49-50) is also injured because she is "interested in purchasing the most fuel-efficient vehicles possible" and challenges an agency action that, by failing to deter fuel-economy

Respondents instead observe that this case addresses the penalties for violating fuel-economy standards, rather than the standards themselves. RESP10-12. But that observation ignores the "important role" that penalties play in "deterring violations" of the standards. 28 U.S.C. § 2461 note, sec. 2(a)(1). The "purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the [fuel-economy] standards." JA52. The standards are meaningful only because of the penalties that enforce them: "Without the threat of civil penalties, manufacturers will not be prodded to install as many fuel-saving devices, nor to install them as promptly." *Ctr. for Auto Safety (CAS) v. NHTSA*, 793 F.2d 1322, 1332 (D.C. Cir. 1986).

Indeed, Intervenors themselves highlight the direct connection between penalties and fuel-economy standards by admitting that "increased penalties have the effect of making the [fuel-economy] standard more stringent." JA42; *see also* AGA9 ("penalties for failure to comply with fuel economy standards" have "real bite" and "are the chief tool of [fuel-economy] enforcement"). Nor do fuel-economy credits

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violations, will "diminish the types of fuel-efficient vehicles and options available." *Pub. Citizen v. NHTSA*, 848 F.2d 256, 261 (D.C. Cir. 1988).

diminish the penalties' importance. *E.g.*, RESP11-12; AAM26-27. Credits are earned solely from "over-compliance" with fuel-economy standards, while penalties are assessed for "non-compliance." JA78-79 & n.3. And Intervenors admit that, because the penalty amount directly affects the price of credits, JA38, higher penalties will "force manufacturers away from … using credits" to comply with the standards, and toward implementing fuel-saving technology instead. AGA55.[3]

The Suspension Rule therefore harms Petitioners' members by suspending—indefinitely—a penalty increase that would have "accomplish[ed] [the] goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles." JA53. Instead, it replaced the inflation-adjusted $14 penalty rate with an inadequate, decades-old $5.50 rate that does "not provide a strong enough incentive for manufacturers to comply" with the standards, JA13; NRDC27-28. And

[3] Respondents also "significantly overstate[] the options available to manufacturers for avoiding liability for civil penalties." JA38. For example, Intervenors acknowledge, "the domestic minimum passenger car [fuel-economy] standard cannot be met by purchasing … credits." *Id.* And the overall "availability of credits will be significantly reduced as [fuel-economy] standards rapidly increase over the next few years." *Id.*

because automakers sell roughly 15 million new vehicles each year, *see* 77 Fed. Reg. at 62,679, the suspension's effect on even some automakers' compliance decisions will meaningfully impact overall emissions. *See LaFleur*, 300 F.3d at 270 ("The injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice." (internal quotation marks omitted)).

Respondents counter that Petitioners "cannot be certain" that the suspension affects automakers' "business decisions." RESP15. But "petitioners need not prove a cause-and-effect relationship with absolute certainty," even "where the injury hinges on the reactions of third parties, here the auto manufacturers." *Competitive Enter. Inst. (CEI) v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990). So long as automakers' "conduct is sufficiently dependent upon the incentives provided by the [agency's] action, then the resultant injury will be fairly traceable to that action." *Wilderness Soc'y v. Griles*, 824 F.2d 4, 17 (D.C. Cir. 1987). And here, there is "no difficulty in linking the petitioners' injury to the challenged agency action." *CAS*, 793 F.2d at 1334. Petitioners' injuries stem from "less fuel-efficient vehicles," and the final rule that the agency suspended was "for the purpose of making

vehicles more fuel-efficient," *id.*, thereby demonstrating a causal link through "the agency's own factfinding." *CEI*, 901 F.2d at 114.

Moreover, automakers *confirm* that the Suspension Rule affects their business decisions, stating that the $14 penalty rate would immediately "begin driving changes" to their compliance decisions for the fleets they are currently designing. AGA53-55. Those compliance decisions (and the resulting increased emissions over the vehicles' lifetime) "cannot be undone once model years are finalized and move towards production." AGA53-54. Automakers' own assertions thus also establish the causal link and, at a minimum, a "'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 n.5 (2013)).[4]

For the same reasons, a favorable decision would redress Petitioners' injuries by "alter[ing] the manufacturers' incentives to

[4] The Tonachel declaration, ADD16-24, and the declaration submitted by Amicus, *see* IPI10-11, further confirm causation here. Intervenors, notably, do not produce any declaration to rebut Tonachel's, relying instead on an extra-record critique of an allegedly "similar … analysis." AAM29-30. And they do not address Amicus's declaration at all.

produce fuel-efficient vehicles" in the fleets they are currently designing. *Pub. Citizen v. NHTSA*, 848 F.2d at 263. Reinstating the $14 penalty rate would have "a deterrent effect that ma[kes] it likely, as opposed to merely speculative, that the penalties would redress [members'] injuries by … preventing" fuel-economy violations. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 187 (2000).

B. The petition is timely

1. The term "prescribe" in the Energy Policy and Conservation Act (EPCA) refers to the action of developing and finalizing a rule. *See, e.g.*, 49 U.S.C. §§ 32902(a), 32912(c)(1) (the agency "shall prescribe by regulation" various fuel-economy rules). This is consistent with the term's ordinary meaning. *See* Black's Law Dictionary (10th ed. 2014) (defining "prescribe" as "to establish authoritatively (as a rule or guideline)"). And because the rulemaking process culminates with publication in the Federal Register, deadlines in EPCA that run from the date a rule is "prescribed" naturally start when the rulemaking process ends—i.e., when the rule is published in the Federal Register.

That is precisely what this Court determined when construing similar provisions of ECPA in *Abraham*. "Under the terms of the EPCA," the Court held, "*publication* in the Federal Register … is the

culminating event in the rulemaking process." 355 F.3d at 196. And where "Congress did not use the word 'publish' when setting a deadline …, it instead used the word 'prescribe,' suggesting that the terms are interchangeable." *Id.* (citation omitted). The same interpretation also applies to "the judicial review provisions of the EPCA," the Court explained, which begin the filing deadline when a "rule is prescribed." *Id.* at 196 n.8 (quoting 42 U.S.C § 6306(b)(1)).

Respondents never engage with this Court's analysis in *Abraham*. Instead, they (and Alliance) attempt to diminish its significance because it involved different provisions of EPCA. RESP18-19; AAM48-49. But a faithful application of this Court's analysis dictates the outcome here. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (describing the "basic canon of statutory construction that identical terms within an Act bear the same meaning"). In the fuel-economy provisions of EPCA, just like the provisions at issue in *Abraham*, "the language of the statute … reflects the fact that Congress considered publication as the terminal act effectuating" a rule. 355 F.3d at 196.

Indeed, the specific statutory history of section 32909 confirms that reading. The current text reflects Congress's non-substantive consolidation of two earlier judicial review provisions regarding fuel-

economy rules, which began identical 59-day filing deadlines when a rule was either "prescribed" or "published" in the Federal Register. NRDC20-21. Neither Respondents nor Alliance explain why Congress would have intended those deadlines to begin on different dates. And Congress later confirmed that the terms meant the same thing when it consolidated the provisions into section 32909(b). Alliance's speculation that the consolidation substantively altered one of those deadlines, AAM54, runs afoul of the Supreme Court's instruction that, when Congress consolidates prior laws, "it will not be inferred that Congress … intended to change their effect, unless such intention is clearly expressed." *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957). And here, Congress stated expressly that the consolidation was "without substantive change." Pub. L. No. 103-272, § 1, 108 Stat. 745 (1994).

Respondents and Alliance nonetheless suggest that "prescribed" means something different in this context—and something quite obscure. Instead of defining "prescribed" in section 32909(b), they contend that—whatever the term means—the Suspension Rule in *this* case was "prescribed" prior to publication, when it was "made available for inspection" at the Office of the Federal Register. AAM57. In fact,

Respondents even acknowledge that "Federal Register publication … may [be] when some rules are 'prescribed,'" RESP19, but they suggest that a different date should apply here. That *ad hoc* approach is no way to interpret a statute—especially a filing deadline that requires clear, administrable rules. In any event, their arguments against Petitioners' straightforward interpretation all fail.

First, it is immaterial that the agency once asserted its belief that "prescribe" means something other than publication in the Federal Register. RESP15-16. Agency interpretations of judicial review provisions warrant no deference. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). That is especially so here, where the agency's passing reference in an unrelated preamble did not actually define the term "prescribe." And contrary to Respondents' current focus on public inspection at the Office of the Federal Register, the agency notably starts its own filing deadline for reconsideration petitions upon "publication of [a] rule in the Federal Register." 49 C.F.R. § 553.35(a).

Nor does *Public Citizen v. Mineta* provide any guidance here. 343 F.3d 1159 (9th Cir. 2003). The Ninth Circuit's construction of when "an order is issued" under the National Traffic and Motor Vehicle Safety Act, *id.* at 1164, has no bearing on when a "rule is prescribed" under

EPCA, especially given this Court's subsequent interpretation of the latter phrase in *Abraham*. And Respondents ignore this Court's very sound reasons for its construction: e.g., only upon publication are rules "considered final" for purposes of judicial review. 355 F.3d at 196 n.8.

Indeed, it would make little sense to define "prescribed" in section 32909(b) as the date of public inspection because—as Respondents and Alliance acknowledge, RESP19; AAM51-52—many rules are not yet final or effective at that stage. *See, e.g.*, *Zhang v. Slattery*, 55 F.3d 732, 749 (2d Cir. 1995). "Agencies must publish substantive rules in the Federal Register to give them effect." *NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009) (citing 5 U.S.C. § 552(a)(1); *Morton v. Ruiz,* 415 U.S. 199, 233 & n.27 (1974)). Thus, in many if not most cases, a petitioner likely *could not* challenge a rule under EPCA unless and until it was published in the Federal Register.

Respondents and Alliance nonetheless suggest that *this* rule is different because it purported to take effect before it was published. But whether the rule lawfully could take effect any earlier than 30 days after publication depends on the agency's "good cause" assertion, 5 U.S.C. § 553(d)(3), which—as explained below—clearly fails. Regardless, this rule's peculiarities provide no basis to interpret section

32909(b) in a way that would start the filing deadline before many rules are final.

Alliance relies heavily on the concept of notice. AAM45. But when Congress enacted section 32909(b), there was little reason to believe the public actually knew of documents that were available for public inspection, physically, at the Office of the Federal Register in Washington, D.C. To the contrary, the Office itself explains that until "[a] few years ago, our public inspection service was quite literally a desktop piled high with paper documents," which meant that, "as a practical matter, public access was limited to a few Beltway insiders."[5] And while public inspection documents are now available online, the website warns readers, in bolded lettering, that "**[o]nly official editions of the Federal Register provide legal notice to the public and judicial notice to the courts**."[6]

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[5] Fed. Register, Pub. Inspection Documents, www.federalregister.gov/reader-aids/office-of-the-federal-register-blog/2011/11/public-inspection-documents (last visited April 2, 2018).

[6] Fed. Register, Pub. Inspection Issue, www.federalregister.gov/public-inspection/current (last visited April 2, 2018).

In short, interpreting the filing deadline in section 32909(b) to run from the date of publication is faithful to the statute's text, to this Court's decision in *Abraham*, and to the provision's statutory history. It also provides a clear, readily administrable bright line that ensures sufficient notice and finality for all petitioners. Indeed, it aligns section 32909(b) with 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. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997). This interpretation of the statute is thus the far more "logical," "reasonable," and "fair" approach. AAM57.

2. Respondents and Alliance are also wrong in asserting that the filing deadline in section 32909(b) is jurisdictional. Like an ordinary claim-processing rule, the deadline "uses mandatory language, [but] does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms." *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016); *compare Matuszak v. Comm'r of Internal Revenue*, 862 F.3d 192, 196 (2d Cir. 2017) (identifying a "rare" filing deadline that does "speak in clear jurisdictional terms").

Rather than identify the required clear jurisdictional terms, Respondents suggest a different test applies here because the filing

deadline is not a "statute of limitations." RESP21. But the Supreme Court regards all "filing deadlines," not just statutes of limitations, as "quintessential claim-processing rules." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)); *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154-55 (2013) (collecting other filing deadlines).

Respondents therefore err by "disregard[ing] the Supreme Court's many opinions discussing the difference between jurisdictional and claim-processing rules," *Clean Water Action Council v. EPA*, 765 F.3d 749, 751 (7th Cir. 2014), and relying instead on cases that predate the Court's recent, concerted effort to "ward off profligate use of the term 'jurisdiction,'" *Sebelius*, 568 U.S. at 153. Indeed, the Supreme Court has already rejected Respondents' claim that the filing deadline is jurisdictional simply because it appears within section 32909's broader grant of jurisdiction to this Court. RESP21. Rather, a deadline that "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." *Sebelius*, 568 U.S. at 155 (citing *Gonzalez v. Thaler*, 565 U.S. 134, 146-47 (2012)).[7]

Neither Respondents nor Intervenors dispute that equitable tolling is warranted here if section 32909(b) is not jurisdictional. *See Wong*, 135 S. Ct. at 1631-32. Thus, were this Court to abrogate *Abraham*'s interpretation that "prescribed" in the "judicial review provisions of the EPCA" means "publication in the Federal Register," 355 F.3d at 196 & n.8, the Court should still treat the petition as timely because Petitioners relied "in good faith on then-binding circuit precedent" in determining when to file. *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008).

C. Petitioners' challenge belongs in this Court

Although Respondents and Alliance devote significant attention to 49 U.S.C. § 32909, Association of Global Automakers (Global) argues that this case belongs in district court because section 32909 does not apply here at all. AGA56-60. Global's argument fails to properly account for this Court's opinion in *Abraham*.

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[7] Alliance's "similar proximity-based argument," *Sebelius*, 568 U.S. at 155—i.e., that the filing deadline and jurisdictional grant originally appeared in the same paragraph, AAM58-59—fails for the same reason.

Like the present case, *Abraham* involved an agency's attempt to suspend the effective date of a final rule prescribed by the prior administration. *See* 355 F.3d at 189-90. Some of the same petitioners as here—including Natural Resources Defense Council (NRDC) and the States of New York, California, and Vermont—wished to challenge those suspensions as *ultra vires*, but were uncertain where to file. Thus, they filed challenges in both this Court and the district court. *Id.*

Petitioners argued that the challenge more properly belonged in district court because the agency "did not have authority to delay the effective date of the Final Rule," and thus the delays did not, technically, constitute "rule[s] prescribed under [EPCA]." *New York v. Abraham*, 199 F. Supp. 2d 145, 149-50 (S.D.N.Y. 2002). The district court rejected that argument. *Id.* at 150-52.

This Court affirmed. The Court explained that the agency's power to prescribe the delays "derive[d], if at all, from Congress's general grant of authority [to the agency] in the EPCA." *Abraham*, 355 F.3d at 194. The Court also explained that "when there *is* a specific statutory grant of jurisdiction to the court of appeals," as in the consumer-appliance provisions of EPCA, 42 U.S.C. § 6306(b), "it should be construed in favor of review by the court of appeals." *Id.* at 193; *accord*

Cal. Energy Comm'n v. Dep't of Energy, 585 F.3d 1143, 1148-50 (9th Cir. 2009) (determining that agency's denial of preemption waiver fell within direct review provision of EPCA). The Court therefore concluded that "the delays should be treated as 'rule[s] prescribed under [EPCA]' for purposes of determining jurisdiction." *Abraham*, 355 F.3d at 194.

Now, despite this Court having previously ruled that suspensions of final rules "fall within the EPCA's grant of jurisdiction to this court," *id.*, Global argues—without discussing *Abraham*—that Petitioners should have filed the instant challenge in the district court.

This case belongs in the court of appeals pursuant to *Abraham*. Here too, because "there *is* a specific statutory grant of jurisdiction to the court of appeals" in the fuel-economy provisions of EPCA, 49 U.S.C. § 32909(a), "it should be construed in favor of review by the court of appeals." 355 F.3d at 193. And like with the consumer-appliance provisions in *Abraham*, the "statutory structure of the jurisdictional provisions of the [fuel-economy] portion of the [Act] favors finding jurisdiction in this court." *Id.* Section 32909(a) broadly confers jurisdiction in the court of appeals to challenge rules "prescribed in carrying out any of sections 32901-32904 or 32908," as well as rules

"prescribed under section 32912(c)(1)." Section 32915 also provides for direct appellate review of any civil penalties assessed by the agency.

Therefore, as in *Abraham*, "most acts undertaken by [the agency] under its grant of authority regarding [the fuel-economy program] are subject to review by the court of appeals, and there is no clear expression of legislative intent that amendments to the effective dates of rules … are excepted from this requirement." *Id.* Moreover, even if it is ambiguous "whether jurisdiction lies with a district court or with [the] court of appeals," this Court "must resolve that ambiguity in favor of review by a court of appeals." *Id.* (quoting *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1529 (10th Cir. 1993)); *see also Clark v. CFTC*, 170 F.3d 110, 114 (2d Cir. 1999) (observing that this is "especially true" where Congress conferred "extensive jurisdiction" on the court of appeals to review related agency decisions).

Global devotes the bulk of its attention to whether the Civil Penalties Rule was prescribed under section 32912(c)(1) of EPCA, or instead under the Inflation Adjustment Act. AGA58-59. But Petitioners have sought review of the Suspension Rule, not the Civil Penalties Rule. And no one—not even Respondents—contend that the Suspension Rule

was prescribed under that other statute.[8] To the contrary, the agency in the Suspension Rule invoked its "statutory authority to administer the [fuel-economy] standards program," and cited sections 32902 and 32912 of EPCA as "[a]uthority." JA78. Even now, the agency continues to defend the Suspension Rule as purportedly authorized by EPCA. RESP39 ("[EPCA] directs NHTSA to implement the [fuel-economy] program, and the agency exercised that authority here.").

Petitioners of course contest that authority, as they did in *Abraham*. But this Court explained there that any such power "derives, *if at all*, from Congress's general grant of authority" over the relevant regulatory program. 355 F.3d at 194 (emphasis added). Thus, as in

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[8] In any event, the Civil Penalties Rule was prescribed, at least in part, under section 32912(c)(1) because the rule responded to a petition for rulemaking under that provision. JA51-53; *see* JA1-14. The agency also based much of that rule on section 32902(a)(2) and (b)(3). JA53. Thus, even a challenge to that rule likely would fall within section 32909(a). *See Sutton v. U.S. Dep't of Transp.*, 38 F.3d 621, 625 (2d Cir. 1994) (where agency decision was "made in substantial part" pursuant to statutory provision providing for direct review, "exclusive jurisdiction to review that determination rests with this Court"). Notably, Respondents have also suggested that challenges to "any new rule setting [fuel-economy] penalty rates" would fall within section 32909. Resp.'s Opp. to Mots., ECF 107, at 10.

Abraham, the Suspension Rule "should be treated" as a rule prescribed under EPCA "for purposes of determining jurisdiction." *Id.*

II. The Suspension Rule Violates Three Basic Principles

A. The agency lacks authority to indefinitely suspend a final rule subject to statutory deadlines

Before suspending a final rule, an agency must point to something in the governing statutes or the Administrative Procedure Act (APA) that gives it authority to do so. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017). Respondents still have identified no such authority here.

Instead, Respondents mischaracterize Petitioners' argument as urging a "categorical prohibition against delaying the effective date of an earlier rule." RESP35. But Petitioners do no such thing. Rather, Petitioners merely observe that an agency lacks "inherent power" to suspend a final rule and therefore must identify some statutory authority for its actions. *Clean Air Council*, 862 F.3d at 9 (citing *Abraham*, 355 F.3d at 202); *see also* Lisa Heinzerling, *Unreasonable Delays*, 12 Harv. L. & Pol'y Rev. 13, 21-30 (2018) (explaining how agencies, including NHTSA here, have failed to identify legal authority for their recent delays or suspensions of final rules).

It is therefore neither relevant nor surprising that Respondents and Intervenors identify instances over the years where agencies have delayed the effective dates of some rules. RESP32-34; AGA37-39; *see, e.g.*, *ASG Indus., Inc. v. Consumer Prod. Safety Comm'n*, 593 F.2d 1323, 1334-35 & nn.48-49 (D.C. Cir. 1979) (identifying 15 U.S.C. § 2058(d) (1976) as authority for the delay). Indeed, especially where delays are brief and time-bounded (like the initial temporary delays in this case), the public may have little incentive or ability to contest whether the agency properly identified its statutory authority.

Far more telling is that neither Respondents nor Intervenors identify any caselaw supporting an agency's authority to do what NHTSA has attempted here: to suspend—indefinitely—a final rule that is subject to statutory deadlines. That is because agencies lack such authority. *See NRDC v. Reilly*, 976 F.2d 36, 40-41 (D.C. Cir. 1992); *Sierra Club v. Pruitt*, No. 17-cv-06293-JSW, slip op. at 7-11 (N.D. Cal. Feb. 16, 2018). Even President Trump's original Chief of Staff understood this. JA55 (instructing agencies not to delay the effective date of final rules that are "subject to statutory … deadlines").

NRDC v. Reilly is directly on point. There, the Environmental Protection Agency (EPA) suspended the effectiveness of final emissions

regulations while it reconsidered them. 976 F.2d at 38-39. NRDC sued, challenging the agency's authority to suspend the regulations. *Id.* at 40. EPA claimed that its "general authority" to administer the regulatory program "includes the power to stay regulations already promulgated." *Id.* The D.C. Circuit rejected that argument. It observed that the Clean Air Act "mandated a highly circumscribed schedule" for the promulgation of emissions regulations. *Id.* at 41. "In the face of such a clear statutory command," the court held, "we cannot conclude that [the agency's general authority] provided the EPA with the authority to stay regulations that were subject to the deadlines established by [statute]." *Id.* Because the court concluded that EPA lacked authority "to suspend the [regulations]," it "grant[ed] the petition for review and vacate[d] the [suspension]." *Id.*

The same outcome is required here. The agency's general "statutory authority to administer the [fuel-economy] program," JA78, does not allow it to suspend the long-overdue adjustment to its civil penalties. Congress provided a "clear statutory command," *Reilly*, 976 F.2d at 41, that the initial adjustment "shall take effect not later than August 1, 2016," followed by annual inflation adjustments "not later than January 15 of every year thereafter." 28 U.S.C. § 2461 note,

sec. 4(a), (b)(1)(B). This Court has explained that "when, as here, a statute sets forth a bright-line rule for agency action, such as … 'Not later than December 31, 1980, and at five-year intervals thereafter' …, there is no room for debate—[C]ongress has prescribed a categorical mandate that deprives [the agency] of all discretion over the timing of its work." *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 263 (2d Cir. 1992).[9]

Respondents again mischaracterize Petitioners' argument as suggesting that these deadlines preclude the agency's *reconsideration* of the penalty increase. RESP37-38. But as Respondents acknowledge, the agency's "ongoing reconsideration" is not before this Court. RESP4. This case challenges only the *indefinite suspension* of the penalty increase. Thus, Petitioners contend simply that the date-certain statutory deadlines—including for subsequent annual adjustments, which

[9] The "[e]xception" that Respondents reference, RESP37-38, is to the "otherwise required amount" of the initial adjustment, 28 U.S.C. § 2461 note, sec. 4(c), not to the statutory deadlines. Respondents' suggestion that the exception somehow authorizes an agency to suspend the initial adjustment indefinitely would violate the "clear purpose of the Act," which is to require "expeditious" and recurring adjustments, and lead to the "absurd result of permitting the perpetual delay" of *any* adjustment whatsoever. *Sierra Club*, slip op. at 11.

Respondents and Intervenors entirely ignore in their briefs—preclude the agency from suspending the inflation adjustment indefinitely.

Finally, Global spends much of its brief critiquing the Civil Penalties Rule. *E.g.*, AGA30-36. But like the reconsideration, that "earlier rule" is not before the Court. RESP4. In any event, if Global thought that earlier rule should not take effect because it was unlawful, Global could have challenged it and sought a stay under 5 U.S.C. § 705. In fact, that clear statutory solution to Global's purported problem, AGA41-42, highlights the absence of any similar authority for the agency's suspension here. And to the extent Global complains about the burdens of litigating the earlier rule, this Court rejected the same argument in *Abraham*: There, the agency complained that, without its asserted "inherent power," "an aggrieved party's only recourse, should it believe [a rule flawed or unlawful], would be to petition the court of appeals for review." 355 F.3d at 203. "But," this Court explained, "that is precisely what the EPCA contemplates." *Id.* So too here.

B. Indefinitely suspending the final rule required notice and comment

In any event, even if the agency had some authority to suspend the penalty increase, the Suspension Rule is still unlawful because the

agency violated the APA by failing to provide notice and opportunity to comment. NRDC33-41. Numerous courts, including this one, have rejected the arguments Respondents put forth here.

First, contrary to Respondents' suggestion, RESP39-40, the indefinite suspension is not exempt from the APA's notice-and-comment requirement as some mere procedural rule. Rather, as courts have consistently held, "agency action which has the effect of suspending a duly promulgated [rule] …. constitutes rulemaking subject to notice and comment requirements." *Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983); *see Open Communities All. v. Carson*, No. 17-cv-2192-BAH, 2017 WL 6558502, at *10 (D.D.C. Dec. 23, 2017) (collecting cases); Heinzerling, *supra*, at 31-34 (explaining why "delays of the effective dates of final rules are not plausibly conceived of as procedural rules").

Suspending the effective date of a final rule is tantamount to an amendment or revocation, and substantively changes the law. *See NRDC v. EPA*, 683 F.2d 752, 762-63 & n.23 (3d Cir. 1982). That is especially so here, where the agency's suspension "will remain in effect indefinitely unless and until the agency completes a full notice and comment rulemaking proceeding." *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984); *see also* IPI17-23 (explaining how the Suspension Rule

changed the status quo). "Thus, on its face, the suspension" of the Civil Penalties Rule was a substantive rule "subject to APA notice and comment provisions." *Envtl. Def. Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983).

The agency's reliance on the "good cause" exception of the APA fares no better. That exception—which applies only where notice and comment are "impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(B)—"should be narrowly construed and only reluctantly countenanced." *Abraham*, 355 F.3d at 204 (quoting *Zhang*, 55 F.3d at 744).

Respondents no longer seriously contend that the agency's desire to reconsider the Civil Penalties Rule on the eve of its (thrice delayed) effective date rendered notice and comment "impracticable." *See* RESP44-45. This Court and others have repeatedly rejected the argument. *See Abraham*, 355 F.3d at 205; *NRDC v. EPA*, 683 F.2d at 765 & n.25. Indeed, since Petitioners filed their opening brief, yet another court has explained that an agency's "desire to have time to review, and possibly revise or repeal, its predecessor's regulations falls short of th[e] exacting standard" required to invoke the good cause

exception. *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, No. 17-cv-03434-JSW, slip op. at 6 (N.D. Cal. Mar. 21, 2018).

Courts have also consistently rejected Respondents' argument that notice and comment were "unnecessary" because the agency, *after* suspending the penalty increase, "invit[ed] public comment about the substantive issues in the related reconsideration proceeding." RESP43. Allowing subsequent comments on the rule's reconsideration "cannot replace" the requirement to solicit comments, beforehand, on the separate question of "whether the rule should [have] be[en] postponed" during the reconsideration. *NRDC v. EPA*, 683 F.2d at 768; *see also Abraham*, 355 F.3d at 206 n.14. In fact, the agency's failure to adequately justify its suspension here (see *infra* § II.C) "highlight[s] the need for notice and comment" before the "indefinite postponement" of the final rule. *NRDC v. EPA*, 683 F.2d at 767.[10]

This very litigation—involving two industry Intervenors, five States, three Environmental Petitioners, and an Amicus—also

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[10] The suspension was also expressly "indefinite[]," JA77, and thus not "temporally limited [in] scope," as Respondents erroneously suggest, RESP41 (quoting *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987)); *see also* AAM2 (erroneously describing the suspension as a "temporary deferment").

disproves Respondents' further contention that notice and comment were unnecessary because the suspension was purportedly "inconsequential to the industry and to the public." RESP43 (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001)). In fact, Intervenors themselves flatly contradict that contention by attempting to justify the suspension based on "immediate economic consequences" to industry. AGA53-55.

Nor do the economic consequences cited by Intervenors provide any basis to withhold notice and comment. Unlike an "imminent threat to the environment or safety or national security," industry compliance costs do not constitute good cause. *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). And here, implementing fuel-saving technology to comply with governing fuel-economy standards "cannot constitute a threat to the *public* interest." *Abraham*, 355 F.3d at 205.

C. The agency never explained why it did not leave the final rule in place during the reconsideration

Finally, the Suspension Rule is also arbitrary and capricious because the agency failed to "justify the indefinite suspension." *Steed*, 733 F.2d at 100. The agency provided reasons why it wished to *reconsider* the Civil Penalties Rule. JA80-81. But the agency never

justified the "separate" and "discrete action" of *suspending* that rule during the reconsideration. *California v. BLM* (*California II*), No. 17-cv-07186-WHO, 2018 WL 1014644, at *6 (N.D. Cal. Feb. 22, 2018). The agency "did not explain" why the penalty increase "could not have continued while the agency" reconsidered it. *Steed*, 733 F.2d at 102.

Attempting to provide some explanation now, Respondents and Intervenors point to the agency's assertion that the Civil Penalties Rule "did not give adequate consideration to all of the relevant issues." RESP26 & AGA47 (quoting JA77). But they noticeably omit the first half of that assertion, which makes plain that it purported to justify the reconsideration, not the suspension. JA77 ("NHTSA is now *reconsidering* the final rule because the final rule did not give adequate consideration to all of the relevant issues." (emphasis added)). Moreover, the agency's desire to further consider certain issues, and possibly revise the penalty rate at some (unspecified) later date, does not justify suspending the penalty increase altogether in the meantime. The agency "cannot use" a possible "future revision, which has yet to be passed, as a justification for the Suspension Rule." *California II*, 2017 WL 1014644, at *6. Thus here, as in *Steed*, because the agency "did not 'cogently explain' why suspension was necessary" when the Civil

Penalties Rule "could have been retained" during the reconsideration, "NHTSA's 'indefinite suspension'" of the rule is "arbitrary and capricious." 733 F.2d at 102.

Tellingly, Respondents now also rely on reasons the agency never mentioned before—for example, a newfangled argument that the monetary "civil penalty" for fuel-economy violations, 49 U.S.C. § 32912, is not a "'civil monetary penalt[y]' at all," RESP28. "The short—and sufficient—answer to [this argument] is that the courts may not accept appellate counsel's post hoc rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Indeed, Respondents candidly acknowledge that this new (and tortured) explanation is "not before the Court in this case." RESP28. Thus, Respondents' "post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself." *Humane Soc'y v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010).

Respondents' related argument regarding "legal uncertainty," RESP29, is irrelevant for the same reason: the agency never invoked that justification below. The justification would fail anyway. *See California v. BLM (California I)*, 277 F. Supp. 3d 1106, 1120 (N.D. Cal. 2017) (describing the harmful regulatory uncertainty that arises from

unilateral suspensions of final rules); Heinzerling, *supra*, at 37-39 (similar); IPI23-25 (similar). Nor can Intervenors justify the suspension based on the penalty increase's potential economic consequences. AGA53-55. That justification would be inconsistent with the agency's assertion that there was purportedly "no … concrete impact from the delay." JA78; *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[u]nexplained inconsistency" is "arbitrary and capricious").

In any event, even if the agency provided some valid reasons for the suspension (which it did not), the suspension is *still* arbitrary and capricious because the agency "failed to consider [other] important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. First, the agency never explained how the indefinite suspension was consistent with the statutory deadlines for the initial and annual inflation adjustments, despite having previously recognized that the agency was "required by the Act to continue adjusting the civil penalty for inflation each year." JA53. Thus, "[i]n light of the express statutory command" for inflation adjustments by particular dates, "NHTSA's 'indefinite suspension' … was arbitrary and capricious." *Steed*, 733 F.2d at 105.

Second, the agency also failed to consider the benefits of leaving the penalty increase in place to deter fuel-economy violations during the reconsideration. *See* IPI6-17 (describing this failure). The agency previously recognized that the Civil Penalties Rule "will accomplish [the] goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles." JA53. But "the agency was too quick to dismiss [those] benefits" when it later suspended the increase. *State Farm*, 463 U.S. at 51. "[G]iven the judgment made" by the agency about the Civil Penalties Rule's beneficial effects, that rule "may not be abandoned"—or suspended indefinitely—"without any consideration whatsoever" of leaving it in place during the reconsideration. *Id.* By ignoring those potential benefits, the agency's suspension "failed to take this 'important aspect' of the problem into account and was therefore arbitrary [and capricious]." *California I*, 277 F. Supp. 3d at 1122.

III. Vacatur Is The Appropriate Remedy

The APA provides that a reviewing court "shall … set aside" unlawful agency actions. 5 U.S.C. § 706(2). Thus, "[i]n the usual case, when an agency violates its obligations under the APA," this Court "will vacate" the agency's unlawful action. *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014); *see also, e.g.*, *Time Warner Cable, Inc. v. FCC*,

729 F.3d 137, 171 (2d Cir. 2013) (concluding a rule was "promulgated in violation of the APA's notice-and-comment requirements and, therefore, … order[ing] that it be vacated").

Respondents offer no reason why the Court should deviate from this usual practice here. Instead, they simply assert that the Court should remand without vacatur if it finds the Suspension Rule unlawful. RESP31, 45 n.17. That unusual remedy would be entirely inappropriate here.

First and foremost, the agency's violations are fundamental. The indefinite suspension directly contravenes clear and consistent caselaw, including from this Court. And the agency has provided "no legitimate reason whatsoever" for "ignor[ing] the commands of the APA." *Envtl. Def. Fund v. EPA*, 716 F.2d at 921. Nor would vacatur be particularly disruptive: "vacating the [Suspension] Rule would simply allow the [Civil Penalties] Rule to take effect, as the agency originally intended." *Nat'l Venture Capital Ass'n v. Duke*, No. 17-cv-1912-JEB, 2017 WL 5990122, at *12 (D.D.C. Dec. 1, 2017).

Moreover, remanding without vacatur would give the agency a "free pass" for "exceed[ing] [its] statutory authority and ignor[ing] [its] legal obligations under the APA." *California I*, 277 F. Supp. 3d at 1126.

In fact, that remedy would reward the agency's unlawful behavior by allowing it to continue to leave the decades-old penalty in place indefinitely. *See, e.g.*, *NRDC v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) ("A remand-only disposition is, in effect, an indefinite stay … and agencies naturally treat it as such."). Nor does the agency's (very) recent proposed rule matter. Any new final rule "is unlikely to go into effect for a number of months," at the very earliest. *California I*, 277 F. Supp. 3d at 1127. And given the agency's fundamental failures here, "there is no certainty that [the proposed rule] will survive potential legal challenge." *Id.*

In short, the Court should follow "the general rule in favor of vacatur." *Id.* And to provide clarity and regulatory certainty, the Court should declare that the applicable penalty rate remains $14 for Model Years 2019-and-after unless and until the agency issues a new final rule changing that rate.

CONCLUSION

For the foregoing reasons, the Court should vacate the unlawful Suspension Rule, reinstate the Civil Penalties Rule, and declare that the fuel-economy penalty rate is $14 for Model Years 2019-and-after.

Dated: April 3, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this Reply Brief complies with the type-volume limitations of Second Circuit Rule 32.1(a)(4)(B) because it contains 6,918 words, excluding parts of the document exempted by Rule 32(f).

Dated: April 3, 2018

/s/ *Ian Fein*
Ian Fein

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 3, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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