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<u>Via Email & Electronic Docket</u>

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Re: Corporate Average Fuel Economy (CAFE) Penalties, Interim Final Rule, 86 Fed. Reg. 3016 (Jan. 14, 2021); Docket No. NHTSA–2021–0001

Dear Mr. Kuppersmith,

The Natural Resources Defense Council (NRDC) and Sierra Club submit the following response to NHTSA's interim final rule and request for comments published at 86 Fed. Reg. 3016 (Jan. 14, 2021) ("Exemption Rule"). The interim final rule is an extraordinarily ill-conceived attempt to defy clear congressional intent, two decisions by the U.S. Court of Appeals for the Second Circuit, and the denial by that Court of a request for reconsideration. NHTSA presents no argument that has not already been considered and rejected. NHTSA should promptly withdraw this unlawful rule and clarify that the $14 penalty rate applies—as it has since 2016—to vehicles beginning with Model Year 2019. *See* 81 Fed. Reg. 95,489 (Dec. 28, 2016) ("Civil Penalties Rule").

I. Neither EPCA nor the Improvements Act allow NHTSA to undo the increased penalty rate.

NHTSA may not delay its application of the $14 adjustment. To do so is to retroactively reduce the penalty for model years as to which the $14 penalty already applies. No provision of EPCA or the Improvements Act gives NHTSA such authority. The $14 penalty "is in force," *New York v. NHTSA*, 974 F.3d 87, 101 (2d Cir. 2020); *NRDC v. NHTSA*, 894 F.3d 95, 116 (2d Cir. 2018) (same), and NHTSA has no authority to now undo or delay it. Pursuant to "the well-established principle that an agency literally has no power to act unless and until Congress confers power upon it," NHTSA must identify a specific grant of statutory authority for its action. *NRDC*, 894 F.3d at 112 (quoting *NRDC v. Abraham*, 355 F.3d 179, 202 (2nd Cir. 2004)). The Exemption Rule fails to do so.

Previously, NHTSA recognized that both EPCA and the Improvements Act impose a "one-way ratchet" on the penalty rate. *See* 84 Fed. Reg. 36,007, 36,021 (July 26, 2019) ("Rollback Rule") (recognizing that "the inflation adjustment essentially acts as a 'one-way ratchet,' where all subsequent annual adjustments will be based off this 'catch-up' adjustment with no ensuing opportunity to invoke the 'negative economic impact' exception," and that "EPCA itself imposes a similar 'one-way ratchet' constraint"). Under both statutes, NHTSA may—or must—increase the penalty rate, but it has no authority to later reduce the penalty rate. *See id.* That is precisely what NHTSA purports to do here. What's more, NHTSA fails to even recognize that its rule departs from the agency's prior interpretations. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (agency action arbitrary and capricious if agency does not "at least 'display awareness that it is changing position' and "show that there are good reasons for the new policy."' (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009))).

Now, NHTSA contends that various provisions of EPCA authorize the Exemption Rule. First, the agency points to its general delegated authority to administer portions of the CAFE program, including by promulgating CAFE standards. 86 Fed. Reg. at 3019-20 (citing 49 U.S.C. § 32902). NHTSA also relies on another EPCA provision that—independent from the adjustments mandated by the Improvements Act, *see New York*, 974 F.3d at 100—authorizes the agency to *increase* the CAFE penalty if certain criteria are met. *Id.* (citing 49 U.S.C. § 32912(c)).[1]

But the Second Circuit has already held, twice, that NHTSA's authority to administer EPCA, including *these specific* provisions, does not permit the agency to suspend the effective date of the same Civil Penalties Rule. *See NRDC*, 894 F.3d at 112 (rejecting argument based on NHTSA's "obligation to implement the CAFE standards" and explaining that EPCA does not "confer authority upon NHTSA to delay this penalty as part of its responsibility for administering the fuel economy portions of that statute"); *id.* ("Nothing in Section 32912 authorized the indefinite delay of a penalty increase required by the statute, either pending reconsideration or for any other reason."); *New York*, 974 F.3d at 100-01. The same reasoning applies to NHTSA's latest attempt to undo the adjustment mandated by the Improvements Act.

[1] NHTSA's claim of authority under § 32912(c) is belied by the agency's total disregard for that provision's procedural requirements. *See* 49 U.S.C. § 32912(c)(2) (requiring 45-days' notice to all automobile manufacturers, consultation with Federal Trade Commission, public hearing with oral testimony and examination).

NHTSA invokes the December 2016 final rule as precedent for the Postponement Rule, but it is not. In 2016, when NHTSA finalized the $14 adjustment, it agreed with industry petitioners that the adjustment should not apply to model years prior to the Improvements Act (i.e. 2014, 2015, and 2016), nor to model years which manufacturers claimed not to be able to make modifications necessary to comply with efficiency standards (i.e. 2017 and 2018). *See* 81 Fed. Reg. at 95,490-91. But that prior decision is no precedent for undoing the $14 adjustment now.

Even assuming NHTSA had the authority it claimed in December 2016,[2] its action here is meaningfully different in at least two respects. First, in 2016 NHTSA carved out model years for which compliance decisions were complete *before* the Improvements Act had been enacted. Here, by contrast, automakers made their compliance decisions *after* they had clear notice of the $14 adjustment. Second, and relatedly, the negative economic impact exception applied only to the initial catch up adjustment. But after that point in time the agency lacked any ongoing authority, under the Improvements Act or EPCA, to "reconsider the economic effects of the increase it had already promulgated in 2016." *New York*, 974 F.3d at 100-01. That exception, therefore, cannot bear on the agency's attempt to now undo application of the $14 adjustment to Model Years 2019-21.

II. In any event, NHTSA must proceed by notice and comment, not by interim final rule.

Issuing the Exemption Rule without notice and an opportunity for comment and with an immediate effective date violates the APA. 5 U.S.C. § 553. The APA's notice-and-comment requirements "apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule." *NRDC*, 894 F.3d at 113. The courts of appeals have repeatedly affirmed this principle. *See id.*; *Abraham*, 355 F.3d at 194 (noting that "altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards"); *Env't Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("[S]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553.").

NHTSA cannot demonstrate good cause for issuing an interim final rule without first taking public comment. The good-cause exception applies only where notice and comment is "impracticable, unnecessary, or contrary to the public

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[2] That authority was never tested. The Second Circuit's admonition that Congress "afforded [NHTSA] no . . . discretion regarding the *timing* of the adjustments" undermines the legal basis for this aspect of the 2016 rule. 894 F.3d at 109.

interest," 5 U.S.C. § 553(b)(B), and "[t]he burden is on the agency to establish that notice and comment need not be provided," *NRDC*, 894 F.3d at 113-14 (citing *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)). As before, NHTSA cannot bear its burden on any of those three prongs. *See NRDC*, 894 F.3d at 114.

The agency's chief argument is that notice-and-comment rulemaking is impracticable because of automakers' need for advance notice about the civil penalty rate that will apply to current model years. 86 Fed. Reg. at 3023. But this exception "is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety." *NRDC*, 894 F.3d at 114. As with the Suspension Rule, that automakers would "prefer different regulations that are easier or less costly to comply with does not justify dispensing with notice and comment." *Id.* (citing *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012)).

Even assuming that automakers' economic interests could support invocation of the good-cause exception in some instances, NHTSA fails to show that following the APA's procedures was impracticable here. The agency received the Alliance's petition on October 2, 2020, but kept the petition a secret and did not publish the Exemption Rule until January 14, 2021. 86 Fed. Reg. at 3016. Once again, "[a]ny imminence was NHTSA's own creation." *NRDC*, 894 F.3d at 114. NHTSA offers no reason why it could not have instead sought public comment during those three-plus months, particularly if it intended to limit the comment period to 10 days. Nor has NHTSA attempted to justify the mere 10-day comment period, which does not "provide a meaningful opportunity for comment." *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012).[3] Furthermore, NHTSA does not explain why, having taken this long to make the petition public, it could not have waited until *after* that brief comment period to issue the rule. The mere "desire to provide immediate guidance" now does not supply good cause. *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995), *superseded on other grounds by statute*, 8 U.S.C. § 1101(a)(42).

[3] "[T[he instances actually warranting a 10–day comment period will be rare. Such instances are generally characterized by the presence of exigent circumstances in which agency action was required in a mere matter of days." *Id.; see, e.g.*, *Omnipoint Corp. v. FCC,* 78 F.3d 620, 629–30 (D.C. Cir. 1996) (upholding 15–day comment period given the "urgent necessity for rapid administrative action" evidenced by "congressional mandate [to act] without administrative or judicial delays" (citation omitted)); *Northwest Airlines, Inc. v. Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (upholding 7–day comment period and invocation of the good-cause exception, when agency needed to resolve expeditiously dispute among airlines about aircraft landing "time slots," or risk widespread flight disruption).

Nor can NHTSA justify the IFR's immediate effective date. The APA requires that substantive rules take effect no less than 30 days following publication. 5 U.S.C. § 553(d). NHTSA claims it may avoid that requirement because this rule "relieves a restriction," but it does no such thing: auto manufacturers suffer no "restrictions" under either penalty rate. The CAFE standards themselves might qualify as "restrictions," but the value of the penalty imposed for violating those standards is not.

Finally, NHTSA's good-cause rationale is incompatible with the key premise the Exemption Rule, which is that automakers have already made all relevant decisions for model years 2019, 2020, and 2021. *See* 86 Fed. Reg. at 3020, 3023. By NHTSA's own logic, immediate publication of the Exemption Rule's change to the penalty will not affect manufacturers' compliance decisions for those model years. *But see infra* III.C. And NHTSA identifies no other consequences that would result from delay; the agency does not contend, for instance, that it would be forced to actually assess model year 2019 penalties before it could undertake notice and comment.

III. The Exemption Rule is arbitrary and capricious.

Even if NHTSA had authority to promulgate the Exemption Rule and had complied with the APA's procedures, the rule is arbitrary and capricious in numerous respects.

1. First, NHTSA's assumption that rescinding the $14 penalty is necessary to avoid impermissible or unfair retroactive application of the increased penalty is wrong. *Contra* 86 Fed. Reg. at 3020. When NHTSA promulgated the Civil Penalties Rule in December 2016, applying the $14 penalty to MY 2019 through MY 2021 was indisputably prospective. NHTSA has taken no subsequent action to make the $14 penalty applicable to those years, and no further action on NHTSA's part was required. Rather, the relevant events stem from the Second Circuit's decisions, which vacated NHTSA's unlawful attempts to suspend or reverse the Civil Penalties Rule. The effect of these decisions was to reinstate that rule—and its application of the $14 penalty to MY 2019 and beyond.

Thus, to the extent imposition of the $14 penalty for MY 2019 through 2021 is retroactive at all, the source of that retroactivity is the Second Circuit's decision in *New York*, as NHTSA seems to acknowledge. *See* 86 Fed. Reg. at 3021 (referring to "industry plans" at "the time of the recent judicial decision" in *New York*). The agency's reliance on the presumption against retroactive legislation or regulations is therefore misplaced. *See* 86 Fed. Reg. at 3020 (citing *Landgraf v. USI Film Prod.*, 511

U.S. 244, 280 (1994) (statute); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (rulemaking)). Unlike those congressional or agency actions, federal judicial decisions are by default "retroactive" in their application. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (noting "the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions ... for near a thousand years'" (quoting *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) (Holmes, J., dissenting))). That rule applies equally to decisions vacating unlawful agency rules. *See, e.g.*, *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289-90 (D.C. Cir. 1995) (vacatur of agency regulation applied retroactively); *United States v. Goodner Bros. Aircraft*, 966 F.2d 380, 385 (8th Cir. 1992) (same); *Burlington Res. Oil & Gas Co. v. U.S. Dep't of Interior*, 21 F. Supp. 2d 1, 2-3, 6 (D.D.C. 1998) (affirming agency decision requiring lessee "to recompute royalties payable to the lessors dating as far back as 1970" based on 1986 Tenth Circuit ruling).[4]

Second, even if retroactivity, and manufacturers' reliance interests, were relevant as a general matter, NHTSA's analysis ignores that the $14 penalty has applied to MY 2019 through MY 2021 for at least 24 of the previous 52 months. NHTSA's initial rule implementing the adjustment to $14, including for MY 2019 through 2021, took effect on August 4, 2016. *See* Civil Penalties, 81 Fed. Reg. 43,524, 43,524 (July 5, 2016). The December 2016 Civil Penalties Rule left the $14 penalty in place for those model years. The Trump Administration began suspending the Civil Penalties Rule's effective date on January 30, 2017. *See* Civil Penalties, 82 Fed. Reg. 8,694 (Jan. 30, 2017) (initially delaying effective date to March 28, 2017); Civil Penalties, 82 Fed. Reg. 32,139 (July 12, 2017) (Suspension Rule) (extending delay "indefinitely pending reconsideration"). But even those suspensions did not establish that a $5.50 penalty *would* apply to MY 2019 and beyond. Rather, as NHTSA emphasized to the Second Circuit, the agency's ongoing reconsideration could have resulted in no change at all. *See* Resps.' Opp'n to Mots. for Summ. Vacatur 9, *NRDC v. NHTSA*, No. 17-2780 (2d Cir. Nov. 17, 2017), ECF No. 107 ("[I]t is important to note that the agency retains its full range of policy options, including the possibility of retaining the $14 penalty rate and the previous determination that such a rate should

[4] Even if principles governing retroactive *rulemaking* did apply, any retroactivity is "secondary." At most, *New York* affects the "*future* legal consequences of past transactions." *Nat'l Med. Enterprises, Inc. v. Sullivan*, 957 F.2d 664, 671 (9th Cir. 1992); *see Bowen*, 488 U.S. at 219-20 (Scalia, J., concurring). That is, it establishes (or re-establishes) that, in the future, manufacturers will be liable for penalties at a $14 rate for their violations of CAFE standards in MY 2019. But it is not "directly retroactive" in the sense of regulating past conduct. *See Nat'l Cable & Telecommunications Ass'n v. F.C.C.*, 567 F.3d 659, 670 (D.C. Cir. 2009); *see, e.g.*, *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 192 (2d Cir. 2010) (considering retroactive State Department rule invalidating municipal taxes *already assessed* against foreign missions).

be applied as early as model year 2019."); *id.* at 26 ("There is no guarantee that the agency will reduce th[e] penalty rate . . . ."). Automakers predicting the outcome of that reconsideration did so at their own peril.

In any event, the Second Circuit made clear that the Civil Penalties Rule—and its $14 penalty for MY 2019—was back in effect on April 23, 2018, when the court took the extraordinary step of vacating the rule and issuing its mandate before even publishing an opinion. *See NRDC*, 894 F.3d. at 100. NHTSA nonetheless suggests that, despite the court's clear instruction that the Civil Penalties Rule was "now in force," *id.* at 116, manufacturers should instead have relied on the $5.50 penalty suggested in NHTSA's *proposed* Rollback Rule issued earlier that month. *See* 86 Fed. Reg. at 3020 n.38, 3021. But that proposal did not change the operative $14 penalty or even constrain the range of options that NHTSA had previously recognized. "Since the proposed rule was simply a proposal, its presence meant that [NHTSA] was *considering* the matter; after that consideration the [agency] might choose to adopt the proposal or to withdraw it." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007). Because it was therefore "reasonably foreseeable" that NHTSA might abandon the proposal, *id.*, manufacturers could not have reasonably relied on it—let alone now use that unjustified reliance to thwart the effect of the Second Circuit's decisions.

In short, manufacturers have had ample notice that the $14 penalty would or could apply to those model years. As NHTSA asserted in its 2016 rulemaking, manufacturers maintain that they require 18 months' lead time to "adjust their product plans, designs, and compliance plans to address changes in fuel economy standards," or a significant increase in the civil penalty amount. 81 Fed. Reg. at 95,491. Assuming that is so, that 18-month lead-time ran from the introduction of the $14 penalty in July 2016 through January 2018, well before MY 2019 began. *See id.* Indeed, by the time NHTSA issued its unlawful Rollback Rule in July 2019, resetting the penalty to $5.50, the time by which to give automakers sufficient notice for MY 2019, MY 2020, and MY 2021—on the automakers' and NHTSA's own logic—had already passed.[5]

Reliance on NHTSA's final rule attempting to reverse the $14 penalty was also dubious. *Contra* 86 Fed. Reg. at 3021. A coalition of states and the undersigned groups filed challenges to the rule within 7 days and 17 days, respectively, and industry groups

[5] Eighteen months from July 2019 is January 2021; MY 2021 began in 2020 at various points for different automakers.

representing automakers swiftly intervened in support of the agency.[6] Accordingly, manufacturers were clearly on notice that the $14 penalty could be reinstated by a court. To the extent they gambled that the $14 rate would not apply to MY 2019 (or later years), that does not provide NHTSA with a basis to reward that mistaken bet. *Cf., e.g.*, *City of New York*, 618 F.3d at 196 (retroactivity of agency rule permissible where expectations were not "genuinely settled" because legal status of foreign missions was subject of ongoing contestation); *Ray v. County of Los Angeles*, 935 F.3d 703, 715 (9th Cir. 2019) (applying court of appeals' reinstatement of regulations retroactively, despite "financial consequences of [regulated entity's] calculated risk" that district court's vacatur would be affirmed), *cert. denied,* 140 S. Ct. 1124 (2020).[7]

The automakers' own public comments confirm that manufacturers understood and accounted for this risk. NHTSA points to Fiat Chrysler in particular as having "accrued estimated amounts for any probable CAFE penalty based on the $5.50 rate." *Id.* (citing FCA N.V. Interim Report, 6-K (Current report) EX-99.1, at 41 (Sept. 30, 2020)). But in an earlier, October 2019 SEC filing, Fiat Chrysler stated that it had been setting aside funds for MY 2019 CAFE penalties based on the $14 rate, showing clearly that it had *not* relied on any penalty reduction. *See* FCA N.V. Interim Report, 6-K (Current report) EX-99.1, at 61 (Oct. 31, 2019).[8]

Furthermore, NHTSA failed to acknowledge that the December 2016 rule rested in part on the need to avoid retroactive application of the Improvements Act to conduct *preceding* the statute's November 2, 2015 enactment. No such similar concern applies here because manufacturers have been "on notice since 2015 . . . that Congress had established a regime requiring agencies across the federal government to institute mandatory, inflation-linked increases to numerous federal civil penalties, including the CAFE penalties." *NRDC*, 894 F.3d at 115. Nor did NHTSA consider Section 6 of the Improvements Act, which specifically contemplates that penalties "assessed after the date the increase takes effect" may be applied where the

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[6] *See* Pet. for Review, *New York v. NHTSA*, No. 19-2395 (2d Cir. Aug. 2, 2019), ECF No. 1-1; Pet. for Review, *NRDC v. NHTSA*, No. 19-2508 (2d Cir. Aug. 12, 2019), ECF No. 1-1; All. of Auto. Mfrs., Inc.'s Mot. to Intervene, *New York v. NHTSA*, No. 19-2395 (2d Cir. Aug. 29, 2019), ECF No. 41; Ass'n of Global Automakers' Mot. to Intervene, *New York v. NHTSA*, No. 19-2395 (2d Cir. Aug. 29, 2019), ECF No. 42.

[7] Given similar pending challenges to the Suspension Rule, any reliance on that rule was likewise a calculated risk.

[8] Attached to this letter as Exhibit A.

"associated violation predated such increase." *Cf. Bowen*, 488 U.S. at 208 (presumption against retroactivity overcome by congressional intent to make statute retroactive).

2. NHTSA also erroneously assumed that rescinding the $14 penalty will have no effect on future compliance. *See* 86 Fed. Reg. at 3020 (assuming that maintaining the $14 adjustment for MY 2019-21 would "promote no additional compliance with the law"). But the effects of the Exemption Rule are not confined to the model years subject to the Rule because manufacturers' compliance decisions are not limited to single model years. Rather, EPCA requires manufacturers to meet compliance obligations over multi-year periods.

EPCA's credit provisions allow a multi-year window for a manufacturer to comply with a CAFE standard for a given model year. When a manufacturer exceeds the standard for a model year, it generates credits, which can be applied to comply with the CAFE standard in any of the three previous model years or the next five model years. 49 U.S.C. § 32903(a), (b).[9] A manufacturer may also transfer credits among its fleets or purchase credits from another manufacturer. *Id.* § 32903(f), (g). As the D.C. Circuit has repeatedly recognized, these multi-year credit provisions mean that CAFE compliance for one year affects manufacturer behavior in subsequent years.[10] NHTSA entirely failed to consider this fundamental feature of the CAFE program.

For similar reasons, lowering the CAFE penalty—particularly the drastic decrease here—would be likely to affect multiple years of compliance decisions. For example, if a manufacturer's MY 2020 fleet is non-compliant, a manufacturer could (1) pay the penalty, (2) apply previously generated credits, (3) purchase credits from

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[9] If a manufacturer fails to meet the standard for a given year and intends to generate credits in the next three years to satisfy that shortfall, it may submit a plan to NHTSA for approval demonstrating that the manufacturer is likely to be able to do so. 49 U.S.C. § 32903(b)(2).

[10] *See Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 324 (D.C. Cir. 1992) (observing that revising a 1990 CAFE standard after the start of the model year would "obviously affect[] carmakers' behavior—if not in model year 1990, at least in subsequent years," because it would "reduce[] the number of carryover credits that [the manufacturer] can use to blunt the effect of the CAFE standards for model years 1991–93"); *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 117 (D.C. Cir. 1990) ("Based on experience with the EPCA's credit and penalty scheme, when manufacturers receive CAFE credits for exceeding CAFE standards in a given year, they are likely to respond in future years by producing fewer fuel-efficient vehicles."); *Pub. Citizen v. NHTSA*, 848 F.2d 256, 262 (D.C. Cir. 1988) (rejecting argument that petitioners lacked standing due to ending of model year because, given credit provisions, "even a tardy redetermination of the 1986 CAFE standard . . . could alter the manufacturers' incentives to produce fuel-efficient vehicles in future model years").

other manufacturers, or (4) invest in fuel efficiency improvements in MY 2021, MY 2022, and/or MY 2023 to over-comply with the CAFE standard for those years and generate credits to satisfy its MY 2020 shortfall. A higher penalty for MY 2020 (and by extension, a higher price for credits) thus incentivizes the manufacturer to instead invest in technological improvements marginally cheaper than the penalty amount to generate credits in future years. NHTSA recognized this principle in the Rollback Rule. *See* 84 Fed. Reg. at 36,010 (asserting that "an increase in the penalty rate . . . would result in an increase in . . . expenditures" for "credit generation and credit purchases"); 83 Fed Reg. at 13,916 (contending that "increasing the penalty rate [from $5.50] to $14" would cause "manufacturers who had planned to use penalties as one way to make up their shortfall . . . to pay increased penalty amounts, purchase additional credits at likely higher prices, or make modifications to their vehicles outside of their ordinary redesign cycles").[11] Similarly, if the penalty rate for MY 2020 is reduced, noncompliant manufacturers who hold credits might decide to pay the $5.50 penalty for MY 2020—instead of applying their credits—and instead hold those credits to satisfy their compliance obligations in later years. But had the penalty rate remained at $14 for MY 2020, those manufacturers might have *used* their credits to comply with their MY 2020 obligations, and then been incentivized to invest in fuel-saving technology for later years.

3. Finally, NHTSA accounted for costs Congress did not intend it to consider. NHTSA contends that the economic impacts of the COVID-19 pandemic justify its rule. 86 Fed. Reg. at 3022. But whatever the impact of the pandemic on automakers' fortunes, those economic conditions cannot provide a basis for lowering the CAFE penalty for these model years.

NHTSA primarily relies on EPCA as authority for the Exemption Rule, *see* 86 Fed. Reg. at 3019-20, but disregards critical features of that statutory scheme that foreclose its consideration of costs here. EPCA provides the agency with authority to

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[11] Notably, in November 2017—less than 18 months before MY 2019 began—the Alliance's predecessors opposed expedited resolution of challenges to the Suspension Rule, arguing that no harm would occur in the interim due to the availability of these multi-year credit provisions. *See* Ass'n of Global Automakers' Opp'n to Mots. for Summ. Vacatur 25, *NRDC v. NHTSA*, No. 17-2780 (2d Cir. Nov. 17, 2017), ECF No. 103-1 ("In fact, the full effect of the increased civil penalty will not be felt for several more years after [MY 2019], because the "carry-forward" and "carryback" provisions permit manufacturers to use existing credits to cover shortfalls before paying civil penalties."); All. of Auto. Mfrs., Inc.'s Opp'n to Mots. for Summ. Vacatur 12, *NRDC v. NHTSA*, No. 17-2780 (2d Cir. Nov. 17, 2017), ECF No. 105-1 (arguing that the Suspension Rule "would not have an impact before the 2019 model year" and that, even then, "a manufacturer with a shortfall in model year 2019 [would] ha[ve] until model year 2022 to generate, purchase or transfer credits to demonstrate compliance").

increase the CAFE penalty where the increase would not have certain negative economic consequences, *see* 49 U.S.C. § 32912(c), but Congress declined to give the agency corresponding authority to *decrease* the penalty based on economic considerations—or for any other reason. Instead, Congress prescribed a narrow set of circumstances under which the agency could compromise or remit a penalty for an individual automaker, such as where "necessary to prevent the insolvency or bankruptcy of the manufacturer." *Id.* § 32913(a)(1). NHTSA has not invoked its authority under section 32913 or purported to make the requisite findings. And "[w]hen Congress provides exceptions in a statute," as it did here, the "proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *accord Stryker v. SEC*, 780 F.3d 163, 167 (2d Cir. 2015). Indeed, NHTSA has previously recognized that Section 32913's "specific and narrow penalty mitigation authority" reflects "Congress's decision not to let the industry off the hook under [other] circumstances." *Gen. Motors Corp. v. NHTSA*, 898 F.2d 165, 173 (D.C. Cir. 1990) (concluding that "[l]owering the CAFE standards after the model year had begun would undermine the limits Congress placed on NHTSA's authority to mitigate penalties").

To the extent NHTSA invokes the Improvements Act, that statute likewise precludes the agency's consideration of costs here. That Act similarly establishes a one-way ratchet to *increase* civil penalties for inflation, and it further requires that agencies do so on a "highly circumscribed schedule." *NRDC*, 894 F.3d at 109; *see supra* § I. The Act does include a limited exception to avoid or reduce the initial catch-up adjustment based on negative economic consequences, but as the Second Circuit held, NHTSA's authority to reconsider the initial adjustment based on that exception has expired. *See New York*, 974 F.3d at 100. Accordingly, under either EPCA or the Improvements Act, accounting for such costs here was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider").

In any event, NHTSA's analysis of the economic impacts of its rule was arbitrary. It entirely ignored the economic harm that its rule will impose on automakers, like Tesla, who have over-complied and thereby accrued credits. NHTSA never considered what effect its rule would have on the value of those credits. Nor did NHTSA's analysis grapple with the full implications of the COVID-19 pandemic. NHTSA accepts the petition's assertion that the pandemic has had a significant economic impact on automakers. 86 Fed. Reg. at 3022. But NHTSA never considered whether the shuttering of production lines and diminished auto sales would *reduce* automakers' penalty liabilities (by reducing the number of noncompliant vehicles

sold). Finally, NHTSA entirely ignored the effect on automakers' compliance obligations that the agency's own rule reducing CAFE standards for MY 2021 might have. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020).[12] That, too, was arbitrary and capricious.

IV. NHTSA's rule violates NEPA.

In issuing the Exemption Rule, NHTSA concluded that no analysis under NEPA was required, 86 Fed. Reg. at 3024-25, but nevertheless conducted an environmental analysis and reached a finding of no significant impact, *id.* at 3025-26. That analysis was also arbitrary and capricious.

NEPA requires agencies to prepare a detailed environmental impact statement (EIS) for actions that "significantly" affect the environment. 42 U.S.C. § 4332(2)(C). In reviewing an agency's "decision not to issue an EIS," courts first "consider whether the agency took a 'hard look' at the possible effects of the proposed action," *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997)—that is, whether the agency "adequately considered and elaborated the possible consequences of [its] action," *Center for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1215 (9th Cir. 2008).

NHTSA failed to take a hard look at the environmental consequences of its rule because it misunderstood those consequences. Again, NHTSA assumed that applying a $5.50 penalty rate to violations of the CAFE standards for already-completed model years—MY 2019 and 2020—and model years already underway—2021—will have no effect on manufacturers' compliance with those standards, and thus no effect on the environment. 86 Fed. Reg at 3025. But as explained above, CAFE penalties assessed in one year affect manufacturers' compliance decisions in future years. *See supra* § III.2. NHTSA's NEPA analysis entirely ignored this feature of the CAFE penalties program. That was arbitrary and capricious; the agency's NEPA analysis is therefore unlawful.

V. NHTSA should not exempt MY 2022 from the $14 penalty

NHTSA has requested comment on whether it should also undo its implementation of the $14 penalty to Model Year 2022 in light of "lead time" concerns. 86 Fed. Reg. at 3022. For the reasons set forth above, such a decision would be unlawful. Whatever advance notice manufacturers may need, the

[12] To be clear, that rule is also unlawful. But until it is vacated or withdrawn, NHTSA may not simply ignore it.

Improvements Act grants NHTSA no authority to undo the adjustment it finalized in 2016. Nor do EPCA's lead-time provisions bear on NHTSA's implementation of the Improvements Act's penalty increase—much less authorize the *undoing* of that penalty increase. *See New York*, 974 F.3d at 100 (rejecting NHTSA argument that Improvements Act's "directive to increase civil monetary penalties conflicts with the limitations on penalty increases in EPCA"). And NHTSA's contrived rationales for undoing the penalty increase are even weaker here, because manufacturers have impliedly conceded that they have had adequate notice for MY 2022.

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Because the Exemption Rule is unlawful, NRDC and Sierra Club urge NHTSA to lawfully withdraw the rule, thereby restoring the penalty rate of $14.00 that has been "in force" for Model Years 2019 and beyond.

Respectfully submitted,

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