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Docket Management Facility, M–30,
U.S. Department of Transportation
West Building, Ground Floor, Room W12–140
1200 New Jersey Avenue SE,
Washington, DC 20590
Docket No. NHTSA-2021-0001

RE: *Department of Transportation, National Highway Traffic Safety Administration, 49 CFR Part 578, Civil Penalties, Docket No. NHTSA-2021-0001, 86 Fed. Reg. 46,811 (Aug. 20, 2021)*

To Whom It May Concern:

Pursuant to the National Highway Traffic Safety Administration ("NHTSA")'s Supplemental Notice of Proposed Rulemaking ("NPRM"), Civil Penalties, Docket No. NHTSA-2021-0001, 86 Fed. Reg. 46,811 (Aug. 20, 2021), Tesla, Inc. ("Tesla") submits the following comments supporting rapid reinstatement of inflation adjustment to the civil penalty rate applicable to automobile manufacturers beginning with vehicle Model Year ("MY") 2019.

Tesla incorporates by reference its comments in opposition to the NHTSA's Interim Final Rule ("IFR"), Civil Penalties, Docket No. NHTSA-2021-0001, 86 Fed. Reg. 3,016 (Jan. 14, 2021); its letter sent to NHTSA on December 23, 2020[1]; and its briefing in *NRDC v. NHTSA*, Nos. 21-139, 21-339, 21-593 (2d Cir. 2021), which is pending litigation challenging the IFR. Tesla notes that in *NRDC v. NHTSA* it has litigated against the IFR.

Tesla strongly supports the withdrawal of the IFR because it is both substantively and procedurally unlawful, violating at least three statutes enacted by Congress and two decisions of the United States Court of Appeals for the Second Circuit. In addition, Tesla opposes any effort to delay application of the inflation adjustment to any model year later than MY 2019, as doing so would further prolong years of unjustified and illegal delay in implementing the inflation adjustment mandated by Congress and would compound the harms already resulting from that unlawfully delayed adjustment to the civil penalty amount. For the reasons given below, reestablishing the inflation adjusted rate to the CAFE civil penalty starting in MY 2019 would implement final rules consistent with two judicial decisions, follow Congress's clear statutory directive, and put an end to an undue economic injury that has hurt auto manufacturers who produce vehicles that outperform the current fuel economy standards.

I. Background

Tesla's mission is to accelerate the world's transition to sustainable energy. Moreover, Tesla believes the world will not be able to solve the climate change crisis without directly reducing air pollutant emissions—including carbon dioxide (CO2) and other greenhouse gases (GHGs)—from the transportation and power sectors.

To accomplish its mission, Tesla designs, develops, manufactures, and sells high-performance fully electric vehicles and energy generation and storage systems, installs, and maintains such systems, and sells solar electricity. Tesla currently produces and sells four fully electric, zero emissions vehicles (ZEVs): The Model S sedan, the Model X sport utility vehicle (SUV), the Model 3 sedan, and the Model Y mid-sized SUV.

Tesla is also deeply committed to ensuring the U.S. remains a leader in advanced manufacturing.[2] All Tesla vehicles sold in North America are manufactured in the U.S. In 2021, the Tesla Model 3 ranked as the most

[1] On December 23, 2020, Tesla sent a letter to NHTSA opposing the lack of process and secrecy of the agency's actions in the development of this IFR. Although NHTSA did not address the concerns raised by Tesla in its letter, NHTSA acknowledged receipt of the letter prior to the January 6, 2021, completion of the IFR's Executive Order (E.O.) 12866 Regulatory Review process. *See* 86 Fed. Reg. at 3023, fn. 74 (acknowledging receipt of the letter); *See also*, OIRA, Conclusion of E.O. 12866 Regulatory Review at https://www.reginfo.gov/public/do/eoDetails?rrid=131487.

[2] See generally, Tesla, American Footprint (November 2020), submitted as an attachment to these comments.

American car and the Model Y ranked just below as the third most American car on the market.[3] NHTSA similarly confirms that 100% of the vehicle, engine, and transmission assembly in each Tesla vehicle sold in the U.S. occurs in the U.S.[4] In addition, Tesla's U.S. supply chain continues to expand and spans across more than 40 states, such as Alabama, Georgia, Ohio, Indiana, and Michigan.[5]

In the U.S., Tesla conducts vehicle manufacturing and assembly operations at its factory in Fremont, CA, and produces electric drive trains and manufactures advanced battery packs, as well as Tesla's energy storage products, at its Gigafactory Nevada in Sparks, NV. Tesla also builds and services highly automated, high-volume manufacturing machinery at its facility in Brooklyn Park, MN, and operates a tool and die facility in Grand Rapids, MI. Tesla produces solar energy and vehicle charging products at its Gigafactory New York in Buffalo, NY.

In 2012, the first year of EPA and NHTSA's Final Rule for Model Year 2012 - 2016 Light-Duty Vehicle GHG Standards and CAFE Standards,[6] Tesla delivered 2,636 vehicles to customers[7] and had just under 3,000 employees. In 2020, Tesla delivered almost 500,000 vehicles to customers, including over 180,000 vehicles in the fourth quarter of 2020 alone—during the ongoing COVID-19 pandemic -- having its highest sales quarter to date[8] and employing over 70,000 people worldwide. In sum, from 2012 to 2020, under the current EPA and NHTSA performance standards, Tesla's vehicle deliveries have grown by nearly 19,000% and its American manufacturing footprint and workforce have expanded rapidly. At the same time, according to the latest Consumers Reports Owner Satisfaction Survey, Tesla has received the highest owner satisfaction rating of any car brand in 2020—recognition which we have achieved seven times since 2013.[9]

Additionally, in the summer of 2020, Tesla began construction of its newest vehicle and advanced battery manufacturing facility in Austin, TX. The project will invest over $1B in new construction and create at least 10,000 new jobs.[10] Upon full completion, the Gigafactory Texas will produce Tesla's new Cybertruck and Model Y crossover, and manufacture Tesla's new, advanced 4680 lithium-ion battery cell and battery packs.[11] Production on Model Y vehicles is anticipated to begin in late 2021.[12] Globally, by 2030, Tesla aims to sell 20 million electric vehicles per year.[13]

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[3] Cars.com, Tesla Model 3 Snags No. 1 Spot on Cars.com's 2021 American-Made Index®; First All-Electric Vehicle to Top the List in Its 16-Year History (June 23, 2021); https://www.multivu.com/players/English/8915151-cars-com-tesla-model-3-2021-american-made-inde; See also, American University, Kogod School of Business, Made in America Auto Index, https://www.american.edu/kogod/research/autoindex/ (Finding in 2020, each of Tesla's vehicles - the Model S, 3, X and Y - ranked in the top 10 and Tesla was the only manufacturer to have representation from its entire portfolio in the top 10.).

[4] NHTSA, Technical Support Document: Proposed Rulemaking for Model Years 2024-2026 Light Duty Vehicle Corporate Average Fuel Economy Standards (Aug. 2021) at 96, Table 2-6, https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-08/CAFE-NHTSA-2127-AM34-TSD-Complete-web.pdf

[5] See e.g., AutoNews, Suppliers Starting to Set Stage for Tesla in Texas (Sept. 5, 2021), https://www.autonews.com/suppliers/tesla-suppliers-starting-set-stage-texas-gigafactory.

[6] *See* 75 Fed. Reg. 25,324 (May 7, 2010).

[7] Tesla Motors Inc. Form 10-K for the Fiscal Year Ended December 31, 2014 at 53 (Feb. 26, 2015), https://ir.tesla.com/static-files/60fd27ca-c925-4420-83d1-fd39ac8a7d67.

[8] Press Release, Tesla, Tesla Q4 2020 Vehicle Production & Deliveries (Jan 2, 2021), https://ir.tesla.com/press-release/tesla-q4-2020-vehicle-production-deliveries; Bloomberg, Tesla Poised for Expansion After Just Missing 2020 Target (Jan. 2, 2021), https://www.bloomberg.com/news/articles/2021-01-02/tesla-delivers-499-550- electric-cars-in-2020-just-shy-of-target.

[9] Consumer Reports, Most and Least Satisfying Car Brands (Mar. 5, 2020), https://www.consumerreports.org/car-reliability-owner-satisfaction/car-brands-ranked-by-owner-satisfaction/.

[10] *See*, *e.g.*, "Elon Musk says hiring for Tesla's Austin factory could hit 10,000 workers," Austin American-Statesman (March 31, 2021), https://www.statesman.com/story/business/2021/03/31/elon-musk-says-teslas-austin-site-hire-ten-thousand-2022/4826859001/.

[11] See Tesla, Tesla Battery Day Presentation (Sept. 22, 2020), https://tesla-share.thron.com/content/?id=96ea71cf-8fda-4648-a62c-753af436c3b6&pkey=S1dbei4.

[12] Tesla, SEC Form 10-Q, (July 27, 2021) at 32, https://www.sec.gov/Archives/edgar/data/1318605/000095017021000524/tsla-20210630.htm.

[13] Tesla, 2020 Tesla Impact Report (Aug. 10, 2021) at 2, https://www.tesla.com/ns_videos/2020-tesla-impact-report.pdf.

Currently, Tesla has more than 88,000 employees with more than 55,000 employees in the U.S. and has infused billions of dollars in economic activity and created thousands of direct and indirect jobs in states like California,[14] Nevada[15] and New York.[16] Tesla is a leader in creating a diverse and inclusive workplace and sixty percent of Tesla's U.S. workforce comes from underrepresented communities and over 30% are Black and Latinx.[17] Tesla also provides highly competitive wages that meet or exceed that of comparable manufacturing roles, even before equity and benefits are factored.[18]

Tesla also continues to make significant investments in advancing EV, solar, and battery storage technology with almost $1.5B dedicated to research and development in 2020 alone.[19] The company is also investing to establish, and continues to grow, a large network of retail stores, vehicle service centers, and electric vehicle charging stations to accelerate and support the widespread adoption of its zero-emission vehicle (ZEV) products.[20] Since 2012, Tesla has invested heavily in siting, building, and operating EV charging infrastructure. In 2013, Tesla had just eight Supercharger Stations in North America. As of August 1, 2021, this global network has grown to include over 3,000 Supercharger Stations with more than 27,000 individual connectors.[21] In 2020, Tesla opened 743 new Supercharger locations around the world – an average of two new locations every day. Tesla's charging network also includes over 14,000 Destination Charging locations and over 28,000 Destination Charging connectors worldwide that replicate the convenience of home charging by providing hotels, resorts, and restaurants with Tesla Wall Connectors.[22] Tesla is committed to continue expanding these networks to provide a convenient and seamless charging experience for our customers.

[14] See e.g., IHS Markit, The Economic Contribution of Tesla in California (May 2018), https://ihsmarkit.com/research-analysis/the-economic-footprint-of-tesla-in-california.html (Tesla infusing over $4 billion into the California economy in 2017 alone).

[15] See e.g., Nevada Governors Economic Office of Economic Development, Tesla Compliance Audit and Transferable Tax Credit Certificate (July 1, 2018 - June 30, 2019), (Sept 15, 2021) at Appendix A, https://goed.nv.gov/wp-content/uploads/2020/02/2019_0913_Tesla_Audit_and_Tax_Credit_Certificate.pdf. (showing almost $5B in total capital investment from Oct 2014 – June 2019).

[16] See e.g. Tesla, Silevo, LLC and Affiliates, Riverbend Annual Report, 2021 (May 31, 2021), https://www.investigativepost.org/wp-content/uploads/2021/06/Tesla-Riverbend-Report-Form-Final-Redacted-With-Sig-6-1-21.pdf (showing cumulative investment and spend in New York State of almost $824M between Jan 1, 2015 and Aril 30,2021); See generally, DOE, FASB, National Blueprint For Lithium Batteries 2021–2030 (June 7, 2021) at 10, https://www.energy.gov/sites/default/files/2021-06/FCAB%20National%20Blueprint%20Lithium%20Batteries%200621_0.pdf ("With the increasing electrification of the U.S. transportation sector, growth in employment associated with EVs has already been demonstrated, with electric hybrids, plug-in hybrids, and all EVs supporting 198,000 U.S. employees in 2016, and 242,700 U.S. employees by 2019.).

[17] Tesla, 2020 Impact Report (Aug. 10, 2021) at 71-72, https://www.tesla.com/ns_videos/2020-tesla-impact-report.pdf. (describing Tesla's workforce).

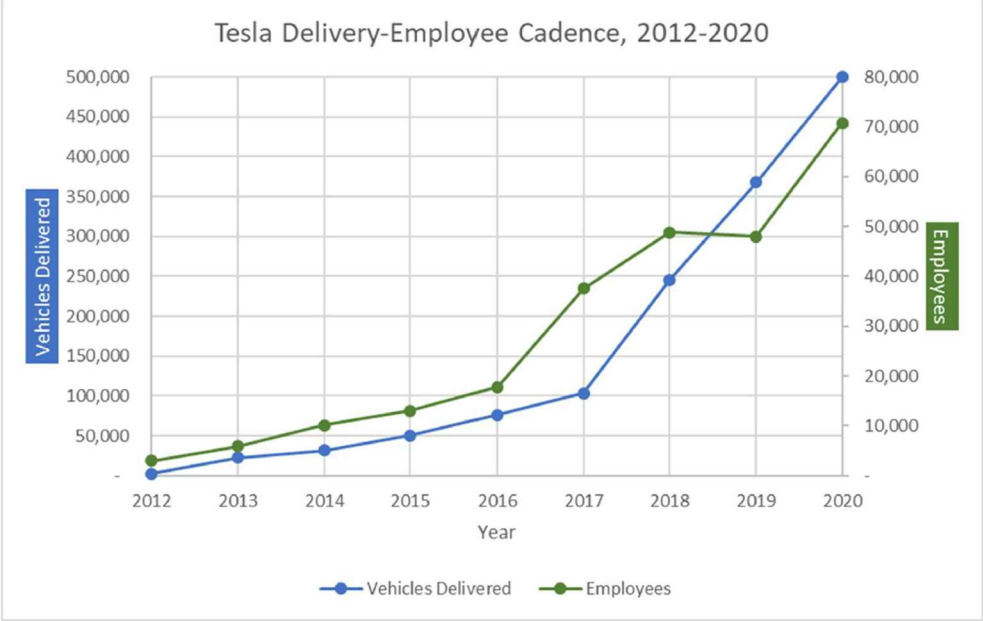
[18] Id. at 65 -66 (describing Tesla's wages. benefits, and compensation).

[19] See Tesla, SEC Form 10-K (Jan. 27, 2021) at 43, https://www.sec.gov/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm.

[20] See 86 Fed. Reg at 43799 ("Electrification of the vehicle fleet is likely to affect both the number and the nature of employment in the auto and parts sectors and related sectors, such as providers of charging infrastructure.").

[21] See, Tesla, Supercharger, https://www.tesla.com/supercharger.

[22] See, Tesla, Destination Charging, https://www.tesla.com/destination-charging.



Tesla manufactures all electric vehicles that are highly efficient and do not directly emit carbon dioxide or other air pollutants. As EPA recognized in its 2020 Automotive Trends Report, Tesla had by far the lowest carbon dioxide emissions (0 grams/mile) and highest fuel economy (118 miles per gallon equivalent) of all large manufacturers in Model Year 2019.[23] Under the CAFE program, manufacturers of electric vehicles receive an incentive through a petroleum equivalency factor (PEF) used to calculate fuel economy.[24] Tesla has accordingly earned a significant volume of compliance credits because its vehicles far exceed the requirements of the CAFE standards each year.

In short, Tesla is an American success story about innovation, environmental protection, and job creation that continued to build even through the adversity of recent years, and it demonstrates that compliance with the CAFE standards -- and the avoidance of CAFE penalties -- are achievable outcomes.

II. The Interim Final Rule should be withdrawn because it is substantively and procedurally unlawful

For the reasons Tesla described in its comments in opposition to NHTSA's IFR and in its briefing in *NRDC v. NHTSA*, Nos. 21-139, 21-339, 21-593 (2d Cir. 2021), both incorporated by reference here, the IFR should be withdrawn because it is substantively unlawful and adopted in accordance with invalid procedures. By exempting automobile model years 2019, 2020, and 2021 from the required inflation adjustment increase in the penalty rate from $5.50 to $14 without any advance notice or opportunity for public comment, the IFR attempted to circumvent the Congressionally mandated penalty adjustment required to be imposed under the CAFE program and evade two clear judicial directives rejecting agency efforts at delay and declaring the inflation adjustment to be "in force." *See NRDC v. NHTSA*, 894 F.3d 95, 103 (2d Cir. 2018); *New York v. NHTSA*, 974 F.3d 87, 101 (2d Cir. 2020). In doing so, the IFR clearly violates the Federal Civil Penalties Inflation Adjustment Act Improvements Act ("Improvements Act"), 28 U.S.C. §2461, and its adoption was procedurally unlawful in violation of the Administrative Procedure Act ("APA") and the National Environmental Policy Act ("NEPA"). Any of these flaws alone, but particularly all of them in combination, warrants withdrawal of the IFR.

The IFR is procedurally invalid because it was promulgated in violation of the APA and NEPA. First, the IFR was adopted without advance notice or opportunity for public comment and without even a colorable basis to

[23] EPA, EPA-420-R-21-003, The 2020 EPA Automotive Trends Report, Greenhouse Gas Emissions, Fuel Economy, and Technology Since 1975 at 12 (Jan. 2021), https://www.epa.gov/automotive-trends/download-automotive-trends-report#Full%20Report (preliminary MY 2020 at 119.1 miles per gallon).
[24] *See* 49 U.S.C. §32904(a)(2)(B).

invoke the APA's good cause exception. *See* Tesla Comment on IFR Docket No. NHTSA-2021-0001, at 3-6; Tesla Petr. Mot. for Summ. Vacatur, No. 21-139 (2d Cir. Mar. 4, 2021) at 16-22. A change in the effective date of a regulation is a substantive revision requiring notice and comment. *NRDC*, 894 F.3d at 113; *NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004). But NHTSA rushed through the IFR as a midnight regulation before the end of the prior administration, even though it could not come close to demonstrating that complying with the APA's procedural requirements was impracticable or unnecessary, or that providing notice and comment was not in the public interest. In addition, despite clear instructions under NEPA to "take a hard look at the environmental consequences" of its actions, *Baltimore Gas and Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (internal quotations omitted), NHTSA ignored the environmental harms that will predictably result from delaying the penalty increase until 2022, such as incentivizing automakers to pay the lower penalties rather

III. Delaying the civil penalty adjustment to a model year after Model Year 2019 would violate the Improvements Act and the Administrative Procedure Act

A. Under the Improvements Act, the penalty adjustment must apply to Model Year 2019 and later

In enacting the Improvements Act in 2015, Congress required that agencies promptly adjust their civil penalties upwards to account for years of historic inflation, by requiring the initial inflation adjustment to be made "[n]ot later than July 1, 2016." 28 U.S.C. § 2461(a), note § 4. The Act mandates that penalties be adjusted upwards to "maintain the deterrent effect of civil monetary penalties and promote compliance with the law" by accounting for inflation. *NRDC*, 894 F.3d at 109 (citing Improvements Act, Pub. L. 101-410, § 2(b), 104 Stat. 890, 890 (1990)). Delaying the inflation adjustment to begin in a Model Year later than 2019 based on some pretext of predictability ignores the fact that the CAFE penalties were increased years before, in NHTSA's 2016 rule, pursuant to that clear statutory directive.

Indeed, Congress adopted that clear instruction to agencies to increase their civil penalties precisely to end prolonged delays in adjusting the penalty amounts. Since the Improvements Act was enacted, NHTSA has on three prior occasions attempted to unlawfully delay the implementation of the penalty increase. The first two attempts to delay were decisively rejected by the U.S. Court of Appeals for the Second Circuit, *see NRDC*, 894 F.3d 95; *New York*, 974 F.3d 87, and a challenge to the third is currently pending before that court, *see NRDC v. NHTSA*, Nos. 21-139, 21-339, 21-593 (2d Cir. 2021). Holding off the application of the penalty adjustment to a model year after MY 2019 would in the same way further "the very kind of … delay that [the Improvements Act] … was enacted to end," violating the statute's clear mandate and "flout[ing] the … core objects of that Act." *NRDC v. NHTSA*, 894 F.3d at 111 (internal quotations omitted). As a result, the delay would also contravene those multiple court decisions that have confirmed the penalty adjustment and stated twice that the 2016 adjustment "is now in force." *NRDC*, 894 F.3d at 116; *New York*, 974 F.3d at 101.

Retroactivity concerns and reliance interest arguments are misplaced and do not prevent the penalty adjustment from being applied to MY 2019. *See* Tesla Comment on IFR at 9-10; Tesla Petr. Mot. for Summ. Vacatur at 14-15. Applying the penalty adjustment to MY 2019 does not raise retroactivity concerns: the statute plainly required an increase in 2016, and the Second Circuit has repeatedly found NHTSA's 2016 increase in the penalty rate to be in force beginning with MY 2019. Those rulings simply confirmed what was the law was all along: that the 2016 rule was lawful and the attempts to alter it were a nullity. *See U.S v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir. 1992) ("A regulation not promulgated pursuant to the proper notice and comment procedures has no 'force or effect of law' and therefore is void ab initio.").

Manufacturers have been aware of the civil penalty adjustment since at least 2016, when the adjustment was statutorily required to go into effect and the implementing rule increasing penalty amounts beginning with MY 2019 was adopted. While certain manufacturers may have hoped that the penalty rate would be reduced or delayed, the Second Circuit struck down NHTSA's attempt to avoid or delay the adjustment in 2018 and again in 2020 and declared the lawful 2016 adjustment to be "in force." *NRDC*, 94 F.3d at 116; *New York*, 974 F.3d at 101. Accordingly, if any reasonable reliance interests exist, they cut in the other direction: the text of the Improvements Act, the 2016 rule, and two court of appeals decisions clearly establish that the civil penalty rate must be adjusted for inflation by 2016 at the latest. There is no logical or legal basis for NHTSA to bootstrap unlawful attempts to delay or evade the penalty increase into a justification for finding implementing a twice-upheld penalty increase as improper due to "retroactivity" concerns. Indeed, the only unfairness that has been created is to those manufacturers that have adhered to the lawful 2016 rule and based their planning and investments on that rule, as twice affirmed by the Second Circuit. This unfairness—which has been compounding

for years as NHTSA repeatedly attempted to illegally delay the penalty increase—would be extended even further if NHTSA attempts to once again unlawfully delay the adjustment by beginning in a model year after MY 2019.

B. Because the Improvements Act does not contain exceptions that would allow further delay, reliance on economic impacts and COVID-19 to justify beginning the adjustment after Model Year 2019 would be arbitrary and capricious

1. NHTSA may not consider economic circumstances in applying the penalty adjustment

The petition for rulemaking that led to the IFR suggested that delay the civil penalty increase until MY 2022 was necessary and justified because of the economic impact suffered by the automobile industry due to COVID–19. *See* 86 Fed. Reg. at 46,814. However, there is no statutory authority for NHTSA to conjure an exception to the mandate in the Improvements Act that the penalty rate must be promptly adjusted to reflect inflation. If NHTSA were to adopt this illegal option and begin the adjustment later than MY 2019, any justifications based on economic circumstances would be entirely unlawful.

The Act only allows for any consideration of costs for the first penalty adjustment if timely made. And, as the Second Circuit held in rejecting a prior attempt to delay, that time has passed. *See New York*, 974 F.3d at 100-01. Specifically, the statute provided a limited exception if an adjustment would have a "negative economic impact," or "the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits." But the Second Circuit made clear any such exception had to be invoked before the date of the second inflation adjustment required by the statute—i.e., before "January 15, 2017," more than four years ago. *New York*, 974 F.3d at 100-01.

Because the Act includes this one reference to costs and no other factors permitted to be considered in adopting the penalty adjustment, it is clear that the statue does not envision an agency considering economic impacts (or any other consideration) in implementing the penalty adjustments. *See Whitman v. American Trucking Association*, 531 U.S. 457, 467 (2001) (reading Clean Air Act provision requiring EPA to set ambient air quality standards at levels "requisite to protect the public health" as not permitting consideration of cost, in part because authority to consider costs had been expressly granted elsewhere in Act).

Because the Improvements Act does not contemplate the consideration of economic factors in applying the mandatory penalty adjustment, NHTSA may not consider those factors. It is a core pillar of administrative law that an agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." *State Farm v. Motor Vehicle Mfrs' Ass'n*, 463 U.S 29, 43 (1983). The Improvements Act does not contain any provision instructing NHTSA to consider economic impacts in deciding when to adjust the penalty amount and so the agency is not permitted to rely on these considerations in deciding how to implement the penalty adjustment. *See USWAG v. EPA*, 901 F.3d 414, 448 (D.C. Cir. 2018) (there must be a "textual commitment of authority," or at least "flexible language" in a statute, for an agency to consider costs).

Regardless, any approved consideration of cost at most relates to the *amount* of the penalty, not the year to which it applies: the statute provides that an agency may "adjust the amount of a civil monetary penalty by less than the otherwise required amount." Changing the model year to which the adjustment applies would be quite distinct from changing the amount of a penalty's inflation adjustment.

Moreover, the CAFE program is already structured to allow for any flexibility necessary due to external factors causing variations across years, such as any variation in economic impacts, as the program allows for the credits to be fungible across multiple years, *see* 49 U.S.C. § 32902(a). NHTSA's implementing regulations, for example, allow manufacturers to carry forward deficits in compliance credits for three years. 49 C.F.R. §535.7(a)(5). In addition, the penalty is proportionate to the number of vehicles sold, *see* 49 U.S.C. § 32902(b), and thus inherently self-adjusting to a degree to economic circumstances. These flexibilities at a minimum mitigate any claimed need to respond to economic considerations.

2. NHTSA may not consider COVID-19 in applying the penalty adjustment

COVID-19 similarly cannot provide a basis for creating an exception to the requirement to adjust penalties under the Improvements Act. There is no statutory authority for NHTSA to consider the role of COVID-19 in adopting the penalty adjustment, which the Improvements Act makes clear is mandatory. As with the economic

considerations described above, the agency cannot lawfully rely on COVID-19 to fabricate an exception to the Improvements Act's unambiguous mandate. *See State Farm*, 463 U.S. at 43. Indeed, courts have repeatedly rejected the pandemic as basis for an agency diverging from its legal obligations. *See, e.g.*, *Ass'n of Cmty. Cancer Centers v. Azar*, 2020 WL 7640818, at *7 (D. Md. Dec. 23, 2020) (rejecting agency "reli[ance] more on speculation than on evidence to establish that the COVID-19 pandemic has created an emergency ... sufficient to justify dispensing with valuable notice and comment procedures."); *Chamber of Com. v. Dep't of Homeland Sec.*, 504 F. Supp. 3d 1077, 1092 (N.D. Cal. 2020) (rejecting agency "reliance on the COVID-19 pandemic to invoke the good cause exception" to notice and comment procedures). NHTSA's attempt to justify an illegal action on this basis would fare no better here.

C. Manufacturer claims of economic distress run counter to public statements and investor disclosures

Even if NHTSA could permissibly consider claimed economic woes of certain automakers in evaluating the penalty increase, as a factual matter there is no economic rationale for delaying the penalty adjustment to a year beyond MY 2019. Manufacturer assertions concerning their financial distress are unsupported by the industry's current performance.

First, as Tesla previously commented, some manufacturers, including some mentioned in the IFR, have outperformed past metrics. For example, FCA ("Stellantis") reported a rise in Q4 2020 sales, the "best month of retail sales ever in December" for its RAM brand, and touted that "a resilient dealer network offset much of the decline in fleet sales caused by the COVID-19 pandemic."[25] Toyota reported U.S. sales in December 2020 increased by 20.4 percent on a volume basis compared to the previous year.[26] Similarly, Ford reported only a "small decline" in sales from over a year ago and that December 2020 sales were up 5.2% from over a year ago.[27] Likewise, GM has stated that its average transaction price in the fourth quarter of 2020 was a record $41,886 and that the full-year 2020 average of $39,229 also set a record.[28]

Second, if anything, the economic conditions of other manufacturers have significantly *improved* since the IFR. As of the second quarter of 2021, all the manufacturers that submitted comments in support of the IFR have reported stronger sales performance and even record profits. For example, Stellantis met with NHTSA and OIRA and "described its economic situation and how applying the increase in Model Year 2019 would negatively affect it economically."[29] Yet, two weeks prior to this meeting, on August 3, 2021, Stellantis reported first-half of the year results with record margins, having all segments profitable, and raised its full-year guidance.[30] The *Detroit News* highlighted the company's record profitability in North America for the first half of 2021 even though it came amidst a global microchip shortage that has its roots in the COVID pandemic.[31] Indeed, these results were preceded by a first quarter of 2021 with strong net revenues and growth in all regions.[32]

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[25] FCA, *FCA US Reports Fourth-quarter and Full-year 2020 Sales Results* (Jan. 5, 2021), https://www.prnewswire.com/news-releases/fca-us-reports-fourth-quarter-and-full-year-2020-sales-results-301201374.html#:~:text=FCA%20US%20LLC%20sold%20499%2C431,Ram%20and%20Alfa%20Romeo%20brands.

[26] Toyota, *Toyota Motor North America Reports December 2020, Year-End Sales* (Jan. 5, 2021), https://pressroom.toyota.com/toyota-motor-north-america-reports-december-2020-year-end-sales/.

[27] Ford, *Fourth Quarter 2020 Sales* (Jan. 6, 2021), https://media.ford.com/content/dam/fordmedia/North%20America/US/2021/01/06/ford-sales-release-dec2020.pdf.

[28] CNN, *Americans are buying cars again* (Jan. 5, 2021), https://www.cnn.com/2021/01/05/business/us-car-sales-recover/index.html.

[29] NHTSA, Memo: EO 12866 Meeting with Stellantis and OIRA (Aug. 16, 2021), https://www.regulations.gov/document/NHTSA-2021-0001-0026.

[30] Stellantis, First Half 2 021 Results, Stellantis Reports Record H1 Pro Forma Results with 11.4% Margin, All Segments Profitable Full-Year Guidance Raised to ~10% Adjusted Operating Income Margin (Aug. 3, 2021), https://www.stellantis.com/en/news/press-releases/2021/august/first-half-2021-results.

[31] The Detroit News, Stellantis reports record profitability in North America in first half of year (Aug 3., 2021), https://www.detroitnews.com/story/business/autos/chrysler/2021/08/03/stellantis-reports-record-profitability-north-america-first-half-2021/5461540001/.

[32] Stellantis, First Quarter 2021 Shipments and Revenues, Strong Q1 2021 Net revenues, with growth in all regions (May 5, 2021), https://www.stellantis.com/en/news/press-releases/2021/may/first-quarter-2021-shipments-and-revenues.

Prominent members of the Alliance for Automotive Innovators, contrary to the original petition for relief, have also recorded strong financial performances. In May, GM, despite the chip shortage, reported first-quarter results that beat earnings expectations.[33] The company followed up by reporting strong second quarter of 2021 results[34] and its average transaction prices climbed yet again by 10% to $47,977, a new record by $4,400.[35] Ford released quarterly earnings that highlighted expectations for better 2021 driven by a strong order bank and raised its anticipated year end performance.[36] The company further noted, "With virtually all of the auto industry's worldwide manufacturing shut down by the global pandemic for much of second-quarter 2020, Ford's automotive business grew in the most recent period against key financial measures on a year-over-year basis."[37]

Likewise, Mercedes commented in support of the IFR citing consumer and regulatory struggles and economic strain from the COVID pandemic.[38] Contrary to such assertions, in April 2021, Daimler North America reported a strong performance in Q1 and raised its annual expectations.[39] This was followed up in July 2021 with the company reporting another strong performance in the second quarter 2021 despite the semiconductor shortage[40] and with profits "trouncing estimates."[41]

Other manufacturers supported the IFR for other economic reasons that also run counter to current financial performance. For example, JLR North America submitted comments supporting the IFR, not because of COVID, suggesting the company's future investment in technology could be impacted.[42] Yet, in May 2021, JLR reported its fiscal Q4 results that boasted a "Strong End to Fiscal 2020/21 with Significant Q4 Profit and Positive Free Cash Flow."[43] The Q4 results were a follow up to a similarly strong report from its third fiscal quarter.[44] Ferrari made ad hominem complaints about wealth transfer and setting the civil penalty rate at $14 dollar.[45]

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[33] CNBC, GM expects strong first half of year despite production interruptions due to chip shortage (May 5, 2021), https://www.cnbc.com/2021/05/05/general-motors-gm-earnings-q1-2021.html.

[34] GM, GM Reports Strong Second-Quarter 2021 Results (Aug. 4, 2021), https://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/emergency_news/2021/earnings/0804-earnings.html.

[35] See Cox Automotive, Cox Automotive Analysis: GM's Q2 2021 U.S. Market Performance (Aug. 3, 2021), https://www.coxautoinc.com/market-insights/cox-automotive-analysis-gms-q2-2021-u-s-market-performance/.

[36] Ford, Ford's Expectations for Better Full-Year 2021 Operating Results Driven by Strong Order Bank, Improving Semiconductor Supplies (July 28, 2021), https://s23.q4cdn.com/799033206/files/doc_financials/2021/q2/Ford-2Q2021-Earnings-Press-Release.pdf; *see also* CNBC, Ford raises its 2021 outlook after surprise second-quarter profit (July 28, 2021), https://www.cnbc.com/2021/07/28/ford-f-earnings-q2-2021.html.

[37] *Id.* at 3.

[38] Mercedes-Benz, Comments submitted October 28, 2021, https://www.regulations.gov/document/NHTSA-2021-0001-0003.

[39] PR Newswire, Daimler North America, Daimler raises margin targets based on strong first quarter performance (Apr. 23, 2021), https://www.prnewswire.com/news-releases/daimler-raises-margin-targets-based-on-strong-first-quarter-performance-301275660.html.

[40] Daimler, 2nd Quarter Results 2021 (July 21, 2021), https://www.daimler.com/investors/reports-news/interim-reports/2021/q2/.

[41] Bloomberg, Daimler Profit Trounces Estimates as Shortages Lift Prices (July 14, 2021), (further noting Daimler, VW and Stellantis all coping well with the scarcity of chips that has constrained car production since late last yea), https://www.bloomberg.com/news/articles/2021-07-14/daimler-s-preliminary-second-quarter-earnings-exceed-projections.

[42] JLR North America, Comments submitted October 9, 2020, https://www.regulations.gov/document/NHTSA-2021-0001-0005.

[43] JLR, Fiscal Q4, Strong End to Fiscal 2020/21 with Significant Q4 Profit and Positive Free Cash Flow (May 18, 2021), https://www.jaguarlandrover.com/news/2021/05/strong-end-fiscal-202021-significant-q4-profit-and-positive-free-cash-flow.

[44] JLR, Fiscal Q3, Jaguar Land Rover Reports Strong Profit and Cash Flow for Third Quarter of Fiscal 2020/21 (Jan. 29, 2021) https://media.jaguarlandrover.com/news/2021/01/jaguar-land-rover-reports-strong-profit-and-cash-flow-third-quarter-fiscal-202021.

[45] Ferrari, Comments submitted November 9, 2020, https://www.regulations.gov/document/NHTSA-2021-0001-0004.

These complaints ring even more hollow after the company delivered solid earnings[46] and reported "Continuing Strong Momentum Across All Regions."[47]

Finally, throughout 2020 and 2021 Tesla manufacturing and sale performance has excelled and the company has posted profits for the past eight quarters.[48] As Tesla has previously noted, NHTSA failed to take into consideration this economic success during the IFR. *See* 86 Fed. Reg. at 46,815 (highlighting comments submitted during the IFR 11-day comment period that NHTSA improperly analyzed the economic effects of the COVID–19 pandemic, for example, by not accounting for any positive economic data).

In sum, NHTSA should provide no weight to requests to skirt the law based upon claims of financial distress. As documented above, the manufacturers supporting the petition for relief and IFR cannot have it both ways. They cannot continue to allege economic distress to curry favorable civil penalty and enforcement relief while at the same time release statements of performance and disclosures to shareholders that do not support such financial conditions.

D. Delaying the adoption of the penalty adjustment would compound the substantial harms generated by years of unlawful delay

While the economic condition alleged as a basis for the Alliance for Automotive Innovation's petition and implementation of the IFR does not exist, the IFR does generate substantial harms to manufacturers, the CAFE program, and the public. By delaying the implementation of the penalty adjustment, the IFR devalues the compliance credits at the core of the CAFE program, which reduces the value of the credits owned by over-performing manufacturers like Tesla, undermines the CAFE program's stability and effectiveness, and generates environmental harms that affect the broader public. Any effort to further delay the implementation of the penalty adjustment by postponing its application to a model year after MY 2019 would multiply and extend these harms even further.

First, use of a $5.50 penalty for model years 2019-2021 significantly devalues credits generated for those years, as compared to the $14 penalty rate established by the 2016 rule and twice reaffirmed by a federal court of appeals. As NHTSA has acknowledged, with an inflation adjustment "[a] manufacturer who is already generating or possesses over-compliance credits will find itself with much more valuable credits to sell and may use this additional capital to invest more heavily in research and development, marketing, add other features to its vehicles which make them more desirable to consumers, or reduce the price of its vehicles." 83 Fed. Reg. 13,904, 13,914-15 (Apr. 2, 2018). Indeed, as Tesla has recently stated, "Proceeds from such sales will go towards building new factories to produce EVs that will continue to displace ICE vehicles."[49] The inflation adjustment can have profound impacts on this investment, as "[a] hypothetical manufacturer with 10 million credits could see the potential value of its credits increase from $55 million to $140 million, while a hypothetical manufacturer with 100 million credits could see the potential value even more dramatically increase from $550 million to $1.4 billion." *Id*. at 13,915; *see* 86 Fed. Reg. at 3,021. But by refusing to implement the congressionally mandated penalty adjustment, NHTSA artificially and illegally suppresses the penalty rate, devaluing the credits, undermining the efforts of manufacturers who outperform the CAFE standards, and penalizing automakers that have led the industry in investing in and deploying technological innovation to enhance energy conservation with superior performing vehicles. As a result, every day the penalty adjustment is not in force, Tesla suffers concrete and substantial harm.

The delay in adopting the penalty adjustment also undermines the CAFE program's effectiveness by injecting further instability into the program and reducing the consequences of non-compliance. By significantly

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[46] Bloomberg, Ferrari Posts Steady Profit Before Outsider CEO Takes Helm (Aug. 2, 2021), https://www.bloomberg.com/news/articles/2021-08-02/ferrari-delivers-solid-earnings-before-new-ceo-comes-on-board.
[47] Ferrari, Q2 2021 Results (Aug. 2, 2021), https://corporate.ferrari.com/sites/ferrari15ipo/files/2021_08_02_-_ferrari_-_q2_2021_results_presentation.pdf.
[48] *See* Tesla, 2021, Q2, Shareholder Deck (July 26, 2021), https://tesla-cdn.thron.com/static/ZBOUYO_TSLA_Q2_2021_Update_DJCVNJ.pdf?xseo=&response-content-disposition=inline%3Bfilename%3D%22q2_2021.pdf%22.
[49] *See* Impact Report (2020), Tesla, https://www.tesla.com/ns_videos/2020-tesla-impact-report.pdf.

reducing the penalty for model years 2019-21, the IFR incentivizes underperforming automakers to pay the lowered penalties and save their available credits for subsequent years -- further delaying the date of their fully coming into compliance In addition, in the absence of a final, definitive rule implementing the penalty adjustment for MY 2019 and on, as required by the Improvements Act, regulated parties cannot make informed decisions regarding CAFE compliance, nor can NHTSA finalize penalty assessments. NHTSA acknowledged that this type of delay is problematic in its proposal regarding CAFE standards for Model Years 2024-2026, in which it notes that a backlog of requests relating to Model Years 2018 and 2019 compliance calculations is "actively chilling the credit market," meaning that "manufacturers are uncertain about either how many credits they have available to trade or, conversely, how many credits are necessary for them to cover any shortfalls."[50] Precisely the same is true with respect to the penalty rate: manufacturers are uncertain about what it will be, and what implications the penalty rate has for compliance strategies (for example, whether to use or bank credits), resulting in a chilled credit market -- perversely undermining one of the key compliance flexibilities the CAFE program creates

The reduced effectiveness of the CAFE program in turn generates environmental harms. A weaker CAFE program undermines the effectiveness of fuel economy standards and results in higher future emissions. *See* Inst. for Policy Integrity, Comments on "Civil Penalties" 4-5 (Jan. 25, 2021).[51] Every day of delay undermines further progress in promoting the nation's energy security, in saving consumers money at the pump, in encouraging technology innovation, and in reducing emissions of greenhouse gases that destabilize the global climate. *See* 77 Fed. Reg. 62,624, 62,658-62, 62,999-63,006, 63,055-62 (Oct. 15, 2012). Indeed, NHTSA itself recognized in its supplemental NPRM that this shifting of credits to later periods results in perpetuating more carbon emissions and conventional tailpipe pollutants, even if the model years that have generated any credit deficiency have passed. *See* 86 Fed. Reg. at 46,819 ("Overall, NHTSA anticipates that applying the adjustment beginning with Model Year 2019 may lead to the eventual application of more fuel-saving technology, resulting in fewer greenhouse gas emissions and reductions in many criteria and toxic air pollutants compared to applying the adjustment beginning in Model Year 2022.").

Even if the IFR is withdrawn, if NHTSA decides not to begin implementing the penalty adjustment until a model year later than MY 2019, the delay will continue and further compound these very same harms by extending the period during which the penalty amounts are not adjusted for inflation.

In contrast, a higher civil penalty after adjustment for inflation combined with strong and stable CAFE performance standards for light-duty vehicles help drive investment in electric vehicle manufacturing and technology because the performance standards incentivize manufacturing vehicles that reduce fuel consumption, lower carbon emissions, and help transition the world to sustainable energy. They also incentivize vehicle manufacturers that deploy innovative technologies and out-perform requirements in a given model year by providing tradeable compliance credits of meaningful value. The CAFE standards have helped drive investment in electric vehicle manufacturing and technology because these performance standards encourage manufacturing vehicles with lower carbon emissions and provide a mechanism by which vehicle manufacturers that deploy innovative technologies and out-perform the standards are rewarded. Emissions credit systems around the world are designed to economically benefit companies with non-polluting products by allowing them to sell their credits to polluting companies. To meet various countries' emission targets and avoid government fines, polluting companies pay non-polluting companies through credit purchases. The goal of this system is for every OEM to be incentivized to reduce emissions and themselves become non-polluting by selling more of their own manufactured electric vehicles instead of paying another company for their non-polluting credits. As Tesla explained in its 2020 Impact Report,[52] Tesla has seen strong positive signs from several OEMs who are launching competitive electric vehicles rather than resorting to manufacturing "compliance cars," which are usually electric vehicles built on an ICE architecture and are designed to meet regulatory requirements rather than to create the best possible product to help create a more sustainable future for the world. In this way, strong CAFE standards and a higher penalty rate align with the broader structure and purpose of the Clean Air Act as well, which was intended to be "technology forcing." *Union Elec. Co. v. EPA*, 427 U.S. 246, 258 (1976).

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[50] Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks, Docket No. NHTSA-2021-0053 (Aug. 5, 2021) at 708, *available at* https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-08/CAFE-NHTSA-2127-AM34-Preamble-Complete-web-tag.pdf.

[51] *Available at* https://policyintegrity.org/documents/Comments_of_the_Institute_for_Policy_Integrity_1.pdf.

[52] *See* Impact Report (2020), Tesla, https://www.tesla.com/ns_videos/2020-tesla-impact-report.pdf.

Conclusion

For the reasons set forth above, the IFR must be withdrawn due to its substantive and procedural illegality. Any effort to begin to apply the inflation adjustment to the CAFE standards with a model year later than Model Year 2019 must also be rejected, as it would further prolong years of unjustified and illegal delay, compounding substantial harms to manufacturers like Tesla and to the CAFE program and the environment in the process.

Respectfully submitted,

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