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

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Re: Corporate Average Fuel Economy (CAFE) Penalties, Supplemental Notice of Proposed Rulemaking, 86 Fed. Reg. 46,811 (Aug. 20, 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 supplemental notice of proposed rulemaking, 86 Fed. Reg. 46,811 (Aug. 20, 2021), on NHTSA's previous interim final rule (IFR), 86 Fed. Reg. 3016 (Jan. 14, 2021) ("Exemption Rule"). As NHTSA now recognizes, the agency had no authority to issue the Exemption Rule. We urge NHTSA to withdraw the Exemption Rule and thereby reinstate the $14 penalty rate that lawfully applies to model years 2019 and beyond.

A. NHTSA lacked statutory authority to issue the Exemption Rule

NHTSA must withdraw the Exemption Rule. As NHTSA now tentatively acknowledges, *see* 86 Fed. Reg. at 46,816, 46,817, no statutory provision authorized NHTSA to undo the Improvements Act's catch-up adjustment for model years 2019 through 2021.

In December 2016, NHTSA issued a rule finalizing the catch-up adjustment, applying a $14 penalty beginning in model year 2019. *See* 81 Fed. Reg. 95,489 (Dec. 28, 2016) ("Civil Penalties Rule"). In the following years, the Second Circuit twice vacated the agency's attempts to suspend or reverse the Civil Penalties Rule, each time specifically stating that that rule was "now in force." *New York v. NHTSA*, 974 F.3d 87, 100 (2d Cir. 2020) (vacating 84 Fed. Reg. 3607 (Jul. 26, 2019) ("Rollback Rule"));

NRDC v. NHTSA, 894 F.3d 95, 115 (2d Cir. 2018) (vacating 82 Fed. Reg. 32,139 (Jul. 12, 2017) ("Suspension Rule")). As those cases held, and as our comments previously explained, NHTSA had no statutory authority to reduce, suspend, or delay the penalty rate set in the Civil Penalties Rule. *See* IFR Comment 2-3.[1]

The Exemption Rule's assertion of authority for its action was baseless. The Rule's preamble relied on NHTSA's delegated authority to administer various portions of the Energy Policy and Conservation Act (EPCA), 86 Fed. Reg. at 3019-20, directly flouting the Second Circuit's holdings that those provisions did not confer any authority to alter the Improvements Act's catch-up adjustment, *see* IFR Comment 2; *NRDC*, 894 F.3d at 112; *New York*, 974 F.3d at 100-01. Nor did the Improvements Act authorize the Exemption Rule. The Civil Penalties Rule discharged the Improvements Act's specific grant of statutory authority to apply a catch-up adjustment, *see* IAA § 4(a),[2] and any ongoing authority to "reconsider[]" or "reverse[]" that adjustment expired shortly thereafter, *New York*, 974 F.3d at 100-01.

Nor can the Civil Penalties Rule itself justify the Exemption Rule. As just explained, the December 2016 rule was lawful, if at all, as an exercise of statutory authority that has expired, and which NHTSA therefore no longer possesses. *See id.* That alone precludes reliance on it now. Moreover, the Civil Penalties Rule's delay of the $14 adjustment until model year 2019 may well have exceeded NHTSA's authority under the Improvements Act. The rule did not expressly identify the source of NHTSA's authority to delay the adjustment—an issue that was never adjudicated in court. To the extent the rule rested on a purported need to "harmonize[]" EPCA and the Improvements Act, 81 Fed. Reg. at 95,491, that rationale is foreclosed by the Second Circuit's subsequent holding that EPCA does not supply authority for delaying the adjustment because "[n]othing in EPCA contradicts or undermines [the Improvements Act's] mandate," *NRDC*, 894 F.3d at 112. The court further cast doubt on whether the Improvements Act itself provided such authority, observing that the Improvements Act did not give NHTSA authority to alter the "*timing* of the adjustments." *Id.* at 109; *see also id.* at 113 n.12.

At most, the Improvements Act authorized NHTSA to delay the $14 penalty to avoid applying the catch-up adjustment to conduct that occurred prior to the Improvements Act's November 2, 2015 passage. *See Landsgraf v. USI Film Prods.*, 511

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[1] NRDC and Sierra Club's comments submitted in response to the Exemption Rule are available at NHTSA-2021-0001-0013 and are incorporated herein by reference.

[2] The Inflation Adjustment Act, as amended by the Improvements Act, is codified at 28 U.S.C. § 2461 note. This comment cites the Act as "IAA."

U.S. 244, 280 (1994) (requiring "clear congressional intent" for statute to "increase a party's liability for past conduct"). But any implicit authority to avoid retroactive penalty increases cannot justify the Exemption Rule. First, "[t]he automobile industry was on notice since 2015" of the increases mandated by the Improvements Act, *NRDC*, 894 F.3d at 115, and applying the $14 penalty to model years 2019 and beyond did not reach compliance decisions that were finalized prior to 2015, *see* IFR Comment 6-8 (summarizing timeline of NHTSA's actions and automakers' lead time). Second, the Second Circuit's vacatur of the Rollback Rule, and reinstatement of the Civil Penalties Rule, was presumptively retroactive. *See* IFR Comment 5-6. Finally, even if the catch-up adjustment itself operated retroactively insofar as it applied to conduct that occurred after 2015 but prior to the adjustment, Congress unmistakably conferred an "express statutory grant" for adjustments to do so. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209 (1988). The Improvements Act specifically provides that a penalty increased under the Act applies to penalties, "including those whose associated violation *predated* such increase, which are assessed after the date the increase takes effect." IAA § 6 (emphasis added).[3]

The Second Circuit's vacatur of the Rollback Rule did not confer any freestanding authority on NHTSA to further delay the catch-up adjustment. Indeed, the court held the Rollback Rule unlawful because NHTSA no longer had any authority to "reconsider[] and reverse[] its prior increase of the CAFE penalty from $5.50 to $14." *New York*, 974 F.3d at 101. And the court specifically instructed that the Civil Penalties Rule was "now in force"—without a remand for any further proceedings. *Id.* Under these circumstances, the agency had no authority to do anything other than update the Code of Federal Regulations to reflect this change. *Cf.* Implementation of Vacatur, 86 Fed. Reg. 29,515, 29,515 (June 2, 2021) ("removing the regulatory provisions associated with the final rule" to "effectuate[] the vacatur of the final rule").

Automakers have nonetheless argued that the Second Circuit's reinstatement of the Civil Penalties Rule left open to which model years the catch-up adjustment should apply. *See* All. for Automotive Innovation's Opp'n to Tesla, Inc.'s Mot. For Summ. Vacatur 13-14, *NRDC v. NHTSA*, No. 21-139 (2d Cir. Mar. 15, 2021), ECF No. 54-1. But by its own terms, the Civil Penalties Rule applies the $14 penalty

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[3] Notably, the prior version of the Inflation Adjustment Act directed the opposite, providing that an increase "shall apply only to violations which occur *after* the date the increase takes effect." IAA § 7 (1996) (emphasis added); *see also Van Buren v. United States*, 141 S. Ct. 1648, 1660 (2021) ("When Congress amends legislation, courts must presume it intends the change to have real and substantial effect." (citation omitted)).

beginning in model year 2019. 81 Fed. Reg. at 95,490. And any change to the model years to which the Rule applies is a substantive amendment requiring statutory authority. *See NRDC*, 894 F.3d at 113 ("[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards." (quoting *NRDC v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004)). However, as explained above, the Second Circuit held that NHTSA lacked any further authority over the catch-up adjustment—the Exemption Rule's assertion of authority is simply incompatible with that holding and the Improvements Act's "highly circumscribed schedule." *New York*, 974 F.3d at 100 (citation omitted). The Second Circuit's decisions thus fully resolve this matter: the Civil Penalties Rule, applicable to model years 2019 and beyond, is "in force," and NHTSA lacks statutory authority to now delay or undo that rule.[4]

For nearly five years, NHTSA has repeatedly exceeded its statutory authority in attempts to avoid the clear import of the laws it is required to administer. The Exemption Rule—like the Rollback Rule and the Suspension Rule before it—is unlawful. Nothing in EPCA, the Improvements Act, or the Second Circuit's two prior decisions authorizes it. Because the Exemption Rule is unlawful, NHTSA should finalize its proposal to withdraw it, thereby restoring the Civil Penalties Rule and its $14 penalty rate.[5]

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[4] Furthermore, in litigation challenging the Suspension and Rollback Rules, petitioners explicitly sought to preserve the Civil Penalties Rule's application to model year 2019. In challenging the Suspension Rule, petitioners urged the court to grant expedited relief to restore the $14 penalty in time to maximize compliance with model year 2019 standards. *See* Pets.' Mot. for Summ. Vacatur 23, *NRDC v. NHTSA*, No. 17-2780 (2d Cir. Oct. 24, 2017), ECF No. 84-2 ("It is therefore critical to stay the Delay Rule (or vacate it quickly)."); Pets.' Reply in Supp. of Summ. Vacatur 13, *NRDC v. NHTSA*, No. 17-2780 (2d Cir. Dec. 1, 2017), ECF No. 115 (reiterating need to "reinstate the penalty increase and restore its deterrent effect for vehicles being designed now"). In response, the Second Circuit granted expedited review, and took the unusual step of vacating the rule and issuing its mandate just days after argument, followed by an opinion later. *See NRDC*, 894 F.3d at 100. The parties relied on the same need for "expeditious consideration" in setting an abbreviated schedule for the Rollback Rule. Scheduling Notice 1, *New York v. NHTSA*, No. 19-2395 (2d Cir. Oct. 23, 2019), ECF No. 113.

[5] In withdrawing the Exemption Rule, NHTSA should consider any "significant and viable and obvious alternatives." *MediNatura, Inc. v. FDA*, 998 F.3d 931, 943 (D.C. Cir. 2021) (citation and internal quotation marks omitted). Because NHTSA has no authority to delay imposition of the $14 penalty beyond model year 2019, applying the adjustment "beginning with a model year later than Model Year 2019," 86 Fed. Reg. at 46,816, is not a viable alternative that NHTSA may adopt. By contrast, in *Department of Homeland Security v. Regents of the University of California*, the conclusion that

B. Even if NHTSA had authority to issue the Exemption Rule, the agency should exercise its discretion to rescind the Rule

Even if NHTSA had authority to reverse the catch-up adjustment for model years 2019 through 2021, the agency should still withdraw the Exemption Rule and reinstate the $14 penalty for those years.

The Exemption Rule's partial reversal of the catch-up adjustment was arbitrary and capricious for numerous reasons, including NHTSA's application of the wrong presumption regarding retroactivity, IFR Comment 5-6; mischaracterization of the timeline regarding the $14 penalty and the reasonableness of the automakers' reliance on NHTSA's actions, *id.* at 6-8; and consideration of impermissible factors (i.e., economic costs), *id.* at 10-11. Moreover, the Exemption Rule erred in unthinkingly adopting the December 2016 rule's rationale. Had NHTSA considered "the extent to which the four years between the two rules should affect [its] reasoning," 86 Fed. Reg. at 86,814, the agency would have recognized important differences. For instance, NHTSA insisted that automakers required 18 months' lead time to adjust to the penalty increase, 86 Fed. Reg. at 3020, but a $14 penalty was on the books for significant portions of that window, including during the period when automakers were supposedly making their plans for model years 2019-21, *see* IFR Comment 6-7. And the December 2016 rule was flawed at the time, because it ignored that the penalty level in one model year affects incentives for compliance across many model years due to EPCA's multi-year window to generate and apply credits. *See* IFR Comment 9-10. As NHTSA's proposal implicitly recognizes, *see* 86 Fed. Reg. at 46,816-17, this was an important factor that the agency should have considered.

For similar reasons, restoring the catch-up adjustment for model years 2019 through 2021 is the best exercise of any purported discretion. Congress mandated that adjustment as part of "a renewed effort to tackle the recurring issue of stagnant civil monetary penalties" that had weakened the enforcement of federal laws for decades. *NRDC*, 894 F.3d at 111; *see also* IAA § 2(a). Updating the penalty for those model years increases incentives for compliance with the CAFE standards, thus promoting

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part of the program was illegal "did 'not cast doubt' on the legality of" the remaining portion, which "remained squarely within the discretion" of the agency. 140 S. Ct. 1891, 1912 (2020) (citation omitted); *see also id.* at 1913 (noting several alternatives for addressing reliance interests, including through "individualized enforcement discretion"). But here, NHTSA has no remaining discretion over the catch-up adjustment. The "illegality determination"—NHTSA's lack of statutory authority to delay the adjustment further—"foreclose[s]" the alternative of delaying the catch-up adjustment by one or two model years. *Id.* at 1914.

greater fuel efficiency and associated benefits from consumer savings and the reduction of harmful emissions.

C. The Exemption Rule did not engender serious reliance interests, and any such interest could not justify the Rule's retention in any event

Automakers have no reliance interests that would justify retaining the Exemption Rule. To merit consideration, reliance interests "must be specifically identified, reasonably incurred, and causally tied to" the agency's prior policy, as opposed to "unidentified and unproven." *Solenex LLC v. Bernhardt*, 962 F.3d 520, 529 (D.C. Cir. 2020). Further, NHTSA cannot reflexively rely on mere assertions, but must "take with a grain of salt the self-serving views of the regulated entities," *Spirit Airlines, Inc. v. DOT*, 997 F.3d 1247, 1257 (D.C. Cir. 2021) (citation and internal quotations marks omitted), seeking to preserve the windfall of an unlawful penalty reduction. In the event that automakers or other entities properly identify reliance interests engendered by the Exemption Rule, NHTSA should consider and discuss those interests, even though, as explained below, they are "entitled to no . . . weight." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020).

Here, any reliance interests asserted by automakers deserve no weight because, among other things, they were not "reasonably incurred." *Solenex*, 962 F.3d at 529; *see also Mozilla Corp. v. FCC*, 940 F.3d 1, 64-65 (D.C. Cir. 2019) (upholding agency's consideration of reliance interests based on conclusion that "reliance would have been unreasonable"). Automakers could not—at any time—reasonably rely on NHTSA's unlawful attempts to exempt model years 2019-21 from the $14 penalty rate.

Since 2016, the penalty rate applicable to model years 2019 and beyond has been $14, and automakers had no reasonable basis to assume otherwise. As we explained in our previous comments, the Exemption Rule was wrong to credit automakers' supposed reliance on a $5.50 penalty rate. *See* IFR Comment 5-9. As our prior comments detail, manufacturers have been on notice that the $14 penalty would or could apply to model years 2019-21. Indeed, even if reliance on the unlawful Rollback Rule would have been reasonable (which it was not), the time by which, according to automakers' own assertions, their planning decisions for MY19-21 were finalized had passed before the Rollback Rule was issued. There was thus no way that automakers planning for those years could have relied—reasonably or otherwise—on a $5.50 penalty rate applying to those model years. *See id.*

Nor do automakers have any reasonable reliance interest in the Exemption Rule itself. As an initial matter, the Exemption Rule was an *interim* final rule, on which NHTSA invited comment. *See* 86 Fed. Reg. at 3016; *cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020). Further, the Exemption Rule was immediately subject to legal challenge. *See, e.g.*, *Mozilla*, 940 F.3d at 64 (reliance "would not have been reasonable unless tempered by substantial concerns for legal or political jeopardy," given "persistent legal challenges"); *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 196 (2d Cir. 2010) (retroactivity of agency rule permissible where expectations were not "genuinely settled" because legal status of foreign missions was subject of ongoing contestation); *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (similar); *see also* Expedition Mot. 14 n.9 ("To be clear, automakers rely on the $5.50 rate at their peril . . . ."). And rather than defend against those challenges on the merits, NHTSA announced only weeks later that it was reconsidering the Rule.[6] *See Mozilla*, 940 F.3d at 64 (that "rules had been in effect 'barely two years before the Commission proposed to repeal them'" undermined reasonableness of reliance); *cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (pointing to "decades of industry reliance on the Department's prior policy").[7] Finally, the rule was plainly unlawful. *Cf. Regents*, 140 S. Ct. at 1914 (agency may "conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight").

For all of these reasons, automakers have no reliance interest in the Exemption Rule that could prevent NHTSA from rescinding it.

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[6] *See* Resps.' Opp'n to Pets.' Mot. for Expedited Briefing & Cross-Mot. to Hold Petition in Abeyance 4-5, *NRDC v. NHTSA*, No. 21-139 (2d Cir. Mar. 4, 2021), ECF No. 42 (asserting that any concern "that manufacturers will rely on the [Exemption Rule] . . . . is diminished by NHTSA's clear statement that it views the interim final rule as within the scope of the President's Executive Order, and the agency's ongoing reconsideration of the interim final rule under that Executive Order").

[7] Indeed, Stellantis (the successor to Fiat Chrysler, a company whose decisions NHTSA has relied on previously), explicitly recognized that it must plan for the Exemption Rule's vacatur or withdrawal. *See* Stellantis Form 6-K (Aug. 4, 2021) (attached as Exhibit A) ("If the litigation is successful in overturning the interim final rule or if NHTSA reconsiders its January 14, 2021 interim final rule, we may need to accrue additional amounts due to increased CAFE penalties and additional amounts we may owe under certain agreements for the purchase of regulatory emissions credits.").

D. Environment impacts of a repeal need not be analyzed

NHTSA is correct that it need not consider the environmental impacts of repealing the Exemption Rule. 86 Fed. Reg. at 46,818 & n.45. "Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency" need not consider the environmental effects of those actions. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004). Here, NHTSA had no authority to issue the Exemption Rule and has no discretion as to whether to repeal it. Accordingly, the agency need not conduct a NEPA analysis before repealing the Exemption Rule.[8]

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Because the Exemption Rule is unlawful, NRDC and Sierra Club urge NHTSA to finalize its proposal to withdraw it, thereby reinstating the Civil Penalties Rule's $14 penalty rate for model years 2019 to 2021.

Respectfully submitted,

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[8] If the agency concludes that it *does* have discretion over the Exemption Rule, then it must consider the repeal's environmental impacts.