

17-2780(L)

17-2806(CON)

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, STATE OF CALIFORNIA, STATE OF MARYLAND, STATE OF NEW YORK, STATE OF PENNSYLVANIA, STATE OF VERMONT,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JACK DANIELSON, in his capacity as Acting Deputy Administrator of the National Highway Traffic Safety Administration, UNITED STATES DEPARTMENT OF TRANSPORTATION, ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,

Respondents,

ASSOCIATION OF GLOBAL AUTOMAKERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,

Intervenors.

On Petition for Review of a Rule of the
National Highway Traffic Safety Administration

**BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY
AT NEW YORK UNIVERSITY SCHOOL OF LAW
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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RULE 26.1 DISCLOSURE STATEMENT

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² This brief does not purport to represent the views of New York University School of Law, if any.

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INTEREST OF AMICUS CURIAE

Policy Integrity submits this brief as *amicus curiae* in support of Petitioners. Policy Integrity is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on environmental and economic issues. An area of special concern for Policy Integrity is the appropriate use of cost-benefit analysis in the promulgation of federal regulations. Policy Integrity consists of a team of legal and economic experts, trained in the proper scope and estimation of costs and benefits and the application of economic principles to regulatory decisionmaking. Our director, Richard L. Revesz, has published more than eighty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational regulatory decisions. And our Economic Fellow, Dr. Sylwia Bialek, holds a Ph.D. in economics and has extensive experience in analyzing and designing incentives associated with environmental policies. She authored comments regarding the National Highway Traffic Safety Administration's ("NHTSA") recent proposal to reconsider the corporate average fuel economy ("CAFE") standards and reconsider the civil penalties that apply to violations of the CAFE standards.³

³ Inst. for Policy Integrity, Comments on NHTSA's Proposed Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas (Oct. 5,

This case concerns NHTSA’s decision, 82 Fed. Reg. 32,139 (July 12, 2017) (JA 77-78) (“Suspension Rule”), to indefinitely suspend the effective date of NHTSA’s 2016 rule adjusting the civil penalties that apply to violations of the CAFE standards from \$5.50 to \$14 per tenth of a mile-per-gallon to reflect inflation, 81 Fed. Reg. 43,524 (July 5, 2016) (“2016 Civil Penalties Rule”) (JA 25-30); *see also* Response to Pet. For Reconsideration, 81 Fed. Reg. 95,489 (Dec. 28, 2016) (JA 51-54). In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed several *amicus* briefs and comment letters regarding other agencies’ actions suspending duly promulgated regulations. In those cases, Policy Integrity has focused on agency decisions that have ignored the harms, in the form of foregone benefits, of their actions. *See, e.g.*, Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Air Alliance Houston v. Env’tl. Prot. Agency*, No. 17-1155 (D.C. Cir. Nov. 1, 2017) (Environmental Protection Agency’s (“EPA”) delay of the Chemical Disaster Rule); Br. for Inst. for Policy Integrity as *Amicus Curiae*, *Open Cmty. Alliance v. Carson*, No. 17-2192, 2017 WL 6558502 (D.D.C. Dec. 23, 2017) (Department of Housing and Urban Development’s (“HUD”) delay of a rule aimed at aiding low-income families); Br. for Inst. for Policy Integrity as *Amicus Curiae*,

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Website links to these and other documents are provided in the Table of Authorities.

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Like the agencies challenged in those cases, NHTSA has similarly ignored the harms of its actions in issuing the Suspension Rule. Policy Integrity’s experience with assessing the value of CAFE penalties, expertise in cost-benefit analysis, and experience with suspension cases give it a unique perspective from which to evaluate Petitioners’ claims that the Suspension Rule of the 2016 Civil Penalties Rule was arbitrary and capricious.⁴

⁴ All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In issuing the Suspension Rule, NHTSA asserted that it would not cause any harm. 82 Fed. Reg. at 32,140 (JA 78). But that judgment was inaccurate and therefore arbitrary and capricious. Because the 2016 Civil Penalties Rule would have increased the penalty for non-compliance with fuel economy standards from \$5.50 to \$14 per tenth of a mile-per-gallon, manufacturers that faced marginal compliance costs of more than \$5.50 and less than \$14 would be expected to increase their fuel efficiency in reaction to the updated penalties. In contrast, suspending the 2016 Civil Penalties Rule removes the incentive that the 2016 Civil Penalties Rule provided for increasing fuel efficiency in this way. As NHTSA's own fuel-economy compliance model predicts, this would have changed average fuel economy in a significant way. In 2022, for example, assuming the suspension is ongoing, the Suspension rule would cause a decrease in fuel economy of more than two miles per gallon on average for passenger vehicles for that one year alone. And even a shorter two- or three-year delay would lead to a cumulative and ongoing impact. By reducing those fuel savings and associated emission reductions, NHTSA has caused the public harm.

NHTSA's argument that any harms would not be "immediate" because the 2016 Civil Penalties Rule did not apply to model years before 2019, 82 Fed. Reg. at 32,140 (JA 78), is based on inaccurate premises. The Suspension Rule was issued

just as manufacturers were making their compliance decisions for the 2019 Model Year and beyond. Because of that timing, the Suspension Rule could be expected to have caused manufacturers that would have otherwise increased compliance to not do so. And, in any event, because manufacturers can obtain compliance credits for early compliance, *see* 49 U.S.C. § 32903, removing the future penalty increase would have immediately caused two harms. First, for any manufacturer that was considering making increased compliance investments before Model Year 2019 in order to take advantage of the compliance credits, the Suspension Rule would have weakened that incentive, causing a predictable decrease in early compliance. Second, those manufacturers that chose to invest in increased compliance before Model Year 2019 with the expectation that 2016 Civil Penalties Rule would make their credits more valuable were harmed because the Suspension Rule immediately depressed the value of those credits.

NHTSA cannot avoid the reality that the Suspension Rule will cause harm by asserting that it simply preserved the status quo. *See* Respondents' Opp. to Motions for Summary Vacatur or Stay at 24 ("Resp. Opp."), ECF No. 107. The status quo—as defined by law and basic principles of economics—is a world that does not include the contested Suspension Rule. Without the Suspension Rule, the 2016 Civil Penalties Rule would be in force and affect the analysis of any manufacturer planning compliance with the CAFE standards.

NHTSA's failure to provide a reasoned explanation for its action here violated the APA and contributed to an environment of harmful regulatory uncertainty. The Suspension Rule should be vacated.

ARGUMENT

The Suspension Rule is subject to review under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2); *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 765-66 (4th Cir. 2012) (holding that a suspension is a rulemaking); *See also* Opening Br. of Env'tl. Pets. ("NGO Br.") at 17-18. Under the arbitrary and capricious standard, an agency must "examine the relevant data" and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* ("*State Farm*"), 463 U.S. 29, 43 (1983) (internal quotation marks omitted). In the case of a suspension, agencies must "cogently explain" the suspension in a manner that satisfies that *State Farm* test. *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984). In this case, NHTSA has not met this burden.

I. NHTSA's Claim that the Suspension Rule Did No Harm Was Arbitrary and Capricious

The Suspension Rule is arbitrary and capricious because NHTSA failed to consider an "important aspect" of the Suspension Rule, *see State Farm*, 463 U.S. at

43—namely the forgone benefits of suspending the 2016 Civil Penalties Rule. *See also Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (a “serious flaw undermining” the agency’s analysis of benefits and harms renders the rule unreasonable). Instead of acknowledging and addressing the forgone benefits, NHTSA claimed that “no party will be harmed by the delay,” because it caused “no immediate, concrete impact.” 82 Fed. Reg. at 32,140 (JA 78). NHTSA bases this assertion on the fact that, under the 2016 Civil Penalties Rule, the higher penalties would not have been imposed before Model Year 2019, or assessed until 2020. *Id.* But that claim is fatally flawed because the Suspension Rule had an immediate and measureable impact on fuel economy, as NHTSA’s own model shows.

A. The 2016 Civil Penalties Rule Would Have Improved Fuel Efficiency and Suspending It Caused Harm

NHTSA’s claim of no harm is flawed because, even if it were true that the Suspension Rule did not have an “immediate” impact (and it is not, as discussed below), the Suspension Rule surely has caused harm because it effectively repealed the 2016 Civil Penalties Rule. In that way, the Suspension Rule deprived the public of all of the future benefits of those new penalties. Though NHTSA titled the action a “delay,” courts look at the “character of the action taken” in order to decide how to review the action. *See Natural Res. Defense Council v. EPA*, 683 F.2d 752, 763 n.23 (3d Cir. 1982); *Steed*, 733 F.2d at 98 (“an ‘indefinite suspension’ does not differ

from a revocation simply because the agency chooses to label it a suspension”). Given that the Suspension Rule has no termination date, the action should be treated as a repeal that rescinds all of the benefits of the 2016 Civil Penalties Rule. *See Natural Res. Defense Council*, 683 F.2d at 763 (explaining that indefinite stays are “tantamount to a revocation”); *see also* NGO Br. at 34.

Understood in this way—as an effective repeal—it is clear that rescinding 2016 Civil Penalties Rule causes harm because lowering the penalty reduces the number of companies that would have otherwise been willing to increase their compliance efforts under the 2016 Civil Penalties Rule. “[T]he purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards.” 81 Fed. Reg. at 95,490 (JA 52). In economic terms, the penalties work like safety valves because they allow car manufacturers to comply with the CAFE standards or pay the penalty if their compliance costs would otherwise be too high. *See* 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 63,127 (Oct. 15, 2012).⁵ The penalties also allow manufacturers to increase

⁵ *See also* NHTSA, CAFE Pub. Info. Ctr., Civil Penalties (“Manufacturers that do not meet the applicable standards in a given model year can pay a civil penalty.”); NHTSA, CAFE Overview (describing the availability of penalties for manufacturers that do not meet the applicable standards); John K. Stranlund, *The Economics of Enforcing Emissions Markets: A Review of the Literature*, 11 Rev. Envtl. Econs. Policy 231, 238 (2017) (describing the economics of compliance);

compliance partially and pay only partial penalties. In addition, manufacturers are permitted to earn tradable compliance credits for compliance with stricter standards or higher penalties that are in the future, with each credit representing a tenth of a mile-per-gallon, *see* 49 U.S.C. § 32903 (2016). Thus, when an individual manufacturer's marginal costs of compliance with the standards exceed the penalty, the company can be expected to choose to pay some or all of the penalties. But when the marginal cost of compliance is lower than the penalty, the company will comply with the standards. And depending on the predicted value of credits, a company may choose to overcomply in order to earn credits in advance of future compliance needs.

In this way, the level of NHTSA's civil penalties effectively determines the upper limit on compliance costs per vehicle, capping the compliance cost of the standards.⁶ And raising the penalty increases the incentive for manufacturers to

Henry D. Jacoby & A. Denny Ellerman, *The Safety Valve and Climate Policy*, 32 Energy Policy 481 (2004) (describing the use of the safety valve principle to limit the cost of emissions restrictions); Marc J. Roberts & Michael Spence, Effluent charges and licenses under uncertainty, 5 J. Public Econ. 203 (1976) (describing the benefits of a penalty system enhancing the emission licensing when the abatement costs are unknown); William A. Pizer, *Combining Price and Quantity Controls to Mitigate Global Climate Change*, 85 J. Public Econ. 431 (2002) (describing the welfare benefits of enhancing quantity controls by using price controls like penalties when the compliance costs are unknown to the regulator).

⁶ *See* Letter from Global Automakers to NHTSA at 4 (Oct. 10, 2017) (“Global Automakers Comments”) (“[T]he CAFE program has always assumed that certain companies would choose to comply with the CAFE standards by paying the applicable civil penalty.”).

invest in compliance technology in order to get a head start on compliance needs. Because of this safety-valve feature and the credits, the Suspension Rule would be expected to affect compliance plans of manufacturers that face marginal compliance costs between \$5.50 and \$14 per tenth of a mile-per-gallon. With the increased penalty, those manufacturers would be expected to increase compliance with the CAFE standards under the 2016 Civil Penalties Rule.⁷ The increased penalty would also increase the incentive to earn credits for earlier and more aggressive investments in compliance. And without the increase, those manufacturers would not be expected to increase their compliance or invest in obtaining credits.

In fact, NHTSA's own model would have allowed it to estimate the effect of the Suspension Rule on compliance with the CAFE standards. NHTSA's data demonstrate that the indefinite Suspension Rule will decrease fuel economy on average for all passenger cars in the year 2022 by more than two miles per gallon, with a substantial impact on the cumulative amount of fuel used. Decl. of Dr. Sylwia Bialek, Ph.D. ("Bialek Decl.") ¶ 14 (ADD8).⁸ Even if the suspension lasts for only

⁷ See Mark R. Jacobsen, *Evaluating U.S. Fuel Economy Standards in a Model with Producer and Household Heterogeneity*, 5 *Am. Econ. J.* 148, 156 (2013) (describing how compliance status is affected by marginal costs of compliance and penalties).

⁸ The information contained in the addendum is subject to judicial notice because it is readily obtainable from publicly available websites. *See Magnoni v. Smith & Laquercia*, 483 F. App'x 613, 616 (2d Cir. 2012). In any event, the fact that the information is not part of the administrative record should not be a reason to

two or three years, after which the \$14 penalty would be reinstated, the Suspension Rule will still cause a substantial increase in the cumulative amount of gasoline used and continue to have a measurable impact on fuel economy in each particular year after the suspension ends. *Id.* ¶¶ 9-13 (ADD6-8). Intervenor car manufacturers also used NHTSA’s model to calculate the impact of adjusting the penalty to \$14 on fuel savings and industry costs and, though they questioned the net benefits, found that the increased penalty would have led to significant fuel savings. *See* Global Automakers Comments at 7-10.

And with these losses in fuel economy come significant harms, including increased emissions of greenhouse gases and conventional pollutants, increased fueling time, and decreased fuel savings. *See* 77 Fed. Reg. at 63,057-62 (describing and quantifying the benefits of improved fuel economy); *see also* Decl. of Luke Tonachel ¶¶ 16-17, NGO Br. (ADD23-24). NHTSA acknowledged as much in its separate proposal to reconsider the 2016 Civil Penalties Rule, explaining (on the same day that NHTSA issued the Suspension Rule), that an increased CAFE penalty rate would lead to “greater fuel savings and other benefits.” Reconsideration of Final Rule, 82 Fed. Reg. 32,140, 32,142 (July 12, 2017) (JA 80). As this evidence shows,

disregard it. As petitioners have explained, NHTSA did not give the public an opportunity to comment on the Suspension Rule, as required by law. *See* NGO Br. at 33-40; Br. for State Pet’r’s at 38-43. Had the agency complied with the law, Policy Integrity would have had an opportunity to submit this information into the administrative record.

it is clear that NHTSA was wrong to assert that the Suspension Rule does not cause “concrete impact.” 82 Fed. Reg. at 32,140 (JA 78). Any change in penalties has a predictable and concrete impact on compliance, as NHTSA’s own model shows, and an associated impact on the public through increased emissions and lowered fuel savings.

B. The Suspension Rule Caused Immediate Harm

Even if the Suspension Rule was not an effective repeal, NHTSA was wrong to assert that the Suspension Rule does not cause “immediate” harm, *id.*, for three reasons. First, though NHTSA is correct that the 2016 Civil Penalties Rule would not apply to model years before 2019, *see* 81 Fed. Reg. at 95,490 (JA 52), basic economic principles teach that the Suspension Rule immediately affected compliance plans for Model Year 2019 and after. As NHTSA previously found, it is reasonable to assume that manufacturers generally need approximately eighteen months of lead-time to prepare compliance plans for a model year. *Id.* at 95,491 (JA 53). In addition, at any particular time, car manufacturers are often making compliance plans that reach into the future much further than eighteen months. *See* 81 Fed. Reg. at 95,490 (JA 52) (“because of industry design, development, and production cycles, vehicle designs . . . are often fixed years in advance”). Indeed, Intervenor car manufacturers made this argument in seeking reconsideration of the original 2016 Civil Penalties Rule. (*See* JA 35.) In that reconsideration petition, filed

in August 2016, the car manufacturers explained that they had already set compliance plans for the next eighteen months. (JA 33-35.) *See also* 49 U.S.C. § 32902(a)(2) (instructing the Department of Transportation to promulgate any increase in fuel economy standards “at least 18 months before the beginning of the model year to which the amendment applies”).

Thus, in July 2017, when NHTSA issued the Suspension Rule, manufacturers were in the process of making compliance decisions in preparation for Model Year 2019—which was approximately eighteen months off at that time. But with the Suspension Rule, a manufacturer that would have chosen to increase compliance rather than pay the new higher penalty of \$14—specifically the manufacturers that faced marginal compliance costs of more than \$5.50 but less than \$14—would have been expected to discard plans to increase compliance, leading immediately and directly to lower overall compliance with fuel economy standards in Model Year 2019. Indeed, the longer the Suspension Rule remains in place the more model years it can be expected to affect directly in this way. Compliance plans for 2020 will likely be set in mid-2018. As such, failure to vacate the Suspension Rule soon will mean that 2020 plans and beyond will be directly affected as well.

Second, even if the Suspension Rule had not been issued so close to the time that manufacturers were setting compliance plans for 2019, it would have immediately affected compliance now by changing manufacturers’ future

compliance needs. This is because manufacturers earn tradable compliance credits now for future compliance with stricter standards or higher penalties, *see* 49 U.S.C. § 32903, and a penalty increase for future model years can be expected to affect the amount of credits that manufacturers decide to earn through overcompliance and credits now. The statute permits regulated entities to shift their compliance obligations earlier (through banking of the earned credits) or shift them to later (i.e., borrowing the credits from future overcompliance). 49 U.S.C. § 32903(a).⁹ Thus, increasing penalties can lead to overcompliance earlier, as manufacturers gather additional credits to be used later. Car manufacturers frequently take advantage of this flexibility, generating compliance credits each year through overcompliance and early compliance.¹⁰ In sum, even if manufacturers were not already making their compliance plans for Model Year 2019 and beyond at the time that NHTSA issued the Suspension Rule, they were certainly making decisions about whether or not to earn or bank compliance credits through early action. And with an increased penalty, more manufacturers would be expected to increase their compliance with the CAFE

⁹ Banking of tradeable credits reduces compliance costs. *See* John E. Bistline & Francisco de la Chesnaye, *Banking on Banking: Does “When” Flexibility Mask the Costs of Stringent Climate Policy?*, 144 *Climatic Change* 597, 598 (2017) (describing the advantages of banking and borrowing emissions and the intertemporal effects those have on compliance).

¹⁰ NHTSA, *Credit Status Report, CAFE Public Information Center* (updated as of May 9, 2017) (compiling data on compliance).

standards under the 2016 Civil Penalties Rule. NHTSA should have taken into account the real harm that the Suspension Rule caused by removing the incentive caused by the \$14 penalty for firms to comply early in order to earn credits.

Third, besides affecting immediate compliance decisions, the Suspension Rule creates competitive harm for car manufacturers that chose to increase compliance investments in response to the 2016 Civil Penalties Rule. If two firms had the same compliance requirements, but one of them increased investment in fuel-saving technology after learning about the 2016 Civil Penalties Rule, that firm would have been disadvantaged by the Suspension Rule compared to a company that chose not to invest in any compliance technologies at that time. That is because an increased penalty raises the demand for and thus the price of compliance credits, as Intervenor car manufacturers have explained. (*See* JA 38 (explaining that the “price of credits will increase substantially” with a higher penalty).) In the years preceding Model Year 2019, companies that rationally expected the credit price to increase could be expected to make additional investments and paid a price higher than \$5.50 per tenth of a mile-per-gallon to boost their fuel economy because those additional investments would have given them extra credits—credits that would soon have been worth more than \$5.50. But with the Suspension Rule, the price of the credits would inevitably drop below \$5.50, thus disadvantaging any companies that had chosen to overcomply on the expectation that the penalty would be higher.

The law requires NHTSA to evaluate the consequences of its actions in a rational manner. *See State Farm*, 463 U.S. at 43.¹¹ Indeed, the Department of Transportation’s governing guidance requires NHTSA to consider the economic consequences of its actions.¹² And longstanding executive guidance instructs agencies to consider the costs of a rule in order to make “a reasoned determination that the benefits of the intended regulation justify its costs.” Executive Order No. 12,866 §(1)(b)(6), 58 Fed. Reg. 51,735 (Sept. 30, 1993).¹³

Rather than assess the impact of the Suspension Rule, NHTSA ignored the Suspension Rule’s immediate and long-term impact on compliance with fuel economy standards, claiming that the Suspension Rule would not cause any harm. That claim was “inaccurate and thus unreasonable.” *Clean Air Council v. Pruitt*, 862

¹¹ *See also Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (considering the costs of a repeal “is common sense and settled law”).

¹² Dep’t of Transp., Order No. 2100.5 at 4 (1980) (regulations should be developed giving “adequate consideration to the alternatives, to anticipated safety, environmental, social, energy, economic, and legal consequences,” among other issues); Neil Eisner, Dep’t of Transp., Rulemaking Requirements 46 (2011) (explaining that Order No. 2100.5 “requires an economic analysis” for all significant and non-significant rulemakings).

¹³ Executive Order 12,866 “remains the primary governing [Executive Order] regarding regulatory planning and review” under the President Trump administration. Memorandum: Implementing Executive Order 13,771, Titled “Reducing Regulation and Controlling Regulatory Costs” (Apr. 5, 2017) (“Guidance on Executive Order 13,771”).

F.3d 1, 10 (D.C. Cir. 2017); *see also Nat. Res. Def. Council, Inc. v. U.S. Forest Serv.*, 421 F.3d 797, 811-12 (9th Cir. 2005) (faulting the Forest Service’s reliance on “[i]naccurate economic information”). And NHTSA’s action here in ignoring the competitive harms of the Suspension Rule and harms to the public fails to address “an important aspect of the problem,” as required by *State Farm*. *See California*, 277 F. Supp. 3d at 1122 (quoting *State Farm*, 463 U.S. at 43).

II. The Suspension Rule Did Not Preserve the Status Quo

In opposition to petitioners’ motion for summary vacatur, NHTSA argued that the Suspension Rule caused no harm because it simply preserved the status quo. *See Resp. Opp.* at 24. But that claim ignored basic principles of law and rational government decisionmaking.

The “status quo is the last *uncontested* status which preceded the pending controversy.” *Consarc Corp. v. U.S. Treasury Dep’t, Office of Foreign Assets Control*, 71 F.3d 909, 913 (D.C. Cir. 1995) (emphasis added) (internal citation omitted). The controversy here was caused by the agency’s issuance of the Suspension Rule. Without the Suspension Rule, the 2016 Civil Penalties Rule would be in effect.¹⁴ Rather than maintain the status quo, the Suspension Rule “disrupt[s]

¹⁴ NHTSA had prescribed several previous delays of the 2016 Civil Penalties, but the last such delay ended on July 10, 2017, two days before the Suspension Rule was issued. *See* 82 Fed. Reg. 29,009, 29,009-10 (June 27, 2017) (JA 75-76).

it.” *California*, 277 F. Supp. 3d at 1120 (finding that agency’s delay of a rule “plainly did not ‘maintain the status quo’” even though compliance dates were in the future).

The fact that, under the 2016 Civil Penalties Rule, NHTSA planned to apply the higher penalties starting with the 2019 Model Year does not change this analysis. The 2016 Civil Penalties Rule was on the books and as such would have been taken into account for planning purposes by any manufacturer. Indeed, as explained above, the existence of the 2016 Civil Penalties Rule would have immediately begun affecting manufactures’ decisions and compliance plans.

Basic principles governing cost-benefit analysis underscore this conclusion. When assessing the economic impact of a new rule, including a suspension, agencies must first establish a “baseline,” which is the agency’s “best assessment of the way the world would look absent the proposed action”—in this case, the world without the Suspension Rule. *See* Office of Mgmt. & Budget, *OMB Circular A-4* at 15 (2003) (“Circular A-4”)¹⁵; *see also* U.S. Dep’t of Transp., *Benefit-Cost Analysis Guidance for Discretionary Grant* at 7 (July 2017) (A “baseline defines the world without the

¹⁵ Circular A-4 is a guide for agencies on regulatory cost-benefit analysis, which was issued by the Office of Management and Budget under President George W. Bush. The Trump administration has instructed agencies to follow Circular A-4 when setting baselines. *See* Guidance on Executive Order 13,771 at pt. V.

proposed project” and should include factors that would occur in the absence of the proposed project).

In addition, when setting a baseline, agencies should include the “future effect” of current regulations in that baseline. Circular A-4 at 15. That means that agencies should include the costs and benefits that are expected under any other regulations that were previously issued by the agency, in order to properly judge the impact of the action under consideration on those benefits. *See EPA, Guidelines for Preparing Economic Analyses* at 5-1, 5-3, 5-11 (2010).¹⁶ Indeed, agencies should include the impact of any final regulations that have not gone into effect yet, as well as any non-final rules that are imminent or “reasonably anticipated with a high degree of certainty.” *Guidelines* at 5-13.

In this case, the baseline should have included the 2016 Civil Penalties Rule because it was another regulation that had been promulgated by the agency and would have been in force were it not for the Suspension Rule. *See Guidelines* at 5-1, 5-3, 5-9, 5-11. And once the proper baseline was established, it would have been clear that any action that indefinitely puts off the benefits of the 2016 Civil Penalties Rule would have imposed significant costs, in the form of forgone benefits.

¹⁶ *See also* Memorandum re Current Guidance on Economic Analysis in SEC Rulemakings at 7 (Mar. 16, 2012) (the baseline should include “the existing regulatory structure”).

Setting the baseline in this manner provides the best way to understand the impact of the new action. *See Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (explaining that establishing the appropriate baseline is critical to understanding the effect of a proposed project). With the baseline established, the agency can measure the impact of the new rule—in this case the Suspension Rule—against that baseline. Any new incremental costs and benefits would be attributable to the proposed action, rather than some other factor and thus would be properly considered when assessing whether to finalize the proposed action.

In fact, a frequent industry argument against a new regulation is that the agency must include existing regulations in the baseline, even when compliance deadlines are far out in the future, in order to avoid imposing a new rule justified by the same benefits as those existing regulations. *See, e.g.,* Original Br. of Industry Pet'rs at 69-71, *Sw. Elec. Power Co. v. EPA*, No. 15-60821 (5th Cir. Dec. 5, 2016), ECF No. 00513783903 (arguing that EPA should have allowed the public to comment on the impact of the Clean Power Plan, a rule that would have limited carbon dioxide air emissions from power plants, on a rule that would limit toxic wastewater discharges from the same power plants); Pet'r Nat'l Mining Ass'n Br. at 41 & n.19, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (arguing that EPA improperly counted benefits that result from reductions in a separate regulation). Future benefits would be converted to present values, but they are never disregarded. *See* Circular

A-4, at 31-32. It is only rational to include current regulations in the baseline in the same manner when repealing or suspending deadlines as when amending or issuing regulations.¹⁷

Following this rational principle, many agencies, including NHTSA in other contexts, have recognized that on repeal or suspension, the right baseline includes the rule the agency is seeking to repeal or suspend. For example, the Department of Transportation, along with fifteen other agencies, recently recognized that suspending the effective date of a rule designed to protect human research subjects would cause forgone benefits by suspending “what would have been the benefits of implementing” the original rule during the period of the suspension. Federal Policy for the Protection of Human Subjects: Delay, 83 Fed. Reg. 2885, 2889 (Jan. 22, 2018). In the past year, other agencies, including the BLM, EPA, and the Department of Labor have also acknowledged that suspending rules causes lost benefits.¹⁸

¹⁷ See Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763, 1793 (2002) (costs and benefits should receive equal treatment).

¹⁸ See Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,056-57 (Dec. 8, 2017) (BLM acknowledging that suspension of a rule meant to reduce natural-gas leaks at oil and gas facilities mining on public lands would cause forgone benefits); Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 43,494, 43,497-98 (Sept. 18, 2017) (EPA estimating the foregone annual benefits of suspending an emissions rule); Proposed Extension

NHTSA itself has recognized this point in a past rulemaking. In April 1981, shortly after Ronald Reagan became President, NHTSA suspended the requirement to install automatic seatbelts or airbags, but acknowledged that it would cause forgone benefits, including potential additional mortalities. Federal Motor Vehicle Safety Standards, Occupant Crash Protection, Final Rule, 46 Fed. Reg. 21,172, 21,176 (Apr. 9, 1981); Federal Motor Vehicle Safety Standards, Occupant Crash Protection, Proposed Rule, 46 Fed. Reg. 12,033, 12,034 (Feb. 12, 1981) (“The Department estimates that the delay would result in approximately 600 more deaths and 4,300 more serious injuries.”).¹⁹

Setting the proper baseline helps make clear that the timing of a rule’s compliance dates can have “an important effect on its net benefits.” Circular A-4 at 7. Specifically, a suspension of an emissions limit can cause “significant deleterious effects on the environment.” *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 36 (D.D.C. 2012) (vacating agency stay for failure to comply with APA procedures);

of Applicability Dates, Definition of the Term “Fiduciary,” 82 Fed. Reg. 12,319, 12,320 (March 2, 2017) (Labor estimating that the proposed delay would lead to investor losses of \$147 million in the first year and \$890 million over ten years). The citations in this section to recent regulatory suspensions do not constitute an endorsement of any aspect of the impact analyses or justifications for the suspensions beyond the decision to analyze forgone benefits compared to a regulatory baseline.

¹⁹ NHTSA also separately rescinded the requirements, but was challenged in court, leading to the seminal *State Farm* decision. *State Farm*, 463 U.S. at 46 (holding that NHTSA’s decision to rescind the seatbelt and airbag requirement was arbitrary and capricious).

see also Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1458-59 (D.C. Cir. 1997) (describing substantial emissions that vacating EPA’s emissions limit would impose during the time it took EPA to reissue the rule). NHTSA’s actions in ignoring the impact of the Suspension Rule on the benefits that would have accrued under the 2016 Civil Penalties Rule represents a sharp break from standard agency practice and violates longstanding principles of reasoned decisionmaking.

III. NHTSA’s Failure to Provide a Reasoned Explanation Increases Regulatory Uncertainty

NHTSA’s failure to provide a reasoned explanation here in compliance with the Administrative Procedure Act can also cause harmful uncertainty. “One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). As petitioners have also separately argued, agencies are required to provide the public with notice of a proposed action and give the public an opportunity to participate in the proposed action by submitting comments.²⁰ *See* NGO Br. at 33-40. These basic procedural steps help promote regulatory certainty because industry and the public can count on agencies going through these steps before changing the regulatory landscape. Because of these procedures, both the

²⁰ *See* 5 U.S.C. § 553; Bethany A. Davis Noll & Denise Grab, *Deregulation: Process and Procedures That Govern Agency Decisionmaking in An Era of Rollbacks*, 38 Energy L.J. 269, 276 (2017).

public and industry generally receive sufficient warning of a change and can adjust to the change. Indeed, once a regulation has been promulgated, it may be just as harmful to summarily remove the regulation as to make standards more stringent because stability promotes innovation and investment, while regulatory uncertainty can dampen them.²¹ Once businesses know what they need to spend money on, they need to be able to count on the requirements not shifting underfoot.

When agencies fail to follow these rules, their actions can lead to turmoil. For example, in a similar but unrelated case, the Department of Interior has twice sought and failed to stay the Waste Prevention Rule, a 2016-era regulation limiting natural-gas leaks from oil and gas facilities on public lands. *See California*, 277 F. Supp.3d at 1127 (vacating first suspension for failure to follow notice and comment requirements and for lack of statutory authority); *California v. BLM*, No. 17-07186, 2018 WL 1014644, at *17 (N.D. Cal. Feb. 22, 2018) (enjoining second suspension for failure to provide a reasoned explanation). Meanwhile, Interior has also promised to rescind or revise the rule.²² Even the parties that have been opposed to the Waste

²¹ *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 116 (2018) (explaining how the rules governing regulatory change make such change more difficult and thus promote regulatory certainty, innovation, and investment); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112, 156-57 (2011) (explaining that erratic legal change carries its own costs).

²² Press Release, Interior Statement on Venting and Flaring Rule Vote (May 10, 2017) (“[W]e will suspend, revise or rescind” the Waste Prevention Rule.); *see also* Waste Prevention, Production Subject to Royalties, and Resource Conservation;

Prevention Rule since it was issued have lamented the “chaos and uncertainty resulting from the BLM’s decision to revise” the rule and various suspension attempts.²³

In this case, the Suspension Rule has upended the status quo, caused forgone benefits in the form of the lost benefits of increased compliance caused by the 2016 Civil Penalties Rule, and contributed to an environment of regulatory uncertainty. NHTSA’s irrational claim that the Suspension Rule fails to cause harm should be vacated as arbitrary and capricious.

Rescission or Revision of Certain Requirements, Proposed Rule, 82 Fed. Reg. 7924 (Feb. 22, 2018).

²³ Motion to Lift Stay and Suspend Implementation Deadlines, *Wyoming v. Interior* (Feb. 28, 2018), ECF No. 195 (D. Wyo. 16-285).

CONCLUSION

For the foregoing reasons, the Court should grant the petitions and vacate the Suspension Rule.

DATED: March 12, 2018

Respectfully submitted,

/s/ Richard L. Revesz_____

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7), the foregoing Brief contains 6237 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

DATED: March 12, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 12, 2017, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Richard L. Revesz_____

ADDENDUM

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

<p>NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, STATE OF CALIFORNIA, STATE OF MARYLAND, STATE OF NEW YORK, STATE OF PENNSYLVANIA, STATE OF VERMONT,</p> <p style="text-align: right;"><i>Petitioners,</i></p> <p style="text-align: center;">v.</p> <p>NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, JACK DANIELSON, in his capacity as Acting Deputy Administrator of the National Highway Traffic Safety Administration, UNITED STATES DEPARTMENT OF TRANSPORTATION, ELAINE CHAO, in her capacity as Secretary of the United States Department of Transportation,</p> <p style="text-align: right;"><i>Respondents,</i></p> <p>ASSOCIATION OF GLOBAL AUTOMAKERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.,</p> <p style="text-align: right;"><i>Intervenors.</i></p>	<p>No. 17-2780-cv</p>
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DECLARATION OF DR. SYLWIA BIALEK, Ph.D.

I, Sylwia Bialek, state and declare as follows:

1. I am an Economic Fellow at the Institute for Policy Integrity at NYU School of Law. I have personal knowledge of the subject matter of this declaration and, if called as a witness, could and would competently testify as to its contents.

2. I have a Ph.D. in economics (summa cum laude) at Goethe University in Frankfurt, Germany. I received a Master of Science degree in International Relations and Finance and Banking at the Warsaw School of Economics in Warsaw, Poland. I have extensive professional experience analyzing incentives associated with environmental policies. I also have experience with fuel economy standards and the associated penalties. I have provided technical comments on proposals issued by the National Highway Traffic Safety Administration (“NHTSA”), including on NHTSA’s recent proposal to reconsider the corporate average fuel economy (CAFE) standards¹ and to reconsider the civil penalties that apply to violations of the CAFE standards.²

3. I have assessed the impact on fuel economy of NHTSA’s decision, 82 Fed. Reg. 32,139 (July 12, 2017) (“Suspension Rule”), to indefinitely suspend, the effective date of NHTSA’s 2016 rule adjusting the civil penalties that apply to violations of the CAFE standards from \$5.50 to \$14 per tenth of a mile-per-gallon to reflect inflation, 81 Fed. Reg. 43524 (July 5, 2016) (“2016 Civil Penalties Rule”).

¹ Inst. for Policy Integrity, Comments on NHTSA’s Proposed Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas (Oct. 5, 2017), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0827-9729>.

² Inst. for Policy Integrity, Comments on NHTSA’s Proposed Reconsideration of the Final Rule on Civil Penalties (Oct. 10, 2017), *available at* <https://www.regulations.gov/document?D=NHTSA-2017-0059-0006>.

4. To perform this assessment, I used NHTSA's publicly available model: the CAFE Compliance and Effects Model, commonly referred to as "the CAFE model" or "the Volpe model."³ I used the model software and source code that are available on NHTSA's website.⁴ NHTSA made several sets of data available on that website. To perform my analysis, I used the data underlying the 2016 Draft Technical Assessment Report for Model Years 2022-2025 Passenger Cars and Light Trucks ("NHTSA data").⁵

³ See NHTSA, Compliance and Effects Modeling System: The Volpe Model, <https://www.nhtsa.gov/corporate-average-fuel-economy/compliance-and-effects-modeling-system>; See also Draft Technical Assessment Report Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025 at Section 5.4.2, Environmental Protection Agency, National Highway Traffic Safety Administration and California Air Resources Board (July 2016) (describing the model and engineering assumptions underlying it).

⁴ See NHTSA, Compliance and Effects Modeling System: The Volpe Model, <https://www.nhtsa.gov/corporate-average-fuel-economy/compliance-and-effects-modeling-system>.

⁵ The technology file I used was "technologies_2016-05-14_ATxP.xlsx." In the scenario file, I used the "Augural CAFE Standards" as the basis for simulations. That data included all of the CAFE standard increases that have been set so far by the agency. See NHTSA and EPA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 62,627-28 (Oct. 15, 2012) (describing standards for 2017 and later); EPA, Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (2017), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf> (determining that it was appropriate to maintain the standards as set in 2012). In March 2017, NHTSA announced an intention to reconsider fuel economy standards for model years 2022-2025, see Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards

5. The default model inputs provided by NHTSA include the penalty level, market data, technology data, fuel economy, and other information.⁶ The model also allows NHTSA to estimate the applicable fleet and the corresponding CAFE standard for any particular car fleet each year on average and by manufacturer. The model combines information about CAFE standards and fleets with information about various available technologies over time in order “to simulate how a manufacturer might make progress toward compliance with CAFE standards” and ultimately to estimate the fuel economy that will be achieved by any particular car fleet each year—on average and by manufacturer.⁷ The model also predicts the yearly amount of fuel consumed by vehicle type over the lifetime of a vehicle.

for Model Year 2022-2025 Light Duty Vehicles, 82 Fed. Reg. 14,671, 14,672 (Mar. 22, 2017), but NHTSA has yet to finalize any revision of the standards.

⁶ The Volpe model is “overly conservative” in estimating compliance improvements and cost reductions. *See* Environmental Law & Policy Center et al., Comments on Proposed Reconsideration of the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model year 2022-2025 Light-Duty Vehicle at 26 (Oct. 5, 2017), <https://www.regulations.gov/document?D=NHTSA-2017-0059-0011> (see attachment 13-NRDC Comment on Reopened Final Determination).

⁷ CAFE Model Documentation at 3 (July 2016), *available at* https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812305_cafe_modeldocumentation.pdf.

6. To estimate the impact of the Suspension Rule, I left the model inputs constant, with one exception,⁸ and adjusted only the year that the penalty increase begins in order to learn how that timing would affect fuel economy. I adjusted the year the penalty level changes for three different scenarios. For the first two scenarios, I changed the year that the \$14 penalty begins by moving it out either two years to Model 2021 (“two-year suspension”) or three years to Model Year 2022 (“three-year suspension”).

⁸ The default inputs into the Volpe model assume that non-European manufacturers will choose to comply with CAFE standards regardless of how high compliances costs become, but that assumption is not reasonable. The assumption appears to be based on historic compliance levels during a time when regulation stringency was much lower as compared to future standards. *See* Union of Concerned Scientists, Response to Automaker Comments Regarding Raising CAFE Fines at 5 (Dec. 21, 2017), <https://www.regulations.gov/document?D=NHTSA-2017-0059-0019>. With an increased penalty and more stringent fuel economy standard, historic compliance levels are likely to change. *See id.* Indeed, NHTSA recently acknowledged that “manufacturers are falling behind the standards for model year 2016 and increasingly so for model year 2017” and so “it is likely that many [more] manufacturers will face the possibility of paying larger CAFE penalties over the next several years than at present.” Reconsideration of Final Rule on Civil Penalties, 82 Fed. Reg. 32,140, 32,141 (JA 79). While there might be factors other than economic considerations affecting the decision whether to pay penalty or comply, in running the model, I have assumed that all manufacturers behave consistently with standard economic theory and observations and pay the penalty when it is less expensive than their costs of compliance. Nonetheless, I also ran the model with NHTSA’s compliance preference assumptions included. As with my other findings, see *infra* ¶¶ 9-14, those results demonstrate that a suspension will have a significant effect on compliance, albeit of a smaller magnitude (between one-fourth and one-third of the effect).

7. For the third scenario, I assumed that the \$14 penalty would be indefinitely postponed and never apply. The default modeling horizon for the Volpe model is 2032. Thus, for the third scenario, I used the \$5.50 penalty from prior to the 2016 Civil Penalties Rule through the year 2032, in order to obtain an estimate of the impact of an indefinite suspension (“indefinite suspension”).

8. I then compared those three scenarios with a “baseline scenario,” where the \$14 penalty applies starting with Model Year 2019, as planned in the 2016 Civil Penalties Rule. *See* Response to Pet. For Reconsideration, 81 Fed. Reg. 95,489 (Dec. 28, 2016) (JA 51-54). In comparing the three suspension scenarios with the baseline scenario, I was able to obtain an estimate of the impact that the suspensions would have on average fuel economy for each year through 2032. Figure 1, below, provides this information over time. In order to illustrate the short and long term impacts of the suspension, the details for 2022 and 2032 are reported here.

9. First, I determined that a two-year suspension would lower the average passenger car fuel economy by .63 miles-per-gallon (mpg) from 46.63 (under the baseline scenario) to 46 mpg in 2022. The Volpe model assumes that in the year 2022, the average CAFE standards will be 47.66 mpg. As such, under the baseline scenario, average passenger fuel economy would be 1.03 mpg below the standard. But under the two-year suspension, average passenger fuel economy would be 1.66 mpg under the standard, a 61% increase in non-compliance.

10. Second, I determined that a three-year suspension would lower the average passenger car fuel economy by 1.2 mpg from 46.63 mpg (under the baseline scenario) to 45.43 mpg in the year 2022, representing a 110% increase in noncompliance.

11. I also modeled the impact on fuel economy standards of the two- and three-year suspensions in the year 2032. In these scenarios, though the \$14 penalty is reinstated after the two-year and three-year suspension, the Suspension Rule continues to have an impact on average passenger fuel economy levels in 2032. That year, average passenger fuel economy levels would be .12 and .31 mpg lower than under the baseline scenario, respectively, for the two-year and three-year suspensions.

12. In addition, under the two-year suspension, passenger vehicles would consume an additional 4 billion gallons of fuel between 2017 and 2032 total. Under the three-year suspension, passenger vehicles would consume an additional 5.5 billion gallons of fuel total between 2017 and 2032. The total of fuel consumed by passenger cars predicted by Volpe for 2017 is 32 billion gallons. So for the three-year suspension, the total additional fuel consumed represents about 17% of the fuel used in 2017.⁹

⁹ Under the two-year suspension, the total fleet vehicles would consume an additional 6 billion gallons of fuel between 2017 and 2032 total. Under the three-

13. In other words, though the impact of those two temporary suspensions on the average fuel economy for a particular year begins to decrease once the \$14 penalty is reinstated, the two delays would still have a significant impact on the cumulative amount of gasoline consumed and continue to have a measurable impact on average fuel economy every year, up through 2032.

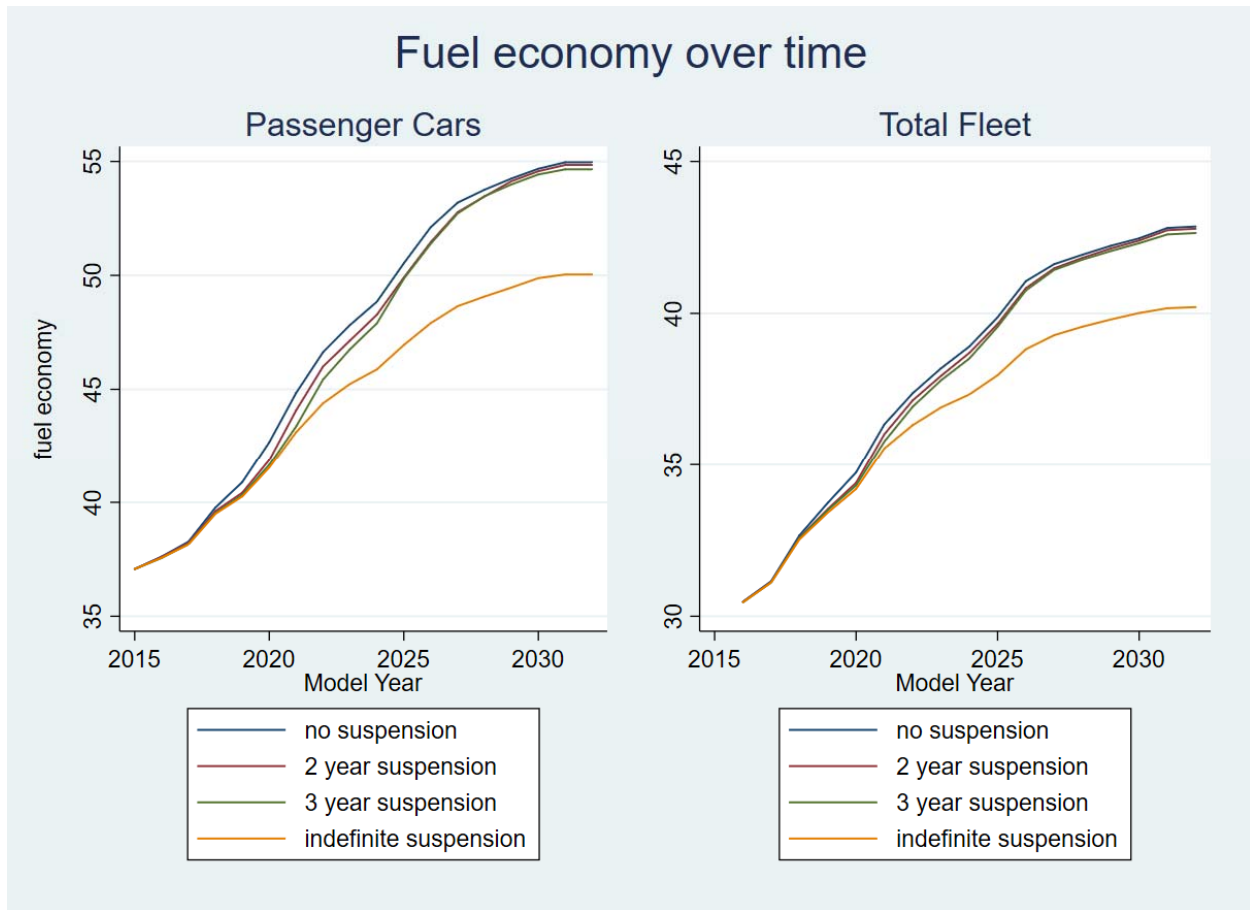
14. Third, I determined that putting off the 2016 Civil Penalties Rule indefinitely would lower the average passenger car fuel economy by 2.24 mpg from 46.63 mpg (under the baseline scenario) to 44.39 mpg in the year 2022, representing a 200% growth in non-compliance.¹⁰ In the year 2032, the Suspension Rule will cause average passenger car fuel economy to drop almost 5 mpg, from a baseline scenario of 54.75 mpg to 49.75 mpg. For the passenger car fleet, vehicles can be expected to consume an additional 25 billion gallons between 2017 and 2032. For the total fleet, the expected increased fuel consumption amounts to 54 billion gallons between 2017 and 2032.

year suspension, for the total fleet, vehicles would consume an additional 10 billion gallons of fuel total between 2017 and 2032. The total of fuel consumed predicted by the Volpe model for the year 2017 is 113 billion gallons. As a result, for the three-year suspension, the total additional fuel consumed represents about 10% of the fuel used in the year 2017.

¹⁰ The two-year, three-year, and indefinite suspension would lower average fuel economy for the total fleet in year 2022 by .23, .44, and 1.05 miles per gallon, respectively.

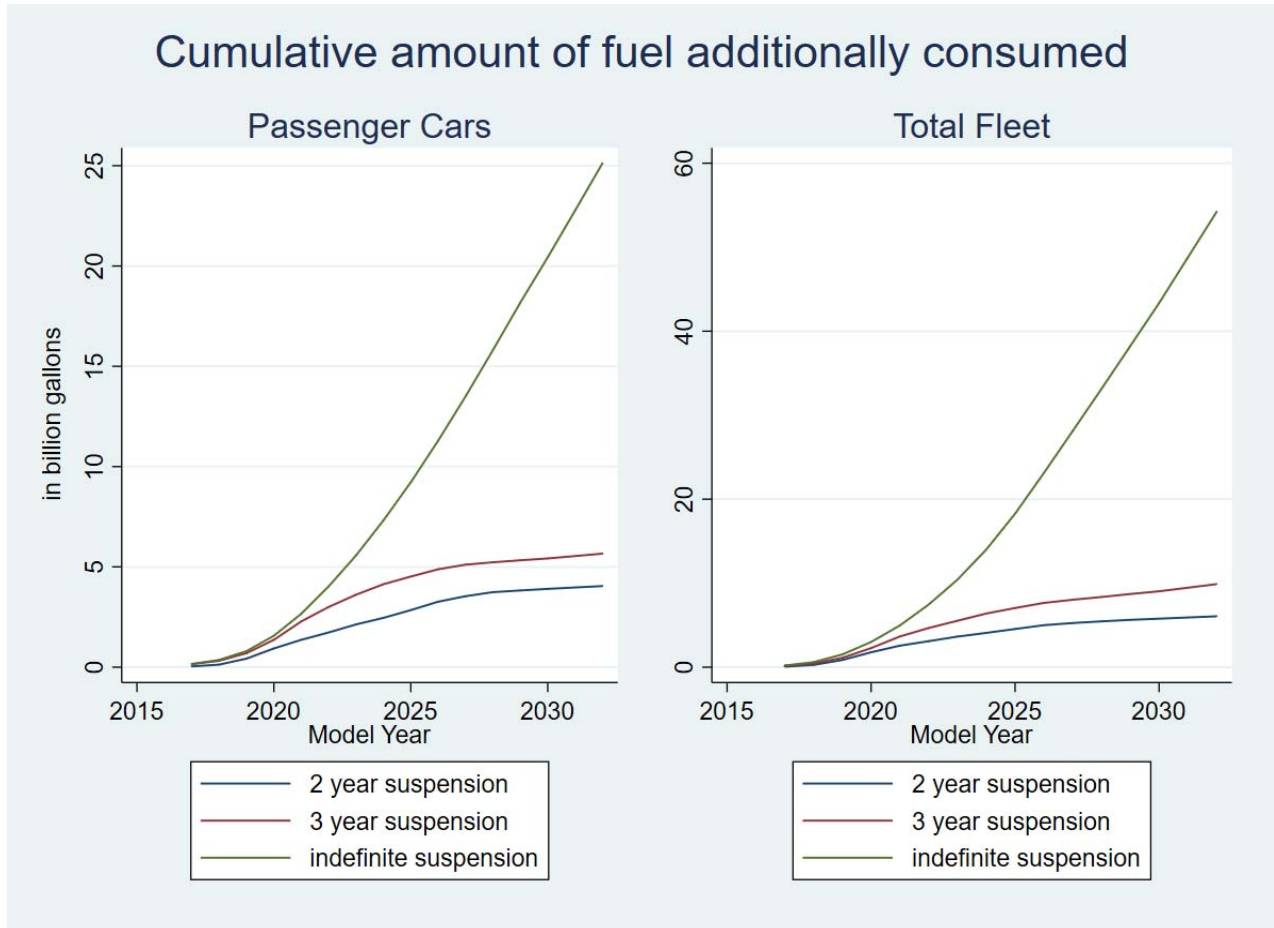
15. Figure 1 illustrates the impact of the three suspensions over time.

Figure 1



16. Figure 2 shows the amount of additional gallons consumed as a result of the three different suspensions, for both passenger cars and the total fleet.

Figure 2



I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on March 12, 2018 in New York, NY

Dr. Sylwia Bialek, Ph.D.