ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017

Case No. 13-74019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALTON TRUCKING, INC., et al.,

Petitioners,

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION,

Petitioner-Intervenor,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, in his official capacity as Administrator of the U.S. EPA,

Respondents,

CALIFORNIA AIR RESOURCES BOARD,

Respondent-Intervenor

On Petition for Review of Final Action of the United States Environmental Protection Agency EPA-HQ-OAR-2008-0691

INTERVENOR CALIFORNIA AIR RESOURCES BOARD'S OPPOSITION TO THE ENVIRONMENTAL PROTECTION AGENCY'S MOTION TO CONTINUE ORAL ARGUMENT

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INTRODUCTION

Intervenor California Air Resources Board ("ARB") opposes Respondent United States Environmental Protection Agency and Scott Pruitt, Administrator's (collectively "EPA") motion to indefinitely continue the May 18, 2017 oral argument. EPA has not met the standards necessary to warrant continuing the oral argument scheduled to occur 10 days from now. Further delaying resolution of this case would harm ARB by perpetuating indefinitely the cloud of uncertainty this appeal has cast over its regulatory program since 2013. In the alternative, ARB requests that the Court decide this matter without oral argument pursuant to FRAP 34(a)(2)(C). The facts and legal argument are adequately presented in the briefs and record, and EPA's stated inability to present meaningful oral argument on May 18 suggests that the oral argument would not significantly aid the Court's decisional process. Finally, if the Court grants EPA's motion, ARB requests that oral argument be continued to a date certain to minimize the prejudice ARB and the people of California will suffer.

SUMMARY OF ARGUMENT

This matter is a direct appeal challenging EPA's 2013 action that authorized a set of California's air pollution rules governing off-road diesel engines, such as vehicle fleets and engines like those on tractors, lawnmowers, bulldozers, cranes, locomotives, and marine craft (hereafter referred to as California's Off-Road

Emissions Program). *See* 40 C.F.R. §§ 89.1, 1068.30. These California rules have been in the works since at least 2007, were submitted to EPA for authorization in March 2012, and the instant challenge by trucking industry interests has been on the Court's docket since November 2013. This case has been fully briefed since January 2017. Oral argument is scheduled for May 18, 2017, and has been since the Court set it back on March 6. All parties confirmed their appearances—including EPA—on March 16. Despite that almost two months have elapsed since the Court's notice of oral argument, EPA filed a motion seeking to indefinitely continue oral argument only 13 days beforehand. EPA's stated reason to continue the oral argument is "[i]n light of the recent change in Administration, EPA requests continuance of the oral argument to give the appropriate officials adequate time to fully review the Off-Road Diesel Decision," and EPA "will not complete the review prior to the scheduled oral argument date of May 18, 2017." EPA Motion at 2.

ARB opposes EPA's request to further delay resolution of this matter. This matter is overdue for adjudication, and the requisite elements of FRAP 34(b) and Circuit Rule 34-2 are not satisfied. EPA's request is not "reasonable," lacks "good cause," and EPA points to no "exceptional circumstances" justifying an indefinite continuance. EPA proffers no specific or general timelines for its purported and undefined "review" process, nor has EPA provided any indication of the contours

of a theoretical future "review," its statutory basis to conduct a review, or what the focus of any future administrative process may be. If EPA believes that it has the authority to review its 2013 Off-Road Diesel Decision, EPA may seek to initiate that review, if it so chooses, independent of this Court's resolution of the pending case. As such, the obvious practical effect of EPA's indefinite continuance request would be to unnecessarily yet indefinitely delay the Court's resolution of a matter long overdue for adjudication, waste the substantial resources already expended by the parties and this Court, and compromise the certainty ARB needs to carry out its mandate to address California's serious air pollution issues.

As discussed further below, ARB respectfully requests that the Court either (1) leave the oral argument on calendar for May 18 because EPA has not met the necessary standards set forth in FRAP 34(b) and Circuit Rule 34-2 to continue oral argument (indefinitely); (2) adjudicate the case on the briefs without oral argument pursuant to FRAP 34; or (3) if the Court continues oral argument, reschedule it to a date as soon as feasibly possible to ensure timely action by the EPA and this matter's ultimate resolution.

PROCEDURAL BACKGROUND OF CALIFORNIA'S OFF-ROAD EMISSIONS PROGRAM AND THE PETITIONERS' CHALLENGE

EPA's Background Section, EPA Motion at 2-4, accurately summarizes the statutory, regulatory, and factual background.

ARGUMENT

I. THE COURT SHOULD PROCEED WITH ORAL ARGUMENT BECAUSE EPA HAS NOT PROVIDED THE REQUISITE JUSTIFICATION FOR CONTINUING ORAL ARGUMENT

ARB seeks to have this case resolved as soon as possible. EPA's request to indefinitely continue oral argument, which this Court set months ago and has been acknowledged by all parties to go forward in less than two weeks, is unjustified, unreasonable, and does not satisfy the legal requirements for a continuance.

The Federal Rules of Appellate Procedure ("FRAP") proscribe unreasonably late requests to continue oral argument. FRAP 34(b) states that:

> [a] motion to postpone the argument or to allow longer argument must be filed *reasonably in advance* of the hearing date.

FRAP 34(b) (emphasis added). This Court's rules also explicitly strongly disfavor postponing oral argument. Circuit Rule 34-2 provides that:

> No change of the day or place assigned for hearing will be made except by order of the Court *for good cause*. Only *under exceptional circumstances* will the Court grant a request to vacate a setting within 14 days of the date set.

Circuit Rule 34-2 (emphasis added). "The court does not look with favor on belated motions for continuance of oral argument . . . . *In re Edmondson*, 518 F.2d 552, 552 (9th Cir. 1975); *see also Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.,* 713 F.2d 1477, 1484 (10th Cir. 1983) ("Where a movant seeks relief that would delay court proceedings by other litigants he must make a strong showing of necessity"). Moreover, when a party seeks an order staying a

proceeding the court should consider whether the stay "will substantially injure the other parties interested in the proceeding; and . . . where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 428, 434 (2009) (quotation omitted); *see also Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (considering "hardship to the parties" and "public interest" in deciding whether to issue a stay).

EPA's motion does not meet the standards set by FRAP 34, Circuit Rule 34-2, or case law. The only basis EPA provides in its motion for a last-minute indefinite continuance of the scheduled/acknowledged oral argument is that the "change in Administration" needs more time to "fully review the Off-Road Diesel Decision." EPA Motion at 2. This scant justification is insufficient to warrant the relief EPA seeks.

A. EPA's Request Does Not Satisfy FRAP 34(b)'s "Reasonable" Requirement

EPA's request does not satisfy FRAP 34(b)'s timing requirement, as its delay in waiting until less than two weeks before oral argument to make the request is unreasonable. The "change in Administration" that provides the sole basis for EPA's continuance took place months ago; President Trump assumed office on January 20, 2017, and the Senate confirmed EPA Administrator Pruitt on February 17. Thus, the new Administration and EPA had almost three months to review this then-pending matter and inform the Court of a possible need for further review. But EPA waited almost three months, until May 5, to seek this

continuance—and essentially at the eleventh-hour before oral argument. EPA's delay is unreasonable.

B. EPA's Request Does Not Satisfy Circuit Rule 34-2's "Good Cause" and "Exceptional Circumstances" Requirements

EPA's request also fails to satisfy Circuit Rule 34-2's "good cause" and "exceptional circumstances" requirements. As stated, EPA's only stated basis for the continuance, is that the "change in Administration" needs more time to "fully review the Off-Road Diesel Decision." EPA Motion at 2. This bare-bones assertion fails to establish "good cause" to continue the oral argument, since, as noted above, the new Administration has been in office for months and has had almost three months to inform the Court of a purported interest in a "review." And because EPA's motion was filed less than 14 days before the date set for oral argument, EPA also must demonstrate the existence of an "exceptional circumstance." No such exceptional circumstance is found in EPA's motion. This case concerns a garden-variety direct appeal of a statutorily based EPA authorization of California air regulations, as is plainly spelled out in the Clean Air Act. *See* 42 U.S.C. § 7543(e)(2)(A)(ii). This is precisely of the same type of regulations that California has been submitting to EPA, and EPA has been approving, for decades through many changes in administrations. *See e.g.*, *Motor and Equip. Mfrs. v EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979, *cert. denied,* 446 U.S. 952 (1980) ("*MEMA I*"); *Motor and Equip. Mfrs. v EPA*, 142 F.3d 449, 453

(D.C. Cir. 1998) ("*MEMA II*").[1] In short, EPA has stated no "exceptional circumstance" justifying such a late-hour continuance because none exists.

Further, EPA provides no basis or information on what "review" the "change in Administration" intends to undertake—or what review it is statutorily authorized to conduct in the first place. The cases cited by EPA (*see* EPA Motion at 7-8) for the proposition that an agency has inherent authority to review its past decisions do not support the request. Those cases all involved subsequent judicial review of an agency decision that departed from an earlier decision. None involved the question posed by this motion: whether oral argument scheduled for less than two weeks hence in a fully briefed case involving the authorization of a state rule (not a United States rule/policy) should be taken off calendar so that an agency can consider whether to initiate an administrative process to potentially revise, replace, or repeal, a prior statutorily based agency decision. If EPA believes that it has the authority to review its 2013 Off-Road Diesel Decision, EPA may seek to initiate that review, if it so chooses, independent of this Court's resolution of the pending case.

[1] EPA has approved more than 135 waivers or authorizations of different ARB air emission regulations over the decades pursuant to Clean Air Act section 209(e), 42 U.S.C. § 7543(e). *See* Dkt. Entry 46 (ARB's Respondent-Intervenor's Brief at 23-24 for a short sampling of EPA's past decisions as reflected in the Federal Register); *see also* Dkt. Entry 40-1 (Respondent EPA's Brief at 11-12).

Lastly, overall economy and public resources would be saved by proceeding with this case to conclusion. Over the decades since the inception of the Clean Air Act, California has sought more than 135 waivers and authorizations from EPA for other of its emissions regulations, and it will continue to do so in the future. If this Court upholds EPA's 2013 Off-Road Diesel Decision, EPA can still pursue whatever review processes are available to it under law should it ultimately decide that it has the interest and the authority to do so. That review process would be substantially aided by guidance from this Court as to its scope of its obligations under Clean Air Act section 209(e).

C. An Indefinite Continuance Serves no Legitimate Policy and Only Complicates ARB's Regulation of California's Severe Air Pollution Problems

As stated, EPA's brief provides no firm date or time frame by when the new Administration intends on completing an inchoate "review." As such, EPA provides no instructive information to the Court and the parties as to when this case might be re-set for oral argument. It merely asks for an indefinite continuance and offers no time frame as to when this matter can properly be resolved. The D.C. Circuit has warned against efforts by EPA to avoid rulings in ripe disputes even when the agency has proposed a concrete course of action. *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (agency cannot "stave off judicial review of a challenged rule simply by initiating a new proposed

rulemaking" because that would mean "a savvy agency could perpetually dodge review").

California suffers from some of the worst air pollution in the nation, which poses serious public health problems for its residents. Many parts of California are in nonattainment with the federal National Ambient Air Quality Standards ("NAAQS"). The Clean Air Act requires ARB to develop a State Implementation Plan ("SIP") that maps out California's path toward attainment of the NAAQS, which is periodically updated. *See* 42 U.S.C. §§ 7410, 7511, 7512; Cal. Health & Safety Code § 39602. ARB begins the planning process for SIP measures years in advance of the deadlines, and its subsequent SIP measures often rely on emission reductions achieved by previous measures. Currently, ARB relies on the Off-Road Emissions Program in California's SIP submittals to achieve significant emission reductions in California, including reducing emissions of particulate matter ($PM_{2.5}$) by 70 percent by 2023. *See* Dkt. Entry 46 (ARB's Respondent-Intervenor's Brief at 20).

A delayed decision in this case leaves a cloud of uncertainty over California's efforts to attain the NAAQS, hinders ARB's planning process for attainment, undermines compliant companies' investments, and endangers public health in the State. ARB's obligation to plan for how the State will achieve compliance with federal air quality standards will be made more difficult if it

cannot rely on the emission reductions achieved by the Off-Road Emissions Program, which constitute a significant portion of the emission reductions ARB relies on to achieve compliance with the NAAQS. If ARB will need to revise its SIP to achieve those emission reductions from other sectors, it needs to know that as soon as possible so that it can begin that planning process.

The Court should reject EPA's open-ended, nebulous request that will only serve to inject further delay uncertainty as to California's ability to protect its citizens from polluted air.

II. ALTERNATIVELY, ARB REQUESTS THAT THE COURT ADJUDICATE THE CASE WITHOUT ORAL ARGUMENT PURSUANT TO FRAP 34(a)(2)(C)

As an alternative to proceeding with oral argument on May 18, ARB requests that the Court decide this matter without oral argument. FRAP 34(a)(2)(C) allows the court to dispense with oral argument if three judges agree that "the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." FRAP 34(a)(2)(C). Here, the parties' extensive briefing and comprehensive record make the case amenable to decision on the briefs and record. Given EPA's representation that it "would likely be unable to represent the current Administration's conclusive position" at the May 18 argument (EPA Motion at 9), it does not appear that the Court's decisional process would be "significantly aided" by oral argument under these new circumstances. As such, the current

posture of the case makes it amenable to decision without oral argument. If the Court is not inclined to proceed with oral argument on May 18, ARB requests that it decide the case on the merits without argument.

III. IF THE COURT CONTINUES THE ORAL ARGUMENT, THE COURT SHOULD RESCHEDULE IT TO TAKE PLACE ON A DATE CERTAIN

If the Court nonetheless continues the oral argument, ARB requests that the Court deny EPA's request that it be continued indefinitely. An indefinite delay would frustrate ARB's goal of achieving an expeditious and timely resolution to this matter. ARB requests that Court reschedule the oral argument to take place on a future date certain as soon as feasibly possible to ensure timely action by the EPA and this matter's expeditious resolution.

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CONCLUSION

For all of the foregoing reasons, ARB respectfully requests that the Court deny EPA's motion to indefinitely continue oral argument. In the alternative, ARB requests the Court decide this matter without oral argument, or only continue the oral argument to a date certain to best ensure this case's timely adjudication.

May 8, 2017

Respectfully submitted,

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9th Circuit Case Number(s) 13-74019

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