

Case No. 18-1192,
consolidated with No. **18-1190**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF CALIFORNIA, by and through XAVIER BECERRA,
ATTORNEY GENERAL and CALIFORNIA AIR RESOURCES BOARD,
STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF
ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, by and
through BRIAN FROSH, ATTORNEY GENERAL and MARYLAND
DEPARTMENT OF THE ENVIRONMENT, COMMONWEALTH OF
MASSACHUSETTS, STATE OF MINNESOTA, by and through
MINNESOTA POLLUTION CONTROL AGENCY, STATE OF NEW
JERSEY, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE
OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH
OF PENNSYLVANIA, by and through JOSH SHAPIRO, ATTORNEY
GENERAL and PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, STATE OF RHODE ISLAND,
STATE OF VERMONT, STATE OF WASHINGTON, and DISTRICT OF
COLUMBIA

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
ANDREW K. WHEELER, Acting Administrator, United States
Environmental Protection Agency,

Respondents.

**STATE PETITIONERS' OPPOSITION TO MOTION TO DISMISS
AND REPLY IN SUPPORT OF SUMMARY DISPOSITION**

(Counsel listed on Signature Pages)

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INTRODUCTION

This Court now has pending before it: State Petitioners' Emergency Motion for Summary Vacatur, or in the Alternative, for Stay Pending Judicial Review of EPA's "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles" ("EPA's Action" or "the EPA Memo"); and EPA's motion to dismiss this case as moot based on its withdrawal of the EPA Memo. EPA has offered no substantive opposition to State Petitioners' request for summary disposition of the merits of this case and the Court can, and should, grant State Petitioners' request.¹

As to EPA's motion, EPA has not carried its heavy burden to demonstrate that this case should be dismissed as moot. Unless the EPA memo is invalidated, there is a possibility it could be reinstated, temporarily or permanently, in the context of a challenge to EPA's notice withdrawing the EPA Memo. An order from this Court declaring EPA's Action invalid would eliminate this possibility and would confirm that EPA cannot disregard legislative direction or abdicate its statutory responsibilities.

¹ In light of the withdrawal of the EPA Memo, there is no longer a need for this Court to extend its administrative stay of EPA's Action into a stay pending judicial review. Accordingly, State Petitioners withdraw their alternative motion for a stay.

ARGUMENT

State Petitioners' request for summary disposition of the merits is substantively unopposed, and should be granted. As State Petitioners argued in their moving papers, summary disposition is warranted because EPA's Action constitutes an unlawful suspension of the regulatory limitations on glider vehicle production, which EPA attempted to accomplish without undertaking the required notice and comment process, and without the evaluation of the Action's substantial public-health and air-quality impacts that would be necessary to any reasoned decision-making process. As State Petitioners also argued, EPA's Action is subject to review as an unlawful modification of a duly promulgated regulation and as an "abdication of [EPA's] statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n. 4 (1985); *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998).

In its response to State Petitioners' motion, EPA does not dispute that its Action is reviewable, that its Action is unlawful, or that its Action would cause tremendous harms to the public and the environment, in contravention of the Clean Air Act. Although EPA's withdrawal notice did not go so far as to acknowledge the illegality of EPA's Action, EPA now has conceded for purposes of this litigation that it is not "free to disregard legislative

direction in the statutory scheme that [EPA] administers,” simply because the Clean Air Act affords it some enforcement discretion. *Heckler*, 470 U.S. at 833. EPA’s errors are clear and undisputed, and summary disposition of this case is proper.

Instead of defending its Action, EPA argues that this case is moot and moves to dismiss it on that basis. *See* EPA Mot. 6-8. But EPA has not carried the “heavy burden” of demonstrating mootness. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000). In its motion, EPA points only to its withdrawal of the Memo, made in response to the present litigation, and to its pledge, made in connection with that withdrawal, not to reinstate the Memo. *See* EPA Mot. at 6-8; ECF No. 1743093 at 12-13 (withdrawal notice). While State Petitioners welcome these developments, there remains a risk that, absent invalidation by this Court, the Memo could go back into effect. Specifically, the glider manufacturers—who have so determinedly advocated against regulatory production limits—may challenge EPA’s withdrawal of the Memo and argue that, if their challenge is successful, EPA’s Memo should come back into effect. *Cf. Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“by vacating or rescinding the rescissions proposed by [CAB’s rule], the judgment of this court had the effect of reinstating the rules previously in

force”); *Alaska v. USDA*, 772 F.3d 899 (D.C. Cir. 2014) (district court’s invalidation of agency action withdrawing rule had legal effect of reinstating it). State Petitioners believe that any such challenge would be meritless. Nevertheless, there is reason to doubt that EPA would vigorously oppose an industry challenge to the withdrawal notice, or a request for a judicial stay of the withdrawal notice. Indeed, EPA’s ongoing concern about the purported effects of production caps on the glider industry is evinced in its commitment, in the withdrawal notice, to “move as expeditiously as possible” to conclude the efforts to revise or repeal those caps that EPA already has underway. ECF No. 1743093 at 13; *see* ECF No. 1740848 at 53-61 (proposed repeal of production caps). Accordingly, State Petitioners’ petition and request for summary disposition are not moot, and will not become moot at least until 60 days have elapsed since EPA provided public notice of the withdrawal (*see* 42 U.S.C. § 7607(b)(1)), without any challenge to the withdrawal notice having been filed.

CONCLUSION

For these reasons, State Petitioners respectfully request that this Court issue an order declaring EPA’s Action invalid. State Petitioners respectfully submit that EPA’s motion to dismiss this case should be denied, or that at minimum, the Court should postpone ruling on that motion until

after September 24, 2018, when 60 days will have passed from the date EPA provided the public notice of the withdrawal.

Dated: August 2, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this Opposition to Motion to Dismiss and Reply in Support of Summary Disposition was prepared in a proportionally spaced, 14-point font and that, according to the word-count program in Microsoft Word, it contains 882 words. *See* D.C. Cir. R. 18(b).

Dated: August 3, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2018, this Opposition to Motion to Dismiss and Reply in Support of Summary Disposition was electronically served on all parties through the appellate electronic case filing system.

Dated: August 3, 2018

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