ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

UNION OF CONCERNED SCIENTISTS, et al.,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,

Respondents.

No. 19-1230, and consolidated cases

FEDERAL RESPONDENTS' REPLY IN SUPPORT OF MOTION TO EXPEDITE

Petitioner State of California does not deny that it seeks to compel automobile manufacturers to meet State fuel economy standards that depart from the nationwide standards set by Respondents National Highway Traffic Safety Administration and the Environmental Protection Agency ("Federal Respondents"). The public has an unusual interest in the prompt disposition of Petitioners' attempts to undermine federal standards. The uncertainty flowing from this litigation is impacting industry investment and production decisions, in turn affecting the price, safety, availability, and emissions of light cars and trucks purchased across America. Petitioners' arguments opposing expedition lack merit and should be rejected.

I. FEDERAL RESPONDENTS HAVE ESTABLISHED GOOD CAUSE FOR EXPEDITION.

As Federal Respondents' motion explains, there is good cause for this Court to grant expedited consideration. Petitioners' oppositions do not establish otherwise. Petitioners claim that expedition is not warranted because all challenges to agency action engender regulatory uncertainty. Interest Group Opp. 10; State & Mun. Opp. 20. Although regulatory uncertainty alone might not ordinarily be sufficient to warrant expedition, the uncertainty provoked by California's actions here is far more prejudicial to the public interest than in a routine case. California has sought to place significant roadblocks in the way of compliance with the nationally-uniform regulatory framework established by the One National Program Action.

California does not disavow that it has sought to coerce automakers to comply with its regulatory regime through punitive procurement guidelines. It claims instead that its efforts to coerce automakers "have nothing to do with this litigation" and "are in no way contingent upon" this litigation. State & Mun. Opp. 21-22; *see also* Interest Group Opp. 14. But a State procurement policy requiring manufacturers to "recognize [California's] authority to set greenhouse gas and zero emission vehicle standards," Mot. 6, can hardly be unaffected by a federal court's determination that California has no such authority. At a minimum, by settling the underlying legal issue, a decision here would substantially obviate the risk to automakers who must presently choose between adhering to federal law and securing State contracts.

Second, it is irrelevant that a portion of the California program is currently aligned with existing federal standards. Interest Group Opp. 11; State & Mun. Opp. 15-16. California is still attempting to compel automakers to comply with a second regulatory regime that has been deemed unlawful under both the Energy Policy and Conservation Act and the Clean Air Act. Furthermore, as Petitioners themselves admit, not all parts of the preempted California program align with existing federal standards. Interest Group Opp. 13. EPA's action withdrew California's authority to impose zero-emission-vehicle standards.[1] *See* Mot. 4. Petitioners do not dispute their intent to enforce those standards. Rather, they argue that automakers face no harm because compliance with State standards will "facilitate[] automakers' compliance with federal emissions standards." Interest Group Opp. 13.

This vague assertion does not establish that all automakers would voluntarily comply with these standards absent California's dictate. Nor does it obviate the present harm to automakers from California's insistence that they *must* comply, despite federal law. Petitioners are thus incorrect that automakers "must make the

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[1] State Petitioners' claim that these standards were not the basis for Federal Respondents' motion, State & Mun. Opp. 16 n.15, is incorrect. The motion stated generally that automakers are impacted by uncertainty around whether they are "protected from varied state regulation of fuel economy," Mot. 5. Other statements concerning, for example, "pressure to adhere to California's preferred standards" were not particularized to greenhouse gas emission standards, but described California's regulatory regime generally. *See id.* at 4-6.

same investments and incur the same costs" whether these petitions are granted or not. *Id.* at 11 (internal quotation omitted).

Notably, California declined to seek a stay of the One National Program Action, which would have left its regulatory program intact during the pendency of this litigation. Having forgone this option, there is no question that California hopes to compel automaker compliance in circumvention of federal law. Without expedited consideration, California can continue to assert these extra-legal demands even longer.

In any case, California's "deemed to comply" provision, which allows automakers to satisfy California's greenhouse gas dictates by complying with existing federal standards, will have no application if the federal standards are revised as proposed. *See* State & Mun. Opp. 8. Petitioners concede that expedition may well be warranted if the federal standards change. Interest Group Opp. 15. But action on the federal standards is likely to occur while this case is pending,[2] at which time the opportunity to expedite this important predicate challenge will have passed. As these actions are two parts of an interrelated framework that *together* impact automakers' obligations, this Court should not deny expedition just because a second agency action might necessitate *even more* urgency. It should grant expedition now and, if the standards are revised, do so again in any challenges to that revision.

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[2] The final rule is currently pending with the Office of Information and Regulatory Affairs. *See* https://www.reginfo.gov/public/do/eoDetails?rrid=129423.

Petitioners cannot dispute that the acute regulatory uncertainty here creates a unique public interest in prompt resolution of this case. Petitioners' briefs rely almost exclusively on allegations that there is no irreparable harm, but that is not germane to the Federal Respondents' request.[3] Indeed, Petitioners' case law does not address requests for expedition at all – let alone requests made on the basis of unusual public interests. *See* Public-Interest Opp. at 15; *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (addressing standard for stay of agency orders); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (addressing standard for stay pending completion of agency reconsideration); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (addressing standard for stay pending appeal).

At the same time, Petitioners demonstrate no prejudice from expedition. *See infra* 8-11. To the contrary, Petitioners' accounts of their own harms support Federal Respondents' assertion of a broad public interest in prompt disposition. *See, e.g.*, Indus. Opp. 4 (noting significant investments upended by the Action that "harm Industry Petitioners"). Given the impacts of the present uncertainty on the

[3] Petitioners also claim that any harm is Respondents' fault, as they took a year to finalize the Action and delayed filing expedition motions. The first assertion is irrelevant: automakers did not face this conflict until the waiver was withdrawn. The second is meritless. Respondents' motion was filed 23 days after the last petition was docketed and before the procedural motions deadline for any case. *See* Handbook, Section VIII(B) (providing for motions to expedite within 30 days of docketing, according to the schedule set for "other procedural motions").

automotive sector and the public at large, *see* Mot. 4-6, Federal Respondents have established good cause for expedition. 28 U.S.C. § 1657(a).

II. THIS COURT HAS JURISDICTION TO CONSIDER THE PREEMPTION REGULATIONS.

Petitioners repeat their argument that it would be more efficient to hold these cases in abeyance until the district court first determines the validity of NHTSA's preemption regulation. State & Mun. Opp. 23 n.24; *see also* Indus. Opp. 5; Interest Group Opp. 6. The opposite is true.

EPA's waiver action is indisputably reviewable exclusively in this Court. 42 U.S.C. § 7607(b)(1); *see* Federal Respondents' Opp. to Mot. to Hold Pet. in Abeyance 4, 15. The Preemption Regulations are also exclusively reviewable in this Court. *Id.* at 15-20. As Federal Respondents have explained, the Preemption Regulations are "prescribed in carrying out any of sections 32901–32904 or 32908" and thus may be reviewed only through a petition in the court of appeals. 49 U.S.C. § 32909(a)(1). The Preemption Regulations carry out NHTSA's authority under 49 U.S.C. §§ 32901 through 32903, to promulgate regulations to protect the integrity of the national fuel economy program. *See, e.g.*, 84 Fed. Reg. 51,310, 51,316 (September 27, 2019). They are directly and integrally tied to NHTSA's authority to set and implement national, uniform fuel economy standards under 49 U.S.C. § 32902(a). *Id.* at 51,312.

Waiting for the district court proceedings to conclude could delay this case for months. Indeed, the district court will not even hear argument on the agencies'

Motion to Dismiss until April 16, 2020. *California v. Chao*, No. 1:19-cv-2907 (D.D.C.), Minute Order of Jan. 15, 2020. Nor will the district court's ruling on the agencies' motion to dismiss the complaints "sharpen and narrow the issues for this Court." Interest Group Opp. 17, citing *Green v. Dep't of Commerce*, 618 F.2d 836, 842 (D.C. Cir. 1980). *Green* involved a district court order rejecting one defense to a FOIA request, but leaving undecided whether any particular documents must be released or whether other defenses apply. 618 F.2d at 839. This Court found that the order was not final. The Court noted that once the district court issues an order that actually requires the release of specific documents, then "perhaps" such an order would "sharpen and narrow the legal issues that must eventually be decided by an appellate court." *Id.* at 841-42. In other words, the district court's decision in that case would apply legal standards to specific facts, which could lead to more effective appellate review. Here, in contrast, the issue before the district court is purely legal. Awaiting *that* court's views on *this* Court's jurisdiction will not streamline *this* Court's consideration of that issue.

III. FEDERAL RESPONDENTS ARE NOT BARRED FROM SEEKING EXPEDITION.

Petitioners claim that the Court's Handbook of Practice and Internal Procedures "does not contemplate a motion [to expedite] filed by a defender of the decision under review." Interest Group Opp. 16. This is incorrect. The Handbook allows for expedition of cases "in which the public generally, or in which persons not before the

Court, have an unusual interest in prompt disposition." Handbook, Section VIII(B). A petitioner is no more equipped than a respondent to assert that expedition serves the public interest, and such relief is equally available to all parties. The Handbook refers generally to "movants" or "counsel" seeking expedited review, not "petitioners." *Id.*

Nor is expedition precluded where the agency action has not been stayed. *See* Interest Group Opp. 9. The Handbook does not include this purported limitation. Handbook, Section VIII(B). And for good reason. In exceptional cases such as this, litigation in the normal course can create unacceptable burdens on parties or the public that can and should be minimized through expedited consideration, even though the challenged action remains in effect. *See* Mot. 4-7. As demonstrated in Federal Respondents' motion, automaker, states, and the public share an unusual and strongly compelling interest in the prompt disposition of these cases. Indeed, California's conduct here makes this case particularly exceptional. It is the rare case in which regulated stakeholders can be subjected to State penalty for stating that they will abide by federal law, but California has made it so here. *Id.*

IV. FEDERAL RESPONDENTS' PROPOSED SCHEDULE IS REASONABLE.

Finally, Petitioners claim that Federal Respondents' schedule is unworkable and prejudicial, and that this Court should issue an order soliciting proposed briefing schedules. State & Mun. Opp. 24; Interest Group Opp. 17-18; Indus. Opp. 4. This

argument is also misplaced. Petitioners have had ample opportunity in response to this motion to outline any counter-proposal for briefing. Federal Respondents filed their motion and furnished this Court with its proposed schedule 30 days ago.[4] Petitioners do not identify any reason why they were unable to offer any counter-proposal or why they need a separate invitation from the Court to do so.[5]

In any event, the proposed schedule is feasible and appropriate. The proposed briefing intervals diverge only slightly from those provided in the Federal Rules for a *typical* case, let alone an expedited one. Mot. 7. Petitioners nonetheless assert that these intervals are unreasonable because this is a complex proceeding with multiple petitioners. State & Mun. Opp. 24; Interest Group Opp. 17; Indus. Opp. 4. But far more complex cases have been briefed in similar time. In litigation over EPA's Clean Power Plan Rule, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.), the Court ordered on January 28th that Petitioners' opening briefs be filed on February 19th – only 22 days

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[4] Federal Respondents did not propose diversions from the briefing format provided in Rule 32(a)(7)(B)(1), because the Court's Handbook specifies that "[p]arties with common interests in consolidated . . . appeals must join in a single brief where feasible." Handbook, Section IX(A)(2). Petitioners' interests are aligned here so a single brief is feasible.

[5] Petitioner's assertion that expedition should be denied to allow resolution of purported disputes over the administrative record, State & Mun. Mot. 24, ignores the standard for granting expedition. The possibility of another procedural motion does not bear on whether the public's interest warrants expedition. *See Producers of Renewables United for Integrity Truth and Transparency v. EPA*, No. 18-1202 (D.C. Cir.), ECF Nos. 1765529 & 1784954 (considering motion to supplement record after granting expedited schedule).

later. Respondent EPA's brief was due 38 days later on March 28th. There, opening briefs were 42,000 words, more than three times the typical limit, and coordination was required across thirty-nine separate petitions. Likewise, litigation concerning EPA's Cross-State Air Pollution Rule, *EME Homer City Generation, L.P., v. EPA*, No. 11-1302 (D.C. Cir.), involved 45 separate petitions. Petitioners' combined 28,000-word briefs were due February 9, 22 days after the Court's January 18th scheduling order, with Respondents' briefs due 21 days later on March 1.[6]

Nor is Federal Respondents' proposed schedule "lopsided" in Respondents' favor. Interest Group Opp. 18. If anything, it is lopsided in Petitioners' favor. Under the proposed schedule, Federal Respondents have 30 days to file their brief. But Petitioners have had since at least November 25, 2019, (the date of the last-filed petition) to begin drafting their arguments – a total of 77 days before the proposed deadline for their opening brief. Indeed, many Petitioners challenged the One National Program Action within 24 hours of issuance, *see State of California v. Chao*, No. 19-2826 (D.D.C. filed Sept. 20, 2019). These Petitioners have already had four months to hone their arguments and will have had 143 days, or nearly five months, by the time their opening brief is due. The 14-day interval for reply briefs, while shorter than provided in Rule 32, is consistent with other expedited cases. *See West Virginia*,

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[6] In both instances, the petitioners requested expedition and the rule was stayed. But those distinctions do not bear on whether the proposed briefing intervals are infeasible in this case.

No. 15-1363, ECF No. 1595922 (18 days to reply to at least six briefs); *EME Homer*, No. 11-1302, ECF No. 1353334 (11 days to reply to four briefs).

Petitioners also cannot fairly assert that the proposal is "prejudicial" because it provides for opening briefs 24 days after the end of procedural briefing. Interest Group Opp. 17-18. Federal Respondents filed their request for expedition a month ago, before the procedural motions deadline, so Petitioners have had ample notice of these dates. Moreover, procedural briefing deadlines were extended twice at Petitioners' request. *See* ECF Nos. 1817810, 1821518. If Petitioners now believe they have left themselves insufficient time for preparing opening briefs, that is a problem of their own devising. It should not prejudice a timely request for expedition.

Federal Respondents acknowledge that they seek a compressed schedule, notwithstanding the case's complexity. But that is what the Court's expedition process allows. Federal Respondents have established that the public has an unusual interest in prompt disposition of this case. The Court should grant the Motion to Expedite and enter the briefing schedule proposed therein.

DATED: January 17, 2020

Respectfully submitted,

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/s/ Chloe H. Kolman
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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2020, a copy of the foregoing Federal Respondents' Reply in Support of Motion to Expedite was served electronically through the Court's CM/ECF system on all counsel of record.

/s/ Chloe H. Kolman
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