ORAL ARGUMENT NOT YET SCHEDULED

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

UNION OF CONCERNED SCIENTISTS, et al., *Petitioners*, *v.* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *Respondent*.	No. 19-1230 and consolidated cases

INTERVENORS' OPPOSITION TO
PETITIONERS' MOTIONS FOR ABEYANCE

Intervenors the Coalition for Sustainable Automotive Regulation (the "Coalition") and the Automotive Regulatory Council, Inc. (the "Council") (collectively, "Intervenors") respectfully oppose the Motions for Abeyance filed in the above-captioned case and all cases consolidated herewith.[1]

[1] Consolidated cases are *California v. Wheeler*, No. 19-1239, *South Coast Air Quality Management District v. EPA*, No. 19-1241, *National Coalition for Advanced Transportation v. EPA*, No. 19-1242, *Sierra Club v. EPA*, No. 19-1243, *Calpine Corp. v. EPA*, No. 19-1245, *City & County of San Francisco v. Wheeler*, No. 19-1246, and *Advanced Energy Economy v. EPA*, No. 19-1249. On January 3, 2020, Petitioners in Nos. 19-1242 and 19-1245 filed a notice joining the motions for abeyance filed in the consolidated cases.

BACKGROUND

These consolidated petitions for review concern the joint final rule of the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) titled, "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" (the "ONP Rule"). 84 Fed. Reg. 51,310 (Sept. 27, 2019). The ONP Rule announced the agencies' final action on a portion of the joint rulemaking package that was proposed by EPA and NHTSA on August 24, 2018.[2] The ONP Rule has three parts. First, NHTSA affirmed that federal law preempts state regulation of tailpipe greenhouse gas (GHG) emissions standards. *Id.* at 51,311–28. Second, EPA finalized its withdrawal of preemption waivers that it had previously granted to California under Section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b). 84 Fed. Reg. at 51,328–50. Third, EPA also finalized its determination that Section 177 of the Clean Air Act, 42 U.S.C. § 7507, does not authorize other states to adopt and enforce California's GHG standards. 84 Fed. Reg. at 51,350–52.

I. Factual Background

The ONP Rule reaffirms the longstanding practice of a unified national standard for fuel economy standards. For over 40 years, motor vehicle fuel economy

[2] *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Notice of Proposed Rulemaking, 83 Fed. Reg. 42,986 (Aug. 24, 2018) (the "2018 NPRM").

was regulated solely by NHTSA through the Corporate Average Fuel Economy (CAFE) program. As NHTSA has long recognized (and as Petitioners cannot and do not dispute), the direct correlation between fuel economy and tailpipe GHG emissions means that regulations governing tailpipe GHG emissions are essentially fuel economy standards. *See, e.g.*, 83 Fed. Reg. at 43,232–35 (recounting the history and rationale for EPCA preemption of state emissions standards related to federal fuel-economy standards since 2002). In 2004, however, the California Air Resources Board (CARB) began rulemaking to regulate GHG emissions from automobiles. Twelve states adopted California's regulations pursuant to Section 177 of the Clean Air Act, 42 U.S.C. § 7507. And EPA moved to regulate tailpipe GHG emissions following *Massachusetts v. EPA*, 549 U.S. 497 (2007).

A 2009 agreement among EPA, NHTSA, and CARB, called the "One National Program" agreement, created a unified national program for fuel economy-related regulation. As part of that agreement, NHTSA and EPA committed to issuing federal fuel economy and GHG emissions regulations jointly, and CARB agreed to deem automakers who complied with federal regulations as having complied with state regulations, as well. The One National Program agreement had the effect of removing the specter of overlapping and inconsistent standards regulating tailpipe GHG emissions and motor vehicle fuel economy, and avoided the need for federal preemption of the state tailpipe GHG standards. EPA and NHTSA

reaffirmed their commitment to the One National Program agreement through a series of rulemakings following the agreement.

On August 28, 2018, EPA and NHTSA issued their joint NPRM, *see supra* note 2, that affirmed that federal law preempts state regulation of tailpipe GHG emissions standards and that EPA cannot grant a preemption waiver for California tailpipe GHG standards. While the federal rulemaking was pending and discussions between the agencies and California were underway, California promulgated a rulemaking that would effectively withdraw itself and the other states that have adopted California's GHG program from the One National Program. On November 13, 2018, CARB formally amended its GHG emissions regulation to provide that the "deemed to comply" provision will no longer apply if the federal standards are amended in any way. California has not sought either a Section 209(b) waiver or a "within the scope" determination from EPA for its amended regulations—now without the key "deemed to comply" provision, once the federal standards are amended[3]—despite the requirement that it do so under Section 209(b) of the Clean Air Act.

[3] The forthcoming Part Two of the SAFE Vehicles rulemaking will establish uniform fuel economy and GHG standards for Model Years 2021–2026. *See* 83 Fed. Reg. 42,986 (Aug. 24, 2018). The agencies are expected to publish the final standards early this year.

On August 5, 2019—shortly before the ONP Rule was published—CARB sent a letter to all automakers regarding the State's GHG program. In the letter, CARB informed automakers that to generate a credit bank for California's GHG program, they must notify CARB in writing that they will comply with the State's regulations rather than federal standards. CARB gave automakers only eleven days to decide whether to make this declaration of compliance.

On September 19, 2019, CARB held a public meeting during which its members discussed their enforcement strategy in light of the forthcoming ONP Rule. CARB's Chief Counsel stated that "[w]e would take the position that our standards are still in effect … and so we can enforce against all of the car companies … in future years." Statement of Ellen Peter, Meeting of State of California Air Resources Board at 32 (Sept. 19, 2019), https://tinyurl.com/rnenrbp. CARB backtracked on this position soon after, releasing a statement that it would *not* enforce its regulations while litigation was pending. *States: CARB Says It May Enforce Auto GHG Rules After Waiver Suit*, Inside EPA/Climate (Sept. 25, 2019), https://tinyurl.com/tllh3xr. Instead, CARB threatened automakers that, if California were eventually to prevail, it might retroactively enforce its regulations for the period in which the litigation was pending. *Id.*

Then, on November 15, 2019—shortly after the ONP Rule was published—the California Department of General Services announced two new purchasing

policies for the government of California. One of the new policies—scheduled to take effect last week, on January 1, 2020—prohibits any state agency from purchasing vehicles from a manufacturer that does not "recognize" California's authority to set greenhouse gas and zero emission vehicle fuel standards. *See* California Department of General Services, *Vehicle Manufacturer Purchasing Restrictions*, https://tinyurl.com/w7dg9x9 ("Beginning January 1, 2020, state agencies are required to purchase vehicles from Original Equipment Manufacturers (CARB-aligned OEMs) that recognize California's authority to set vehicle emissions standards under section 209 of the Clean Air Act."). According to California Governor Gavin Newsom, the policy is intended to punish automakers who disagree with the State regarding its authority to regulate motor vehicle GHG emissions. *See* Coral Davenport, *California to Stop Buying from Automakers that Backed Trump on Emissions*, N.Y. Times (Nov. 18, 2019), https://tinyurl.com/r4n4q6s (quoting Governor Newsom as stating that "[c]armakers that have chosen to be on the wrong side of history will be on the losing end of California's buying power").

II. Procedural Background

The ONP Rule has been subject to numerous challenges in several different forums. On September 27, 2019, an initial "protective" petition for review of NHTSA's preemption determination was filed in this Court by one of the Petitioners

in the instant proceeding. *See Envtl. Def. Fund v. NHTSA*, No. 19-1200. That case was dismissed at that Petitioner's request on November 22, 2019. This challenge was commenced on October 28, 2019, when Petitioners filed a second "protective" petition for review of NHTSA's preemption determination.[4] Each of the seven subsequent petitions filed in this Court challenging the ONP Rule have since been consolidated with this case. *See supra* note 1 (listing consolidated cases). Many of these later-filed petitions also challenge EPA's withdrawal of California's Section 209(b) preemption waiver, in addition to protectively challenging NHTSA's preemption determination.

In the U.S. District Court for the District of Columbia, the first challenge to NHTSA's rulemaking was filed on September 20, 2019. *See California v. Chao*, No. 1:19-cv-02826-KBJ. Then, on September 27, 2019, Petitioners in this action also filed a complaint in the district court. *See Envtl. Def. Fund v. Chao*, No. 1:19-cv-02907-KBJ. This action, along with another challenge filed on November 14, 2019, *S. Coast Air Quality Mgmt. Dist. v. Chao*, No. 1:19-cv-03436-KBJ, was consolidated with the first-filed action on December 18, 2019. Importantly, these actions in the district court only purport to challenge NHTSA's preemption determination—not EPA's waiver determination.

[4] On November 21, 2019, this Court granted Intervenors' motion for leave to intervene in these proceedings. *See* Dkt. No. 1816934.

After the first challenges were filed in this Court and in the district court, California submitted a petition for clarification or reconsideration to EPA. *See* State & Mun. Pet'rs' Mot. for Abeyance, App'x A, Dkt. No. 1821653. Later, on November 26, 2019, the State and Municipal Petitioners in this action submitted another petition for reconsideration to EPA. *See id.*, App'x B. EPA has not acted on either petition.

ARGUMENT

When exercising its discretion to hold a proceeding in abeyance, federal courts must balance their "interests in judicial economy and any possible hardship to the parties." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732–33 (D.C. Cir. 2012) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 259 (1936)). Only this Court will be able to resolve all the claims that Petitioners raise on the merits. Sooner or later, Petitioners will therefore have to incur the burdens and expense of merits briefing. Against that cost for Petitioners must be weighed Intervenors' need to know with certainty what emissions standards will apply in California and the Section 177 States in Model Year (MY) 2021, which under applicable regulations may have already started for some vehicle manufacturers. All manufacturers will soon have to meet with California officials to determine how to comply with the California GHG standards and then to incur the costs of complying with those standards—if

those standards are enforceable.[5] Noncompliance with California regulations and those of the Section 177 states is subject to heavy penalties. There is an urgent need for this Court to take up the merits as soon its calendar permits. *See* Intervenors' Mot. for Expedited Consideration, Dkt. No. 1821514. Accordingly, this Court should deny Petitioners' motions.

I. Considerations of Judicial Economy Support Denying Petitioners' Motions

Judicial economy would be best served by denying Petitioners' motions for abeyance. While Petitioners cite ongoing proceedings in the district court and before EPA as factors favoring abeyance, neither of those forums has jurisdiction to resolve all of the issues under dispute in these consolidated cases. In the district court, plaintiffs have challenged only NHTSA's preemption determination (the "Preemption Regulations"), and the district court's jurisdiction over that claim is intensely disputed. Further, Petitioners' requests for reconsideration to EPA raise issues relating only to EPA's portion of the rulemaking.

Under 49 U.S.C. § 32909, jurisdiction over challenges to NHTSA's rulemaking—including jurisdiction to determine whether NHTSA has the statutory authority claimed—lies exclusively in the courts of appeal. Petitioners claim that petitions for review of NHTSA's action should be held in abeyance because,

[5] Such planning sessions for MY 2021 in California, if they have not already occurred, will take place this winter or in the spring of 2020.

according to Petitioners, the Preemption Regulations were not prescribed pursuant to one of the six specific provisions that fall under EPCA's direct review provision, 49 U.S.C. § 32909. *See* NGO Pet'rs' Mot. for Abeyance at 12, Dkt. No. 1821672.

However, the district court does not have jurisdiction to hear a challenge to NHTSA's Preemption Regulations, as 49 U.S.C. § 32909 provides for exclusive review in the court of appeals of all "regulations prescribed in carrying out any of sections 32901–32904 or 32908 of this title." *Id*. § 32909(a)(1). With this provision, Congress determined that the court of appeals has exclusive authority to review not only the specific regulations directly promulgated under the provisions cited in Section 32909(a)(1), but also any regulations NHTSA issues that more broadly "carry[] out" those sections of the statute.

The Petitioners cite to the Supreme Court's decision in *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018) ("*NAM*"), as support for its position that challenges to the Preemption Regulations should be heard in the district court in the first instance. But Petitioners' reliance on *NAM* is misplaced. EPCA's relevant jurisdictional provision, 49 U.S.C. § 32909(a), is a far broader judicial review provision than is 33 U.S.C. § 1369(b)(1), the provision at issue in *NAM*. Section 32909(a) is not limited to particular, discrete agency actions or regulations, as is 33 U.S.C. § 1369(b)(1). Rather, Section 32909 generally provides for jurisdiction over challenges to any regulations "carrying out" any aspect of the

expansive provisions it cites. The Preemption Regulations "carry[ ] out" the EPCA provisions cited in 49 U.S.C. § 32909. Those regulations are amendments to the fuel economy standards in Parts 531 and 533 of NHTSA's regulation, *see* 84 Fed. Reg. at 51,361–63, which Congress has authorized the Secretary of Transportation to adopt under Section 502 of the Energy Policy and Conservation Act, as amended, 49 U.S.C § 32902.

As NHTSA explained when adopting the Preemption Regulations, it did so in order to avoid interference with its Section 502 standard-setting authority. *See* 84 Fed. Reg. at 51,319; *see also id*. at 51,320 ("[G]iven the need for clarity on preemption, and *in order to give effect to existing standards established pursuant to 49 U.S.C. [§] 32902*, NHTSA is issuing this final rule now before making a final determination on the standards portion of the proposal.") (emphasis added). While there should be no legitimate question whether NHTSA properly invoked its authority under 49 U.S.C. § 32902 in issuing the Preemption Regulations, that question will need to be answered by this Court, and not the district court.

Petitioners' reliance on *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 718–21 (D.C. Cir 2016), is similarly inapposite. As with *NAM*, the jurisdictional review provision at issue in *Loan Syndications* is not as broad as EPCA's direct review provision, as it provides that rules promulgated "pursuant to" certain sections—as opposed to rules which "carry out" certain provisions—may be

reviewed directly by the Court of Appeals. *Id*. at 720; 15 U.S.C. § 78y(b)(1). Moreover, the Court in *Loan Syndications* made clear that a direct review statute simply must "colorably" authorize an appellate court's jurisdiction over a rulemaking. *Loan Syndications*, 818 F.3d at 723. NHTSA repeatedly invoked Sections 32901 through 32903, provisions cited by 49 U.S.C. § 32909, as the source of its rulemaking authority for the ONP Rule. *See* 84 Fed. Reg. at 51,317–20. Under these circumstances, at the very least, it is certainly "colorable" that NHTSA's regulations were "prescribed under" one of the enumerated EPCA sections. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 (2006).

As for the review of EPA's actions, this Court has exclusive jurisdiction over challenges to EPA's rulemaking under 42 U.S.C. § 7607(b)(1), and Petitioners do not dispute that EPA's preemption waiver determination is reviewable only by this Court. As a result, this Court has exclusive jurisdiction to decide *all* issues relating to NHTSA and EPA's joint action: 49 U.S.C. § 32909 vests jurisdiction to review Petitioners' challenges to NHTSA's rulemaking exclusively in the federal courts of appeals; and under 42 U.S.C. § 7607(b)(1), this Court has exclusive jurisdiction over challenges to EPA's rulemaking. Indeed, as Petitioners recognize, the NHTSA and EPA portions of the joint rulemaking are inextricably intertwined. *See* NGO Pet'rs' Mot. for Abeyance at 2, Dkt. No. 1821672 ("EPA relied on NHTSA's Preemption

Rule as a basis for the Waiver Revocation and then relied on the Waiver Revocation to explain the Section 177 Determination.").

The Supreme Court has explained that "bifurcation of review of orders issued in the same proceeding" wastes judicial resources and is disfavored. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). Petitioners do not dispute that EPA's waiver determination is reviewable only by this Court, meaning that this Court will decide the challenges to EPA's portion of the rulemaking regardless of what ultimately happens in the district court. It would be an unnecessary waste of judicial resources for this dispute to proceed on two separate tracks when all issues are properly before, and can only be decided by, this Court. But that is precisely what will happen if Petitioners' motions are granted. Bifurcating the two challenges over the same joint agency action would mean that two courts within the same circuit will be asked to separately decide the same issue. And the decision of the lower court will almost certainly be reviewed by this Court, as even Petitioners recognize, resulting in further duplication of judicial effort. It would thus conserve the resources of all parties and courts involved for this case to continue without delay in this Court; to proceed otherwise would contravene important considerations of judicial economy.

More specifically, the Supreme Court has recognized the value of consistency and unity in addressing fuel economy and tailpipe GHG emissions. In

Massachusetts v. EPA, the Court addressed EPA and NHTSA's overlapping mandates over tailpipe emissions. It cautioned that although "[t]he two obligations may overlap, … there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." 549 U.S. at 532. To hold Petitioners' challenge in abeyance for bifurcated proceedings flies in the face of the Supreme Court's admonition that duplicative procedures in this area be avoided.

Finally, the petitions for reconsideration submitted to EPA do not justify abeyance in this case. The Administrative Procedure Act provides that petitions for reconsideration do not affect the finality of an agency rule for the purposes of judicial review. *See* 5 U.S.C. § 704 ("[A]gency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application … for any form of reconsideration."). Petitioners cite *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008), for the proposition that this Court often holds cases in abeyance when a petition for reconsideration is pending. *See* State & Mun. Pet'rs' Mot. for Abeyance at 12, Dkt. No. 1821653. But *Sierra Club* involved more than just a *petition* for reconsideration. There, "EPA agreed to *take comment* on the [petition], and the consolidated cases were held in abeyance pending reconsideration." *Sierra Club*, 551 F.3d at 1023 (emphasis added). Here, the parties are faced with markedly different circumstances: EPA has not agreed to take comment on the petitions for reconsideration upon which Petitioners rely.

Moreover, EPA has given no indication that it will reconsider its decision to withdraw a preemption waiver for a program where California has unilaterally sought to change key terms—*i.e.*, by striking the "deemed to comply" provision that is the heart of the One National Program bargain. EPA and California have for months been engaged in acrimonious negotiations seeking to avoid this controversy, and it is naïve to believe that a motion for reconsideration will cause EPA to change its position.

Furthermore, pursuant to Section 307(b)(7)(B) of the Clean Air Act, EPA is only required to "convene a proceeding for reconsideration of the rule" if "it was impracticable to raise such objection" during the period for public comment "or if the grounds for such objection arose after the period for public comment" and if the objection "is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(b). In other words, the petitions for reconsideration can be entirely denied unless EPA determines that the new issues raised in the petitions are "of central relevance to the outcome of the rule." Here, the new issues raised in the petitions for reconsideration are not of central relevance to the outcome of the rule, and therefore the petitions should be denied by EPA. Thus, holding the consolidated

cases in abeyance will not result in EPA reconsidering or clarifying its positions, and so ultimately will not promote judicial economy whatsoever.[6]

For these reasons, Petitioners' arguments about judicial economy are unavailing. It would hardly conserve judicial resources for this controversy to proceed, in staggered and duplicative fashion, in three separate forums: the district court, EPA, and this Court. Because this Court has jurisdiction over all aspects of the challenges to the ONP Rule, judicial economy strongly favors prompt resolution in this Court.

II. Intervenors' Member Companies Would Be Irreparably Harmed If This Case Is Held in Abeyance

Petitioners also fail to carry their burden of showing that abeyance would not harm the parties to this case. As Intervenors have discussed at greater length in their Motion for Expedited Consideration, *see* Dkt. No. 1821514, Intervenors' member companies will suffer irreparable injury if this case is unduly delayed. Thus, expedited consideration—not delayed consideration—is warranted here.

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[6] All arguments and issues raised in the petitions for review filed in this Court can be heard and addressed during the merits briefing process. Of course, this Court cannot hear the new issues raised in the petitions for reconsideration for the first time. But Section 307(b)(7)(B) of the Clean Air Act empowers this Court to determine whether those issues raised in the petitions for reconsideration need to be considered by EPA. *See* 42 U.S.C. § 7607(d)(7)(b).

Protracted litigation over the ONP Rule will continue to undermine the regulatory certainty provided by a unified national standard. But Intervenors are not facing "regulatory uncertainty alone." NGO Pet'rs' Mot. for Abeyance at 17, Dkt. No. 1821672.[7] Because automakers' planning, development, and production process requires so much lead time, a single national standard enables Intervenors' members to make predictable investments in their nationwide fleets. This, in turn, produces better outcomes with respect to consumer choice, costs, regulatory compliance, emissions, and vehicle availability. But while Petitioners' challenge is pending, Intervenors' members will be required to expend unrecoverable resources developing production plans preparing for this possibility—even if California's separate standards are later deemed to be illegal. Prompt disposition is particularly important as Movants' members prepare to certify their fleets for MY 2021, a

[7] In their motion, NGO Petitioners argue that "regulatory uncertainty alone is not a 'real hardship,'" quoting *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812 (2003). However, the decision in *National Park Hospitality Ass'n* is not applicable to these circumstances and therefore has no bearing on whether the hardship that Intervenors' member companies will suffer provides support for Intervenors' position that this case should not be held in abeyance. The Supreme Court in *National Park Hospitality Ass'n* noted only that uncertainty as to the validity of a legal rule does not constitute hardship in the context of whether a controversy is ripe for judicial resolution. *Id*. at 811 ("[M]ere uncertainty as to the validity of a legal rule does not constitute a hardship for purposes of the ripeness analysis."). There is no dispute that the ONP Rule is ripe for judicial review.

process that requires Movants' members to make irreversible decisions about their models and fleet mix by October 2020 at the latest.

California's 2018 amendment to its GHG regulations, which would eliminate the option of complying with the federal GHG standards if those standards are revised, threatens further irreparable harm to Intervenors' members. Despite lacking a waiver from EPA authorizing it to regulate GHG emissions, California continues to seek to enforce its separate regulatory regime against manufacturers—and financially punish manufacturers who disagree with its legal position articulated in these consolidated cases. These actions have tangible and immediate consequences for Intervenors and their members: as noted above, as of January 1, 2020, California has ostensibly barred every agency of the government of California from purchasing vehicles from Intervenors' members, and CARB recently notified automakers that they must declare their intent to comply with the State's GHG regulations or forfeit the ability to generate and use GHG credits. This latter development is important because manufacturers that had previously complied with California's regulations through the "deemed to comply" provision would not (according to California) have the opportunity to use credits that were generated before MY 2020. This could have the effect of radically changing the stringency of the rule: even if California's standards are the same as the federal standards, it will be more difficult to comply with California's requirements without the benefit of banked credits.

The harm from California's elective actions, as articulated in this litigation, is real and immediate. For example, the government of California is a large purchaser of automobiles, including from Intervenors' member companies—between 2016 and 2018, California purchased $58.6 million in vehicles from GM, $55.8 million from FCA, and $10.6 million from Toyota, according to CNN Business. *See, e.g.*, Chris Isidore & Peter Valdes-Dapena, *California Won't Buy Cars from GM, Chrysler or Toyota Because They Sided with Trump over Emissions*, CNN Business (Nov. 19, 2019), https://tinyurl.com/tnjaq47. Under the recently announced purchasing policy, Intervenors' member companies will irreparably lose the opportunity to pursue such sales from a major customer. Accordingly, the longer the validity of California's interpretation of the preemption and waiver issues that will be decided in this matter remains undecided, the greater the financial harm that will be caused to Intervenors by the permanent loss of the opportunity for California's patronage.

What's more, CARB has threatened that, if Petitioners prevail in this litigation, it may retroactively enforce its regulations for the time during which this litigation was pending. *States: CARB Says It May Enforce Auto GHG Rules After Waiver Suit*, Inside EPA/Climate (Sept. 25, 2019), https://tinyurl.com/tllh3xr. All of this is designed to pressure automakers to comply with a program that does not have a requisite Clean Air Act preemption waiver and two federal agencies have stated is preempted by federal law. California should not be allowed to voluntarily

undertake these actions during the pendency of these petitions and simultaneously seek to delay resolution of its petitions for review to accentuate the pressure that its extrajudicial actions have on automakers.

This Court has exclusive jurisdiction to decide all challenges to the ONP Rule. Holding this case in abeyance would only cause needless injury to Intervenors.

CONCLUSION

For the foregoing reasons, Petitioners' motions to hold these proceedings in abeyance should be denied.

Dated: January 10, 2020

Respectfully submitted,

/s/ *Raymond B. Ludwiszewski*

RAYMOND B. LUDWISZEWSKI
RACHEL LEVICK CORLEY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036
(202) 955-8500
Fax: (202) 467-0539
RLudwiszewski@gibsondunn.com
RCorley@gibsondunn.com

Attorneys for the Coalition for Sustainable Automotive Regulation and the Automotive Regulatory Council, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opposition to Petitioners' Motions for Abeyance complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 4,401 words. I further certify that this Opposition complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: January 10, 2020

/s/ *Raymond B. Ludwiszewski*

RAYMOND B. LUDWISZEWSKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036
(202) 955-8500
Fax: (202) 467-0539
RLudwiszewski@gibsondunn.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2020, I electronically filed the foregoing Opposition to Petitioners' Motions for Abeyance with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's appellate CM/ECF system.

I further certify that service was accomplished on the parties in this case via the Court's CM/ECF system.

/s/ *Raymond B. Ludwiszewski*

RAYMOND B. LUDWISZEWSKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036
(202) 955-8500
Fax: (202) 467-0539
RLudwiszewski@gibsondunn.com