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, *et al.*, Respondents.	No. 19-1230, and consolidated cases

STATE AND LOCAL GOVERNMENT PETITIONERS' OPPOSITION TO MOTIONS FOR EXPEDITED CONSIDERATION

Respondents United States Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA"), and Respondent-Intervenors the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers move to expedite these consolidated cases. Those motions should be denied. This Court grants motions to expedite "very rarely" and only when the reasons for doing so are "strongly compelling."[1] But Movants fail to show any "strongly compelling" reasons why the undersigned State, Municipal, and Air District Petitioners in case numbers 19-1239, 19-1241,

[1] Handbook of Practice and Internal Procedures for the United States Court of Appeals for the District of Columbia Circuit 34 (2019) ("D.C. Circuit Handbook").

and 19-1246 (collectively, "State and Local Government Petitioners") should be forced to rush their challenge to Respondents' assault on state authority.

Respondents are in no position to call upon this Court and Petitioners to hurry this challenge, given that Respondents delayed finalizing their attack on state emission standards for more than a year after proposing it, and have yet to finalize the other parts of that same proposal—namely, the parts involving changes to *federal* standards that apply to the same automakers and vehicles but on a nationwide scale.

Moreover, while the subset of automakers represented by Respondent-Intervenors[2] complain about uncertainty, they do not even begin to explain how expediting *this* litigation would dispel any uncertainty they face (which in any event was created by Respondents, not Petitioners). Respondent-Intervenors currently must plan to comply with federal greenhouse gas standards that are harmonized with the California standards at issue in this case, and any uncertainty about the future of those federal standards will not be resolved by this litigation. Further, Respondent-Intervenors fail to provide any evidence of the alleged effects

[2] The exact number of automakers represented by Respondent-Intervenors remains unclear given the apparent dissolution of Respondent-Intervenor Association of Global Automakers and its merger into a new group whose leader stated that its members "don't have a position or a stake in the litigation related to preemption and waivers." Maxine Joselow, *Trade associations merge after clean cars rift*, E&E NEWS GREENWIRE (Jan. 8, 2020), https://www.eenews.net/greenwire/stories/1062027259.

of any uncertainty created by the pendency of this litigation, and their bare references to "significant costs" entirely disregard that automakers are currently *over*-complying with California's standards.

The other bases for expedition referenced in the motions are likewise not compelling. California's vehicle purchasing program is not at issue in this litigation. And the sheer size of the automobile industry is no basis for expedition. If the mere size of a regulated industry justified expedition, this Court would expedite dozens of cases every year. Of course, it does not. And, as explained in previous filings, there are compelling reasons to hold this case in abeyance, rather than expedite.[3]

Therefore, the undersigned State and Local Government Petitioners respectfully request that the Court deny Respondents' and Respondent-Intervenors' motions for expedition.

BACKGROUND

This litigation involves consolidated challenges to "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," in which EPA and NHTSA finalized determinations restricting state authority to adopt and

[3] *See* State and Municipal Petitioners' Mot. to Hold Case in Abeyance, ECF No. 1821653 (filed Dec. 26, 2019); *see also* Public Interest Petitioners' Mot. to Hold Case in Abeyance, ECF No. 1821672 (filed Dec. 26, 2019).

enforce vehicle emission standards. 84 Fed. Reg. 51,310 (Sept. 27, 2019) ("Final Actions").

I. STATUTORY FRAMEWORK

A. State Vehicle Emission Standards and the Clean Air Act

The Clean Air Act directs EPA to prescribe vehicle emissions standards for new motor vehicles and generally prohibits states from adopting their own standards. *See* 42 U.S.C. §§ 7521(a)(1), 7543(a). However, Congress preserved California's inherent health and welfare authority by providing the state with the ability to seek a waiver of federal preemption to adopt and enforce its own standards. And Congress required EPA to grant the waiver if certain conditions were met. *Id.* § 7543(b); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998).[4] Since then, Congress has "ratif[ied] and strengthen[ed] the California waiver provision and … affirm[ed] the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare." *Motor and Equipment Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1110 (D.C. Cir. 1979). Congress also added Section 177 to the Clean Air Act to permit other states to "adopt and enforce" California's standards, under certain conditions. *Chamber of Commerce*

[4] California is the only state that qualifies for this preemption waiver because it, alone, had adopted vehicle emissions standards before March 30, 1966. *See* 42 U.S.C. § 7543(b); *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1296 (D.C. Cir. 1979).

v. EPA, 642 F.3d 192, 197 (D.C. Cir. 2011) (citing 42 U.S.C. § 7507). Thus, Congress expressly authorized the existence of two sets of vehicle emission standards—EPA's and California's—with other states free to choose between the two.

California obtained its first preemption waiver in 1968. 33 Fed. Reg. 10,160 (Jul. 16, 1968). In the ensuing six decades, California has received more than one hundred waivers,[5] including for standards regulating pollutants for which federal standards did not yet exist.[6] Before the Final Actions challenged here, EPA had never sought to revoke a waiver it had previously granted.[7]

The many standards for which EPA has granted California waivers regulate tailpipe emissions of, inter alia, nitrogen oxides, carbon monoxide, particulate matter, and greenhouse gases. In addition, EPA has repeatedly granted California waivers for the state's technology-forcing mandate requiring that a certain number or percentage of vehicles sold or delivered in California by each automaker emit zero exhaust emissions. California first adopted such zero-emission vehicle

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[5] Barry G. Rabe, *Leveraged Federalism and the Clean Air Act*, in LESSONS FROM THE CLEAN AIR ACT: BUILDING DURABILITY AND ADAPTABILITY INTO U.S. CLIMATE AND ENERGY POLICY 113, 132 (Ann Carlson & Dallas Burtraw eds., 2019).

[6] *E.g.*, 34 Fed. Reg. 7,348 (May 6, 1969) (nitrogen oxides vehicle emission standards).

[7] Rabe, *supra* note 5, at 133.

standards in 1990, received its first preemption waiver for these standards in 1993, and has continued to receive waivers for updates to the program.[8] 58 Fed. Reg. 4,166 (Jan. 13, 1993); 71 Fed. Reg. 78,190 (Dec. 28, 2006); 76 Fed. Reg. 61,095 (Oct. 3, 2011); 78 Fed. Reg. 2,112 (Jan. 9, 2013).

B. Fuel Economy Standards and the Energy Policy and Conservation Act

In 1975, Congress adopted the Energy Policy and Conservation Act to reduce petroleum consumption, in part by creating a federal fuel economy program "to provide for improved energy efficiency of motor vehicles." Pub. L. No. 94-163, § 2, 89 Stat. 871, 874 (1975). Congress also preempted state laws "relating to fuel economy standards or average fuel economy standards applicable to automobiles covered by" an average fuel economy standard prescribed under the Act. *Id.*, § 301, 89 Stat. at 914.

The Secretary of Transportation must prescribe "maximum feasible" corporate average fuel economy standards for new vehicles. 49 U.S.C. § 32902(a). In setting these standards, the Secretary must consider several factors, including vehicle emission standards. As originally enacted, the Act required the Secretary to consider the effect of other "Federal standards," which expressly included

[8] A zero-emission vehicle produces zero exhaust emissions of greenhouse gases and other air pollutants such as particulate matter. Cal. Code Regs., tit. 13, § 1962.2. Zero-emission vehicles include full battery-electric and hydrogen fuel cell vehicles.

"emissions standards applicable by reason of Section 209(b) of the [Clean Air] Act," i.e., standards for which California had obtained a waiver. Pub. L. No. 94-163, § 301, 89 Stat. 871, 904-5. In other words, Congress required consideration of *both* EPA's and California's vehicle emission standards. As part of an explicitly non-substantive recodification in 1994, Congress simplified the statutory language to require consideration of "other motor vehicle standards of the Government." Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 1060 (1994) (codified as amended at 49 U.S.C. § 32902(f)). And NHTSA, to which the Secretary has delegated authority, has continued to consider California's vehicle emission standards when setting fuel economy standards. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 346-47 & n.54 (D. Vt. 2007) (listing a dozen occasions NHTSA has considered California's emission standards as "other motor vehicle standards of the Government").

C. Greenhouse Gas Standards and the Development of the National Program

In 2004, California adopted the nation's first standards for tailpipe emissions of greenhouse gases, for model years 2009-2016. Cal. Code Regs., tit. 13, § 1961.1. Private plaintiffs, including some Respondent-Intervenors, challenged these standards as preempted by the Energy Policy and Conservation Act. Both courts that reached the merits of these claims upheld California's standards, relying, in part, on the Supreme Court's holding that setting fuel economy

standards under the Energy Policy and Conservation Act is independent of regulating greenhouse gas emissions under the Clean Air Act. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1166-74 (E.D. Cal. 2007); *Green Mountain Chrysler*, 508 F. Supp. 2d at 397-99; *see also Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) ("[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities [to regulate greenhouse gas emissions from motor vehicles and] protect[] the public health and welfare … a statutory obligation wholly independent of DOT's…").

In 2009, EPA granted California a waiver for its model year 2009-2016 greenhouse gas emission standards. 74 Fed. Reg. 32,744 (July 8, 2009). Then, in 2010, EPA, NHTSA, and the California Air Resources Board ("Board"), with the support of automakers, decided to harmonize standards for model years 2012-2016, including greenhouse gas emission standards set by EPA and California and fuel economy standards set by NHTSA. As part of this agreement, California amended its regulations to deem compliance with federal greenhouse gas emission standards as compliance with its own. 75 Fed. Reg. 25,324, 25,327-28 (May 7, 2010); Cal. Code Regs., tit. 13, § 1961.1(a)(1)(A)(ii).

In 2012, those three regulators extended this national program. EPA set federal greenhouse gas emission standards for model years 2017-2025, and

NHTSA set federal fuel economy standards for model years 2017-2021.[9] In parallel, California "reconfirmed its commitment" to accept compliance with federal greenhouse gas standards as compliance with its state standards, "provided that the greenhouse gas reductions … are maintained." 77 Fed. Reg. 62,624, 62,638 (Oct. 15, 2012); Board Resolution 12-21 (March 22, 2012).[10] EPA granted California a waiver for its greenhouse gas standards for model years 2017-2025, as part of a waiver for a larger package of vehicle emission standards known as the Advanced Clean Cars program. 78 Fed. Reg. 2,112 (Jan. 9, 2013).

D. California's Advanced Clean Cars Program

The Advanced Clean Cars program comprises integrated regulations to reduce vehicle emissions, including standards limiting emissions of greenhouse gases and other pollutants from conventional vehicles and updates to the state's zero-emission vehicle standards. Cal. Code Regs., tit. 13, §§ 1961.2, 1961.3, 1962.2.

California provides automakers with significant flexibility to meet the state's greenhouse gas emission standards. The standards apply based on fleetwide averages, not individual vehicle models, and automakers who over-comply in any given model year generate bankable and tradeable credits, which, in turn allow

[9] NHTSA is limited to promulgating fuel economy standards five model years at a time. 49 U.S.C. § 32902(b)(3)(B). In 2012, NHTSA announced "augural" standards for model years 2022-2025.

[10] Available at https://ww3.arb.ca.gov/board/res/2012/res12-21.pdf.

automakers to comply, in future years, through whatever combination of vehicle sales and credits they prefer.[11] Cal. Code Regs., tit. 13, § 1961.3(a), (b), (c). Automakers also have five model years within which to obtain sufficient credits to offset any non-compliance for a given model year. *Id.* § 1961.3(b)(3).

As noted above, automakers can opt to comply with California's greenhouse gas emission standards by complying with the existing federal greenhouse gas standards, and through model year 2019, all automakers selected this option and complied in this way.[12]

II. EPA AND NHTSA'S 2018 PROPOSAL

On August 24, 2018, EPA and NHTSA proposed significant changes to how motor vehicle pollution and fuel economy would be regulated. The agencies proposed new federal greenhouse gas emission and fuel economy standards for model years 2021-2026, with a preferred alternative to freeze the standards at 2020 levels through 2026. 83 Fed. Reg. 42,986, 42,995 (Aug. 24, 2018) ("Proposal"). The Proposal would replace the substantially stronger standards adopted in 2012. *Id.* Both agencies also proposed to eliminate state authority to adopt and enforce state greenhouse gas emission standards. *Id.* at 42,999.

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[11] California's zero-emission vehicle standards similarly involve fleetwide sales and allow for the banking and trading of credits. Cal. Code Regs., tit. 13, § 1962.2(b), (d).

[12] Board, Initial Statement of Reasons 1, n.2 (Aug. 7, 2018), https://ww3.arb.ca.gov/regact/2018/leviii2018/leviiiisor.pdf.

Given the prospect of weakened federal standards, the Board amended its regulations to clarify that only compliance with the federal greenhouse gas emission standards existing on October 25, 2016 will be deemed compliance with California's standards. Cal. Code Regs., tit. 13, § 1961.3(c). This clarification was consistent with the Board's position when it adopted the "deemed to comply" provision—namely, that this provision was only appropriate "provided that the greenhouse gas reductions [anticipated from the federal standards adopted in 2012] are maintained." Board Resolution 12-21. This clarification did not change the stringency of California's standards.

III. EPA AND NHTSA'S 2019 FINAL ACTIONS

More than a year after their proposal, on September 27, 2019, EPA and NHTSA published the Final Actions at issue here. 84 Fed. Reg. 51,310. Departing substantially from the scope of actions identified in the Proposal, the Final Actions made no changes to federal standards, and instead, targeted only state emission standards. NHTSA adopted a regulation purporting to declare, among other things, that California's greenhouse gas emission and zero-emission vehicle standards are preempted under the Energy Policy and Conservation Act. *Id.* at 51,361-62. EPA revoked portions of its 2013 waiver of preemption for California's Advanced Clean Cars program, likewise targeting California's greenhouse gas and zero-emission vehicle standards. *Id.* at 51,350. EPA also finalized a determination that

Clean Air Act Section 177 precludes other states from adopting or implementing California's greenhouse gas emission standards, regardless of whether California has a waiver for those standards. *Id.* The Final Actions went into effect on November 26, 2019. *Id.* at 51,310.

State and Local Government Petitioners (and others) quickly filed complaints in the District Court for the District of Columbia seeking to vacate NHTSA's preemption regulation.[13] State and Local Government Petitioners filed Petitions for Review challenging EPA's actions, and protectively challenging NHTSA's preemption regulation, in this Court on November 15, 2019 (*California et al. v. Wheeler et al.*, No. 19-1239; *South Coast Air Qual. Mgmt. Dist. et al. v. Wheeler et al.*, No. 19-1241); and November 25, 2019 (*City and Cty. of San Francisco v. Wheeler et al.*, No. 19-1246). With the support of all Petitioners, Petitioners in several of these cases have moved to hold these consolidated cases in abeyance to allow the district court to determine the validity of NHTSA's preemption regulation, which EPA relied on, so that any appeal concerning those issues could be consolidated and considered with these cases.[14]

[13] *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ; *Envtl. Def. Fund v. Chao*, D.D.C. No. 1:19-cv-02907-KBJ; *South Coast Air Qual. Mgmt. Dist. v. Chao*, D.D.C. No. 1:19-cv-03436-KBJ.

[14] *See* Motions for Abeyance, *supra* note 3.

ARGUMENT

I. THERE IS NO GOOD CAUSE TO EXPEDITE REVIEW

Absent statutory exceptions inapplicable here, civil actions are expedited only when "good cause … is shown." 28 U.S.C. § 1657(a). Congress adopted this "good cause" provision intending that courts would expedite those cases in which, for example, "failure to expedite would result in mootness or deprive the relief requested of much of its value, [or] would result in extraordinary hardship to a litigant." H.R. Rep. No. 98-985 at 6 (1984).

To show good cause before this Court, movants must demonstrate, at minimum, that either (1) "delay will cause irreparable injury" and "the decision under review is subject to substantial challenge," or (2) "the public generally, or … persons not before the Court, have an unusual interest in prompt disposition." D.C. Circuit Handbook 34. This Court grants such motions "very rarely" and only when the reasons for doing so are "strongly compelling." *Id.*

Here Respondents and Respondent-Intervenors request expedition based on claims of regulatory uncertainty, the size of the regulated industry, a letter from the Board about compliance flexibility, and California's decision to purchase certain vehicles for its state fleet. These reasons, even when considered in conjunction, fall far short of this Court's standards for expedition.

A. Movants Have Failed to Identify an Irreparable Injury Warranting Expedition

1. The agencies' delay in issuing the Final Actions belies their claim of urgency

Respondents' call for expedited resolution rings particularly hollow given their own significant delays. *Cf.* Order, *Make the Road New York v. Wolf*, No. 19-5298 (D.C. Cir. Dec. 12, 2019) (Katsas, J., concurring) (chastising the federal government for its "unhurried motion" for expedition). EPA granted the preemption waiver at issue here in January 2013. 78 Fed. Reg. 2,112. Respondents proposed to preempt California's standards and partially withdraw its waiver in August 2018, after automakers had spent more than six years planning to comply. 83 Fed. Reg. 42,986. The agencies then delayed finalizing their actions for more than a year after publication of their Proposal, and, further, opted to bifurcate their Proposal, delaying any final actions on the federal standards even longer. 84 Fed. Reg. 51,310. Indeed, the agencies have still taken no final actions on their own federal standards. Respondents and Respondent-Intervenors also delayed filing their motions for expedition by almost a month after State and Local Governments' petitions were filed. Nothing about this timeline suggests Movants will be irreparably injured by this litigation proceeding in the normal course. Indeed, EPA and NHTSA do not even attempt to identify an irreparable injury they will suffer.

2. Movants' fail to demonstrate that regulatory uncertainty will cause irreparable harm worthy of expedition

Both Respondents and Respondent-Intervenors gesture to "regulatory uncertainty" as the grounds for expedition. Resp. Mot. at 2; Intv. Mot. at 2. But any time regulatory action is challenged, parties face some level of regulatory uncertainty. Resulting questions about whether regulated parties should make investments preemptively or delay and risk non-compliance are simply a function of operating in a regulated market. Movants fail to explain why the regulatory uncertainty here is so extraordinary that it produces irreparable harm supporting departure from the ordinary course of litigation.

Respondent-Intervenors assert their members will face "inconsistent regulations" during this litigation and thus will be forced to "expend unrecoverable resources" preparing for a "bifurcated and uncertain regulatory regime." Intv. Mot. at 11. But this argument disregards both that Congress intentionally established a two-standard, "bifurcated" regime for vehicle emissions regulation, and, furthermore, that automakers are *not* currently faced with inconsistent regulations. To the contrary, even after EPA and NHTSA's Final Actions, automakers are currently subject to federal greenhouse gas emission standards that are harmonized with California's—the very federal standards that have been their means of compliance with California's standards. Because the Final Actions made

no changes to those federal standards, nothing has actually changed in terms of applicable greenhouse gas emission standards.[15]

As to future model years, any uncertainty over applicable greenhouse gas emission and fuel economy standards falls squarely at the feet of EPA and NHTSA. The agencies proposed in 2018 to dramatically weaken the federal standards announced six years earlier and have delayed finalizing any changes to those standards for sixteen months and counting.

Furthermore, regulatory uncertainty over those standards will not be resolved by expediting this litigation. Any finalized rollback of the federal standards will be challenged in separate litigation, and if those challenges succeed, EPA's existing standards—which are substantially similar to California's—will be reinstated. Thus, any uncertainty about whether automakers will have to comply with

[15] Neither movant asserts that California's zero-emission vehicle standards provide a basis for expedition, nor may they may do so for the first time in reply. *See* Intv. Mot. at 12-13 (discussing only California's greenhouse gas standards); Resp. Mot. at 1 (same). In any event, any uncertainty around future application of California's zero-emission vehicle standard provides no basis to expedite this case. Automakers have had decades of notice that California would continue imposing increasingly rigorous zero-emission vehicle standards, and have already banked substantial credits under California's zero-emission vehicle program. *See* Board, ZEV Credit Balances for 2018 (last updated Oct. 31, 2019), https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/zev-program/zero-emission-vehicle-credit-balances ("All manufacturers subject to the [Zero-Emission Vehicle] Regulations are in compliance through model year 2018," and positive credit balances are available "to meet the [Zero Emission Vehicle] requirements in coming years.").

greenhouse gas emissions standards akin to California's will remain until EPA finalizes its changes to the federal standards and any challenges to *those changes* are resolved.

Respondent-Intervenors argue that regulatory certainty is particularly important for the automotive industry because it is a "highly regulated, long lead-time industry" that Congress has recognized needs advance planning. Intv. Mot. at 5 & n.6. But Congress declined to require specific amounts of lead time when EPA or California sets vehicle emission standards. Rather, Congress simply required California to "allow sufficient lead time to permit automakers to develop and apply the necessary technology." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998). Respondent-Intervenors have had seven years to develop the technology for California's greenhouse gas standards since EPA granted the waiver in January 2013. They do not, and cannot, assert that they need more time to do so, as discussed below.

In addition, if Petitioners prevail in this litigation, and revocation of California's waiver is rescinded and the purportedly preempted standards are reinstated, the substantial compliance flexibilities available to automakers would make compliance—even so-called "retroactive" compliance, Intv. Mot. at 12—far less burdensome than Movants suggest, for two reasons. First, automakers have been planning to comply with California's standards since January 2013, and the

technologies necessary to comply are known and readily available, as EPA and NHTSA themselves have found.[16] Indeed, automakers have been over-complying with greenhouse gas emission standards[17]—and furthermore, have indicated that increased vehicle electrification (which can be part of a compliance strategy for greenhouse gas emission standards) is important to their long-term strategy independent of regulatory requirements.[18] Second, even if an automaker failed to meet a fleetwide average greenhouse gas emission standard for a given model year during the pendency of this litigation, California could not impose immediate penalties when it regains its authority. Instead, the automaker would have five

[16] *See, e.g.*, Proposal, 83 Fed. Reg. at 43,229 (noting the "wide range of existing technologies that have already been developed, have been commercialized, and are in-use on vehicles today" and that the technology was already available to meet California's standards).

[17] *See* Board, California's Advanced Clean Cars Midterm Review Summary Report at ES-2, ES-49 (Jan. 18, 2017), https://ww3.arb.ca.gov/msprog/acc/mtr/acc_mtr_summaryreport.pdf.

[18] *See, e.g.*, General Motors, SEC Form 10-K (2018), at 10 ("It is strategically significant that we lead the technological disruption occurring in our industry, including consumer adoption of electric vehicles… To successfully execute our long-term strategy, we must continue to develop new products and services, including … electric vehicles… If we do not adequately prepare for and respond to new kinds of technological innovations, market developments and changing customer needs, our sales, profitability and long-term competitiveness may be harmed."), https://investor.gm.com/static-files/54070a3d-55d9-4a0c-9913-7ba9b4d366de.

model years to offset the exceedance with bankable and tradeable credits. Cal. Code Regs., tit. 13, § 1961.3(b)(3).[19]

Respondent-Intervenors fail to mention any of this, contending instead that an August 2019 letter from the Board that *extended regulatory flexibility* somehow irreparably injures them. Intv. Mot. at 8. The Board's letter simply extended the timeframe for automakers to inform the Board which of the *pre-existing* compliance pathways they wanted to select for model year 2020, although the deadline for such elections had already passed for some vehicle models. *See* Cal. Code Regs., tit. 13, § 1961.3(c)(1); *see also* Intv. Mot., Exhibit 1. The Board provided this extension of time at the request of automakers who recognized that, due to the federal agencies' proposed changes to the federal standards, it might be in the automakers' interests to begin to accumulate credits for over-compliance with California's program. No automakers had yet generated any credits under California's program because, through model year 2019, all automakers had opted to demonstrate compliance with California's greenhouse gas emission standards by complying with the federal standards.

Put simply, the notion that the Board's August 2019 letter will make future compliance more onerous or otherwise provides a basis for expedited review here

[19] The same is true for zero-emission vehicle standards, Cal. Code Regs., tit. 13, § 1962.2(d), and automakers have banked significant credit balances to date. *See* ZEV Credit Balances for 2018, *supra* note 15.

is mystifying. The letter was a response to automakers' request for more time to change compliance pathways in reaction to anticipated changes in the federal standards—standards not even at issue in this case. And, further, the letter simply extended a deadline for automakers to make a choice they had always had: how to comply with California's standards. Indeed, the letter does little more than provide additional flexibility that could only make future, potential compliance—the very thing Respondent-Intervenors purport to be worried about—easier. Allowing automakers more time to exercise an option they have always had does not injure the automakers, regardless of whether automakers take advantage of the requested extension or exercise the option to change compliance pathways. Notably, a number of automakers did take advantage of the extension and exercise the option to comply directly with California's program, including at least one member of Respondent-Intervenors' coalition. *See* Exhibit 1 (Letter from Subaru).

In sum, Movants have failed to demonstrate why the alleged regulatory uncertainty here differs from that present in almost any regulatory action, still less why it provides a strongly compelling reason for expediting review. Movants exaggerate the threat posed by any uncertainty and, even more importantly, they have not shown that expedited review here would dispel that uncertainty.

3. California's state fleet purchasing guidelines have nothing to do with this litigation

Respondent-Intervenors also point to new purchasing requirements for California's state vehicle fleets. Intv. Mot. at 12-13. These requirements simply set priorities for acquisitions for California's own state fleet, including limiting the purchase of internal combustion vehicles.[20] But they are not at issue in this litigation, and are in no way contingent upon the outcome or pace of this Court's review.

In addition, Respondent-Intervenors once again exaggerate the potential impact. First, automakers sell roughly 2 million new light-duty vehicles in California each year.[21] In contrast, California typically purchases less than 2,000 light-duty vehicles per year for its state fleet, or less than 0.1% of California's new vehicle auto market.[22] Second, the new guidelines are not an outright ban as Respondent-Intervenors allege, rather they simply prioritize vehicle purchases

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[20] *See* State Administrative Manual §§ 4121.7, 4121.8, https://www.dgs.ca.gov/Resources/SAM.

[21] Cal. New Car Dealers Ass'n, California Auto Outlook (Feb. 2019), https://www.cncda.org/wp-content/uploads/Cal-Covering-4Q-18.pdf.

[22] *See* Cal. Dept. of Gen. Svcs., State Fleet Vehicle Composition Report for Calendar Years 2016-2018 at 4-6 (Oct. 2, 2019), https://www.dgs.ca.gov/OFAM/Resources/Page-Content/Office-of-Fleet-and-Asset-Management-Resources-List-Folder/Publications-on-Fleet-Asset-Management.

from certain automakers, with a number of exemptions that could allow purchases from Respondent-Intervenors' members.[23]

B. Respondent-Intervenors Misconstrue the Standard for Expedition

Motions for expedited review must show that "delay will cause irreparable injury" and that "the decision under review is subject to substantial challenge." D.C. Circuit Handbook 33. Respondent-Intervenors support their claim for expedition on the basis that the Final Actions they want to *uphold* are "subject to substantial challenge." Intv. Mot. at 15. But this turns the Court's standard on its head. Perversely, Respondent-Intervenors would use the strength of Petitioners' arguments to deprive Petitioners of the time necessary to carefully and thoroughly present their case to the Court on these critically important issues. This argument does not support expedition; it simply highlights the irony of Respondents and Respondent-Intervenors moving for expedition when it is State and Local Government Petitioners who are most directly injured by the Final Actions.

C. No Unusual Public Interest Supports a Change from the Ordinary Schedule

Movants have failed to demonstrate that the public has an "unusual interest" in this litigation that justifies expedited review. D.C. Circuit Handbook 34. Respondents' and Respondent-Intervenors' broad, generalized statements fail to

[23] *See* State Administrative Manual § 4121.8, *supra* note 20.

differentiate this case from many other cases of public importance—including reviews of regulations impacting large segments of the national economy—handled by this Court in the normal course.

The observation that the industry regulated by the Final Actions is a "multibillion-dollar" sector of the economy involving the sale of "million[s]" of vehicles, Resp. Mot. at 1, Intv. Mot. at 15, is not a "strongly compelling reason" to seek expedition. *See* Order (Nov. 22, 2019), *Amer. Lung Ass'n, et al., v. EPA, et al.*, No. 19-1140 (D.C. Cir. Aug. 28, 2019) (denying expedition because "[r]espondents have not articulated 'strongly compelling reasons' that would justify expedition of this case," despite EPA's contention the case should be expedited because the challenged rule was "of national importance" and regulated "a significant sector of the economy"). If the test were simply whether a case involves an important industry, or, in Respondent-Intervenors' formulation, any time a case involves the automotive industry or a statute with some amount of lead time, the Court would expedite cases routinely, not "very rarely." *See* D.C. Circuit Handbook 34.[24]

[24] Further, as explained in the pending motions for abeyance, it would not serve the public's interests, or the Court's, to expedite this case and resolve it before the district court determines the validity of NHTSA's preemption regulation. *See* Motions for Abeyance, *supra* note 3. To the contrary, these cases should be held in abeyance, at least until the district court decides the fully briefed motion to dismiss that is now pending before it.

II. MOVANTS' PROPOSED BRIEFING SCHEDULE IS UNWORKABLE

Without attempting to negotiate a mutually agreeable briefing schedule, Movants have proposed that Petitioners' opening briefs be due on February 10, 2020. Resp. Mot. at 7; Intv. Mot. at 2. Respondents key this schedule around the filing of the administrative record on January 9, 2020, "allow[ing] 30 days for the preparation of principal briefs." Resp. Mot. at 7.

These cases are complex, involve a large number of parties who must coordinate briefing (including a large number of government parties with significant internal review procedures), and implicate issues of state authority critical to Petitioners. Respondents' proposed schedule ignores these factors that support longer than the default briefing windows, at least for Petitioners. Respondents' schedule also assumes there will be no disputes over the record. But Petitioners' preliminary review of the voluminous indexes—which they have had only hours to complete—has already identified discrepancies, including unexplained differences between the indexes submitted by the two agencies and omission of relevant materials. At a minimum, expedition should be denied to allow resolution of these issues with the agencies or, if necessary, by the Court.

CONCLUSION

Based on the foregoing reasons, the Court should deny the Motions to Expedite.

Dated: January 10, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and D.C. Circuit Rule 27(a)(2), I hereby certify that the foregoing complies with all applicable format and length requirements, and contains 5,178 words as calculated by Microsoft Word, exclusive of the caption, signature block, and certificates of counsel.

/s/ Meredith J. Hankins
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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c), I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which automatically sends a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

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EXHIBIT 1

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October 25, 2019

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RE: Greenhouse Gas Program Compliance Path for Model Year 2020 Vehicles

Dear Mr. Lyons:

North American Subaru, Inc (NASI) is submitting this letter on behalf of SUBARU CORPORATION (SBR) and Subaru of America, Inc. (SOA) in response to your August 5, 2019 letter regarding greenhouse gas program compliance for model year 2020 vehicles.

Given the current regulatory uncertainty regarding future GHG requirements, and the compliance options that will be available to OEMs, Subaru intends to comply directly with the model year 2020 California Greenhouse Gas program under the standard provisions of "Greenhouse Gas Exhaust Emission Standards and Test Procedures – 2017 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles" (California GHG Standards and Procedures) in Title 13 CCR section 1961.3.

Therefore, for model year 2020, Subaru will not be using the optional National compliance provision in 13 CCR Section 1961.3(c).

Additionally, Subaru intends to comply with 13 CCR Section 1961.3 through the Option 2 "pooling" provision under 13 CCR Section 1961.3(a)(5)(D).

If there are any issues or questions regarding this submission, please contact me by email at dbarker@subaru.com or by phone at (989) 295-7917.

Sincerely,

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