

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.)	Case No. 19-1230 &
)	Consolidated Cases
NATIONAL HIGHWAY TRAFFIC)	
SAFETY ADMINISTRATION, et al.,)	
)	
Respondents.)	
)	

**INTERVENOR STATES' RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO HOLD CASE IN ABEYANCE**

The Intervenor States oppose the request to hold this case in abeyance. The federal government asks for this case to be held in abeyance so that it may have time to decide whether to change course. Relevant here, holding the case in abeyance will give the federal government time to decide whether to grant California a waiver under Section 209(b)(1) of the Clean Air Act. But the federal government's consideration of whether to grant a waiver is a reason to *expedite* the resolution of this case—it is not a reason to refrain from deciding it.

To see why, recall that this case presents the question whether the Constitution forbids the federal government from granting a waiver under Section 209(b)(1). The answer to that question is “yes,” because Section 209(b)(1) is unconstitutional. Section 209(b)(1) violates the equal-sovereignty doctrine by “allowing California to retain [a] piece of its sovereign authority” —the power to set emissions standards for new vehicles—that the Clean Air Act “strips from every other State.” Br. of Intervenor States at 8, Doc. #1862459 (D.C. Cir., Sept. 21, 2020). If nothing else, it is an open and serious question whether Section 209(b)(1) is constitutional. It would behoove all the parties to know the answer to that question before, not after, the federal government considers again whether to grant California a waiver under Section 209(b)(1).

This Court has previously “decline[d] to exercise” its “discretion” to hold in abeyance a case presenting a legal question that would necessarily inform an agency’s consideration of “potential regulatory changes.” *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426 (D.C. Cir. 2018) (*per curiam*). It should do the same here. That is especially so because the Court can provide the parties with an answer to the equal-sovereignty issue without straining the litigants’ resources. There is little left to be done at this stage of the case, which has been “fully briefed” for months. *See Zamora-Mallari v. Mukasey*, 514 F.3d 679, 682 (7th Cir. 2008); *cf. Lead Indus. Ass’n*

v. EPA, 647 F.2d 1184, 1186 (D.C. Cir. 1980) (denying motion to hold case in abeyance filed after oral argument). The Court can, if it wishes, schedule argument at the next available opportunity and quickly issue a decision. And if the Court were to accept the Intervenor States' equal-sovereignty argument, a decision in this case would spare all the parties the many resources that would otherwise be wasted considering whether to issue an unconstitutional waiver to California.

In sum, the parties have fully briefed this case, which presents a critically important question of constitutional law that will inform the very act—the granting of a waiver to California—that the federal government seeks abeyance in order to consider. The Intervenor States respectfully ask the Court to deny the motion and to decide this case.

Dated: February 3, 2020

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Ohio Solicitor General
AARON FARMER
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov
Counsel for State of Ohio

STEVE MARSHALL
Attorney General of Alabama

LESLIE RUTLEDGE
Attorney General of Arkansas

/s/ Edmund G. LaCour Jr. (BMF per authority)
EDMUND G. LACOUR JR.
Alabama Solicitor General
Office of the Attorney General
501 Washington Ave.
Montgomery, Alabama 36130
(334) 353-2196
edmund.lacour@alabamaag.gov
Counsel for State of Alabama

/s/ Nicholas J. Bronni (BMF per authority)
NICHOLAS J. BRONNI
Arkansas Solicitor General
VINCENT WAGNER
Deputy Solicitor General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov
Counsel for State of Arkansas

CHRISTOPHER M. CARR
Attorney General of Georgia

/s/ Andrew A. Pinson (BMF per
authority)

ANDREW A. PINSON
Georgia Solicitor General
Office of the Georgia Attorney General
40 Capitol Square SW
Atlanta, Georgia 30334
(404) 458-3409
apinson@law.ga.gov
Counsel for State of Georgia

THEODORE E. ROKITA
Attorney General of Indiana

/s/ Thomas M. Fisher (BMF per
authority)

THOMAS M. FISHER
Indiana Solicitor General
Office of the Attorney General
302 West Washington Street
IGCS-5th Floor
Indianapolis, IN 46204
(317) 233-8292
katherine.jacob@atg.in.gov
Counsel for State of Indiana

JEFF LANDRY
Attorney General of Louisiana

/s/ Elizabeth B. Murrill (BMF per
authority)

ELIZABETH B. MURRILL
Louisiana Solicitor General
LOUISIANA DEPARTMENT
OF JUSTICE
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov
Counsel for State of Louisiana

ERIC S. SCHMITT
Attorney General of Missouri

/s/ John Sauer (BMF per authority)

D. JOHN SAUER
Missouri Solicitor General
207 W. High St.
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
john.sauer@ago.mo.gov
Counsel for State of Missouri

DOUGLAS J. PETERSON
Attorney General of Nebraska

/s/ Justin D. Lavene (BMF per authority)

JUSTIN D. LAVENE
Assistant Attorney General
Office of the Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2834
justin.lavene@nebraska.gov
Counsel for State of Nebraska

ALAN WILSON
Attorney General of South Carolina

/s/ James Emory Smith, Jr. (BMF per authority)

JAMES EMORY SMITH, JR.
South Carolina Deputy Solicitor General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3642
esmith@scag.gov
Counsel for State of South Carolina

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General
/s/ Judd E. Stone II (BMF per authority)
JUDD E. STONE II
Texas Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
Judd.Stone@oag.texas.gov
Counsel for State of Texas

SEAN D. REYES
Attorney General of Utah

/s/ Melissa A. Holyoak (BMF per authority)
MELISSA A. HOLYOAK
Utah Solicitor General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
(385) 271-2484
melissaholyoak@agutah.gov
Counsel for State of Utah

PATRICK MORRISEY
Attorney General of West Virginia

/s/ Lindsay S. See (BMF per authority)

LINDSAY S. SEE

West Virginia Solicitor General
OFFICE OF THE WEST VIRGINIA
ATTORNEY GENERAL

State Capitol Complex

Building 1, Room E-26

Charleston, WV 25305

(304) 558-2021

lindsay.s.see@wvago.gov

Counsel for State of West Virginia

CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32 (f) and (g), I hereby certify that the foregoing response complies with the limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(a)(2) because it contains 470 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2020, I caused the foregoing motion to be electrically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system. I further certify that a copy of the foregoing has been served via United States First Class Mail upon the following:

William F. Cooper
State of Hawaii
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio