ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

Consolidated with Nos. 19-1239, -1241,
-1242, -1243, -1245, -1246, and -1249

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,

ASSOCIATION OF GLOBAL AUTOMAKERS, INC., et al.,

Intervenors for Respondent,

STATE OF OHIO et al.,

Movant-Intervenors for Respondent,

RESPONSE OF PUBLIC-INTEREST PETITIONERS IN OPPOSITION TO RESPONDENTS' AND INTERVENORS' MOTIONS TO EXPEDITE

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INTRODUCTION

Petitioners in Cases No. 19-1230 and 19-1243 (Public-Interest Petitioners) oppose the motions of respondents (the Agencies) and intervenors Coalition for Sustainable Automotive Regulation and Association of Global Automakers, Inc. (collectively, CSAR) to expedite these consolidated cases. "Th[is] Court grants expedited consideration very rarely," and "[t]he reasons must be strongly compelling." D.C. Cir. Handbook of Practice and Internal Procedures 34 (Dec. 2019) (Handbook). The movants' reasons to expedite review are not strongly compelling, and there is no "good cause" to grant the motions to expedite. 28 U.S.C. § 1657(a).

These petitions challenge final actions by the Agencies to preempt longstanding state laws that limit greenhouse-gas emissions from new passenger cars and light trucks and require deployment of zero-emission vehicles. The challenged agency actions have not been stayed and remain in effect pending judicial review. The Agencies and CSAR nonetheless urge this Court to expedite review because, they claim, this litigation creates uncertainty for automakers that may again become subject to the state laws if the petitions are granted. But this sort of legal uncertainty attends every case challenging administrative action and does not establish irreparable injury warranting expedited judicial review. The movants are unable to distinguish these petitions from numerous others whose resolution likewise will affect the regulatory regime governing a large industry.

Moreover, the legal uncertainty that concerns the movants does not stem from this litigation. Extant federal law imposes the same limits on vehicular greenhouse-gas

emissions as the state laws that will spring back into effect if this Court grants these petitions. The Agencies' long-pending proposal to weaken federal standards is the true source of automakers' uncertainty over what level of greenhouse-gas emissions their fleets must attain. And that legal uncertainty will persist whatever the outcome of this litigation. Indeed, even if the Agencies finalize a proposed rule amending federal standards—itself a speculative prospect—the validity of that rule will be subject to challenge, leaving automakers with ongoing uncertainty about their obligations to control greenhouse-gas emissions. Expediting judicial review here will not relieve that uncertainty.

The motions to expedite are also procedurally unsound. As explained in Public-Interest Petitioners' motion for abeyance, this Court lacks jurisdiction to directly review the foundational agency action at issue: preemption regulations promulgated by the National Highway Traffic Safety Administration (NHTSA) and relied on by the U.S. Environmental Protection Agency (EPA). Those regulations must be reviewed by a district court, and the U.S. District Court for the District of Columbia is reviewing them now in earlier-filed proceedings involving almost all the parties here. It would be counterproductive to compel those same parties to brief and argue the merits of the same agency action in this Court before the district court concludes its review.

In any event, the schedule proposed by the Agencies and CSAR is precipitous and would prejudice petitioners. If this Court opts not to hold the petitions in abeyance, it should follow its usual practice and receive proposals for briefing schedule and format, and only then impose a schedule commensurate with the complexity of this proceeding.

BACKGROUND

A. State and federal regulation of vehicular greenhouse-gas emissions

The Clean Air Act provides for two sets of standards to control air pollution from new passenger cars and light trucks: (1) federal standards developed by EPA; and (2) state standards developed by California, as to which EPA must waive preemption if statutory criteria are met. *See* 42 U.S.C. §§ 7521, 7543. Section 177 of the Clean Air Act allows other States to choose between EPA's standards and California's standards. *See id.* § 7507. The Energy Policy and Conservation Act directs NHTSA to set average fuel-economy standards for passenger cars and light trucks after considering the effects of EPA's and California's emissions standards on fuel economy. *See* 49 U.S.C. § 32902.

Greenhouse gases are pollutants subject to regulation under the Clean Air Act, *see Massachusetts v. EPA*, 549 U.S. 497 (2007), and EPA found in 2009 that vehicular greenhouse-gas emissions "may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. § 7521(a)(1); *see* EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009). EPA's finding triggered a duty on its part to control greenhouse-gas emissions from new vehicles. *See* 42 U.S.C. § 7521(a)(1). By that time, California already had adopted greenhouse-gas standards and received a Clean Air Act preemption waiver to enforce them. *See Chamber of Commerce v. EPA*, 642 F.3d 192, 197 (D.C. Cir. 2011).

B. The One National Program

In 2010, EPA, NHTSA, California, and several major automakers (including members of CSAR) negotiated an agreement, called the One National Program, that harmonized all the greenhouse-gas and fuel-economy standards applicable to model year 2012–2016 passenger cars and light trucks. *See Chamber of Commerce*, 642 F.3d at 198. To effectuate that agreement, California "amend[ed] its regulations to deem an automaker's compliance with [EPA's greenhouse-gas standards] as compliance with [the State's] (previously more-stringent) standards." *California v. EPA*, 940 F.3d 1342, 1346 (D.C. Cir. 2019); *see also* Cal. Code Regs., tit. 13, § 1961.1(a)(1)(A)(ii).

In 2012, after another round of intergovernmental negotiation, the One National Program was extended to model year 2017–2025 vehicles. California again agreed to deem an automaker's compliance with EPA's greenhouse-gas standards as compliance with state standards, "provided that the greenhouse gas reductions [proposed by EPA] are maintained" in federal law. EPA & NHTSA, *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 77 Fed. Reg. 62,624, 62,638 (Oct. 15, 2012); *see also* Cal. Code Regs., tit. 13, § 1961.3(c) (as amended in 2018 to codify that proviso). EPA again waived preemption of California's greenhouse-gas and zero-emission-vehicle standards. *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years,* 78 Fed. Reg. 2112 (Jan. 9, 2013).

C. The federal government's retreat from the One National Program

In August 2018, EPA and NHTSA proposed to weaken the agreed-upon federal standards. They set forth a range of options with a preferred option of flatlining federal greenhouse-gas and fuel-economy standards for model years 2021–2026 at model year 2020 levels. EPA & NHTSA, *The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks*, 83 Fed. Reg. 42,986, 43,189–97 (Aug. 24, 2018). The Agencies also proposed to invalidate all state greenhouse-gas and zero-emission-vehicle standards by way of the three actions at issue in these petitions:

(1) **The Preemption Rule** – a set of NHTSA regulations asserting that the Energy Policy and Conservation Act preempts state greenhouse-gas and zero-emission-vehicle standards for new passenger cars and light trucks;

(2) **The Waiver Revocation** – an EPA order revoking parts of the preemption waiver for California's greenhouse-gas and zero-emission-vehicle standards; and

(3) **The Section 177 Determination** – an EPA order prohibiting other States from enforcing greenhouse-gas standards for which EPA has issued California a preemption waiver.

See id. at 43,232–53. Taken as a whole, the Agencies' August 2018 proposal would have unilaterally replaced the One National Program, a negotiated agreement harmonizing health-protective state and federal vehicular emissions standards, with a solely federal program of severely weakened standards.

More than a year passed. The Agencies then bifurcated their proposal to finalize the three preemption pieces—the Preemption Rule, Waiver Revocation, and Section 177 Determination—"while continuing work" on possible changes to federal standards. EPA & NHTSA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310, 51,311 (Sept. 27, 2019) (Final Rule). The Agencies' September 2019 final actions purported to render the affected state greenhouse-gas and zero-emission-vehicle standards for passenger cars and light trucks unenforceable but did "not have any effect on" EPA's standards. *Ibid.* The federal greenhouse-gas standards have not been changed and continue to impose the same substantive requirements on automakers as did the now-preempted state greenhouse-gas standards.

D. The review proceedings

Because EPA relied on NHTSA's Preemption Rule as a basis for the Waiver Revocation and then relied on the Waiver Revocation to justify the Section 177 Determination, the validity of EPA's actions is closely related to the validity of NHTSA's action. *See* Mot. of Public-Interest Pet'rs for Abeyance at 14–15 (Dec. 26, 2019) (PIP Abeyance Mot.). But, whereas Congress gave this Court jurisdiction to directly review EPA's actions, it gave the district courts jurisdiction to review NHTSA's action. *See id.* at 12–13. In light of Congress's jurisdictional choices, the logical way for judicial review to proceed is for the U.S. District Court for the District of Columbia to review the Preemption Rule first, and for this Court then to review the Waiver Revocation and Section 177 Determination in conjunction with appeals from the district court's judgment. *See id.* at 11–17.

Public-Interest Petitioners therefore challenged NHTSA's Preemption Rule in the district court on September 27, 2019, the day it was published in the Federal Register. *See* PIP Abeyance Mot. at 9 & n.1. California, twenty-two other States, three major cities, and three air-quality management districts in California filed parallel suits. *See ibid.* Public-Interest Petitioners and others also petitioned for review in this Court of EPA's Waiver Revocation and Section 177 Determination. *See id.* at 9–10. Lastly, in an abundance of caution, the parties who challenged NHTSA's Preemption Rule in district court also filed expressly protective petitions for review of that rule in this Court. *See id.* at 9.

NHTSA has moved to dismiss the district-court cases or transfer them to this Court, arguing that the Energy Policy and Conservation Act vests the courts of appeals with jurisdiction to directly review the Preemption Rule. *See* PIP Abeyance Mot. at 10. CSAR has intervened in the district court and joined in NHTSA's motions to dismiss or transfer. Briefing on those motions concluded on November 27, 2019, and the district court is poised to determine its own jurisdiction to review the Preemption Rule. *See ibid.*

By December 2, 2019, this Court had consolidated all eight petitions for review of the Agencies' final actions. On December 18 and December 24, 2019, respectively, the Agencies and CSAR requested expedited briefing and oral argument. On December 26, 2019, Public-Interest Petitioners and State and Municipal Petitioners moved to hold these petitions in abeyance pending resolution of the district-court litigation. The Agencies filed certified indexes of their administrative records in this Court on January 9, 2020.

STANDARDS FOR EXPEDITED CONSIDERATION

This Court may "expedite the consideration of any action … if good cause therefor is shown." 28 U.S.C. § 1657(a). It "grants expedited consideration very rarely," and only for "strongly compelling reasons." Handbook at 34. The movant "must demonstrate that the delay will cause irreparable injury" or that "the public generally, or … persons not before the Court, have an unusual interest in prompt disposition." *Ibid.* This Court sets "a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The injury "must be both certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotations omitted).

ARGUMENT

This Court should deny the motions to expedite and grant the motions to hold these petitions in abeyance pending the district court's review of the Preemption Rule.

I. The movants have not shown good cause to expedite review of these cases.

The Agencies and CSAR have neither demonstrated irreparable injury from delay in the disposition of these petitions nor established an unusual interest in their prompt disposition. And, in light of Congress's choice to vest the district courts with original jurisdiction to review the foundational agency action at issue in these petitions, it would be counterproductive to accelerate briefing and oral argument in this Court on the merits of the Agencies' actions before the district court concludes its review.

A. The movants are not suffering irreparable injury from this litigation.

The federal government and supporters of its actions often will request expedited consideration of petitions for review if this Court stays a final action pending disposition on the merits, and reasonably so. *See* Handbook at 34 ("When the Court disposes of a motion for stay or injunction pending appeal, it may at the same time expedite the case to minimize possible harm to the parties or the public."). *Cf.* 28 U.S.C. § 1657(a) (requiring courts to prioritize "any action for temporary or preliminary injunctive relief"). By contrast, where (as here) agency action remains in effect during the period of judicial review, the status quo during that period benefits the government and parties favored by its action—it does not harm them, and certainly not *irreparably*.

The Agencies do not allege that they or anyone else will be irreparably harmed if this litigation is not expedited. They only observe (Mot. at 6) that prompt disposition of these petitions would "provide the automotive industry with greater certainty and security in making decisions for the impending 2021–2025 model years." CSAR asserts (Mot. at 2) that "regulatory uncertainty inherent in protracted litigation" irreparably harms its automaker members. Legal uncertainty, however, does not itself cause irreparable harm warranting expedited review. And here, automakers' substantive obligations to control greenhouse-gas emissions will remain unchanged unless and until the Agencies decide whether to alter federal greenhouse-gas standards—and even then will remain uncertain until the end of any litigation arising from that decision. CSAR offers no competent, specific evidence that its members will suffer harm if these petitions are not expedited.

1. *Legal uncertainty does not constitute irreparable injury that warrants expedited consideration.*

Confidence in the rule of law promotes a fundamental background level of certainty that facilitates commercial and other transactions. But confidence in the rule of law also requires that citizens and businesses have the right to seek judicial review of government action to ensure that the law is followed. Litigation over government action invariably gives rise to uncertainty that may have financial consequences. After all, "most business transactions could be priced more accurately if even a small portion of existing legal uncertainties were resolved." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 811 (2003). But that second-order uncertainty is a price well worth paying to achieve the higher-level certainty stemming from confidence in the rule of law.

The regulatory uncertainty that inheres in litigation challenging administrative action cannot itself justify expedited review. Otherwise, this Court would be asked to "expedite" its entire agency-review docket, rendering the exercise useless. More than bare uncertainty is needed to justify the "very rare[]" step, Handbook at 34, of moving *these* petitions to the top of "the order in which civil actions are heard and determined," 28 U.S.C. § 1657(a), and correspondingly prolonging the disposition of other petitions that likewise generate uncertainty.

CSAR claims (Mot. at 12) that any uncertainty flowing from this litigation is more injurious than usual because the State of California "has suggested that, if Petitioners prevail …, it may retroactively enforce its [reinstated] regulations for the time during

which this litigation was pending." Apart from the tentativeness of the State's suggestion, which renders any injury to automakers speculative, retrospective application of a judicial decision is not unusual—though not invariable, it is the default rule. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995). The risk that a final judgment will apply retrospectively is part and parcel of the risk inherent in all litigation and does not supply a strongly compelling reason for this Court to expedite its review.

2. The movants' alleged irreparable injury from legal uncertainty is not traceable to this litigation.

The movants allege that the Agencies' final actions "immediately impact automakers' obligations." U.S. Mot. at 4; CSAR Mot. at 11. But the federal greenhouse-gas standards that remain in place impose the same substantive obligations on automakers as the state greenhouse-gas standards preempted by the Agencies' final actions. Thus, the outcome of *this* litigation cannot directly affect automakers' obligations to control greenhouse-gas emissions from their vehicles. *See Chamber of Commerce*, 642 F.3d at 206 (dismissing in part as moot a petition for review of EPA's decision to waive preemption for California's greenhouse-gas emissions standards for model years covered by the One National Program, because "automobile manufacturers will have to comply with the national standards whether we vacate the waiver decision or not"). Put another way, automakers must "make the same investments and incur the same costs to comply with" greenhouse-gas regulations while these petitions are pending as they will once this Court either grants or denies the petitions. *Mexichem*, 787 F.3d at 556.

The Agencies say (Mot. at 4) that they plan to issue a final rule "in the near future" that will weaken federal greenhouse-gas standards to diverge from the state greenhouse-gas standards that will be reinstated if these petitions are granted. The prospect that EPA will finalize that rule "is inherently speculative and contingent on future events." EPA Br. at 32, *California*, 940 F.3d 1342 (D.C. Cir. 2019) (No. 18-1114); *see also California*, 940 F.3d at 1350 (dismissing petitions for review of EPA's April 2018 "final determination" that its greenhouse-gas standards for model years 2022–2025 should be revised, in reliance on EPA's assurance "that 'all of the options are on the table' in th[is] rulemaking"). "In the meantime," automakers know that "the [federal] legal landscape remains entirely unchanged, with every existing regulation in full force and effect, and every legal right and obligation just as it was before." Br. of Intervenors Alliance of Automobile Mfrs. & Ass'n of Global Automakers at 18, *California*, *supra*. Automakers cannot reasonably rely on the Agencies' proposal in order to "make irreversible decisions" today "about their [vehicle] models and fleet mix" for upcoming model years. CSAR Mot. at 12.

Moreover, any final rule changing federal standards will almost certainly be challenged in court. A court may stay that rule's effect at the outset of such litigation, vacate the rule at the litigation's conclusion, or both. In those circumstances, too, the disposition of *these* petitions would not determine automakers' obligations to control greenhouse-gas emissions. Regardless, the validity of a rule amending federal standards would remain in doubt due to litigation over that rule, ensuring that legal uncertainties about greenhouse-gas regulations would persist irrespective of the outcome of *this* litigation.

The only state laws affected by the Agencies' September 2019 final actions that lack a federal counterpart are zero-emission-vehicle standards. But the movants barely mention those standards. They do not explain how this litigation impacts automakers' plans to deploy those vehicles, much less allege irreparable harm from uncertainty about whether the Agencies validly preempted state zero-emission-vehicle standards. Any investments made to comply with zero-emission-vehicle standards while the petitions are pending will have benefits for automakers even if the petitions ultimately are denied, not least because manufacturing zero-emission vehicles facilitates automakers' compliance with federal emissions standards. *See, e.g.*, 40 C.F.R. §§ 86.1829-15(f), 86.1865-12(k).

3. The movants have no competent, specific evidence of irreparable injury.

A party must provide evidence to "substantiate the claim that irreparable injury is 'likely' to occur." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The injury alleged here is "purely financial or economic," so the movants must point to "specific, identifiable," and unrecoverable costs that automakers "will incur" pending review. *Mexichem*, 787 F.3d at 555; *see also Citizens for Responsibility & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018). The movants do not try to carry that burden.

The Agencies only gesture (Mot. at 1) at unspecified "investment and production decisions" that may be affected by this litigation. For its part, CSAR summarily alleges (Mot. at 11) that its automaker members "will be required to expend unrecoverable resources developing production plans" and pay more in "administrative and transactional costs." Those general and conclusory allegations, unsupported by affidavits or

other competent evidence, do not establish irreparable harm. That alone is good reason to deny the motions to expedite.

CSAR is marginally more specific when alleging (Mot. at 12–13) injury from a state policy that links California's acquisition of vehicles for governmental use to automakers' recognition of the State's authority to set greenhouse-gas and zero-emission vehicle standards. But California's policy is not linked to this litigation, the disposition of which will not determine whether the State's policy is lawful or will continue. Thus, if any injury flows from California's procurement policy, it does not support expedited review here.

CSAR also complains (Mot. at 13–14) that its members were somehow injured when, in August 2019, California gave them additional flexibility to begin banking credits earned from over-compliance with state greenhouse-gas standards. Traditionally, automakers have elected to maintain credit banks with EPA for compliance with federal greenhouse-gas standards. The States' willingness to provide additional flexibility did not make automakers' regulatory obligations more onerous, and, in any event, CSAR fails to explain how expediting this litigation would address its concern about this issue.

B. The movants do not show an unusual interest in prompt disposition.

The Agencies and CSAR contend that this Court should expedite these petitions because the automobile industry is a "significant sector of the economy." U.S. Mot. at 2. This Court routinely hears cases whose disposition affects significant sectors of the economy, yet the vast majority of those cases are not expedited. Order at 1, *Am. Lung*

Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 2019) (No. 19-1140) (denying EPA's motion to expedite review of petitions that concern appropriate regulation of the power sector).

The movants do not show that these petitions are unusually deserving of urgent review. There may be unusual interest in prompt judicial review of governmental action that alters automakers' substantive obligations to control greenhouse-gas emissions—e.g., should the Agencies finalize their pending proposal to weaken federal standards. But the movants here have not met their burden to show an unusual interest in prompt disposition of this litigation. Indeed, over half the automakers originally represented in this litigation by intervenor Association of Global Automakers, Inc., are no longer represented by any party here,[1] and the CEO of the trade association that now "represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the U.S."[2] recently stated that it does not "have a position or a stake in th[is] litigation."[3]

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[1] *Compare* Mot. for Leave to Intervene by Coalition for Sustainable Automotive Regulation & Association of Global Automakers, Inc. at 3–4 (Oct. 31, 2019) (listing eleven automaker members of the Association of Global Automakers, Inc.), *with* Association of Global Automakers, Inc., Notice of Name Change, at 2 (Jan. 10, 2020) (listing five automaker members of replacement entity Automotive Regulatory Council, Inc.).

[2] Ex. A, Press Release, Alliance for Automotive Innovation, Nation's Two Largest Automobile Associations Join Forces to Create the Alliance for Automotive Innovation (Jan. 8, 2020), https://www.autosinnovate.org/press-release/auto-industry-trade-associations-unite-forming-unified-voice-on-critical-auto-policy-issues-and-championing-innovation.

[3] Ex. B, Maxine Joselow, *Trade Associations Merge After Clean Cars Strife*, E&E News, Jan. 8, 2020 (quoting John Bozzella, CEO, Alliance for Automotive Innovation), https://www.eenews.net/greenwire/2020/01/08/stories/1062027259.

That these petitions present a "substantial challenge" to the Agencies' actions, CSAR Mot. at 15, hurts, rather than helps, movants' argument for expedited consideration. This Court's direction that a movant must show not only irreparable injury but also "that the decision under review is subject to substantial challenge," Handbook at 34, assumes that the movant is irreparably injured by that decision and can show that its validity is in doubt. The Court's Handbook does not contemplate a motion filed by a defender of the decision under review, presumably because mere uncertainty about that decision's validity does not warrant expedited consideration. *See supra*, pages 10–11. In this unusual situation, it makes more sense for this Court to require a showing that there is *no* substantial challenge to the decision—a showing that CSAR admits it cannot make.

C. An expedited schedule would serve no purpose because this Court lacks original jurisdiction to review the foundational agency action.

Even if the movants had advanced strongly compelling reasons for resolving these petitions unusually expeditiously, accelerating merits briefing and oral argument would be unlikely to achieve that goal. This Court lacks jurisdiction to review NHTSA's Preemption Rule directly. *See* PIP Abeyance Mot. at 12–13. Further, because EPA relied on the Preemption Rule as the basis for the Waiver Revocation, it would be inexpedient for this Court to proceed in a backwards fashion and endeavor to determine whether EPA lawfully relied on NHTSA's action before the Court has even obtained (appellate) jurisdiction to decide whether NHTSA's action is itself lawful. *See id.* at 14–15.

To avoid having this proceeding ping-pong between the circuit and district courts, this Court should at least await the district court's pending determination whether it has jurisdiction to review the Preemption Rule, *see supra* page 7, at which time that court will either enter an appealable order on that issue or else go on to consider the rule's merits in a proceeding that "will sharpen and narrow the legal issues that must eventually be decided" by this Court. *Green v. Dep't of Commerce*, 618 F.2d 836, 842 (D.C. Cir. 1980). That course of action is a far more sensible way to expedite this Court's ultimate review of these petitions than rushing into premature merits briefing in a multilayered proceeding in which jurisdiction over a foundational agency action is, at a minimum, in doubt.

II. The movants' proposed schedule is unreasonable and prejudicial.

This is a complex proceeding in which several, diverse petitioner groups—including almost half the nation's States—seek review of three final actions from two different federal agencies. If the petitions are not held in abeyance, this Court should follow its usual practice in complex cases by first resolving all procedural and dispositive motions and then issuing "an order soliciting a proposed briefing schedule and format" from the parties. Handbook at 11. The movants eschew this sound practice and do not propose any briefing format, leaving it to this Court to decide without the parties' input how eight petitions for review of three agency actions shall be briefed.

The unreasonableness of the movants' proposal is compounded by the fact that this Court will not be in a position to decide whether to expedite this litigation or hold it in abeyance until the completion of procedural-motions briefing on January 17, 2020,

little more than three weeks before movants' proposed deadline for petitioners' merits briefs. This Court's scheduling order in a complex case typically issues only after procedural motions are resolved and the parties have conferred on and proposed a briefing format, and the scheduling order typically gives petitioners at least 30 days from its entry to file their briefs. The minimum times to prepare response and reply briefs are 30 and 21 days, respectively. *See* Handbook at 37. The movants propose to give the Agencies 30 days to respond (37 for intervenors), but to give petitioners only 14 days to reply to the Agencies (and only 7 days to reply to intervenors). U.S. Mot. at 7; CSAR Mot. at 2.

This Court should deny the motions to expedite for the reasons stated in Part I, *supra*. But, if the Court were to determine that the movants have advanced strongly compelling reasons to accelerate briefing and oral argument, it should solicit proposed briefing schedules and formats, rather than enter a precipitous and lopsided schedule that shortens petitioners' briefing periods more than those of the parties claiming a special need for urgent review.

CONCLUSION

The motions to expedite should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing response to a motion contains 4,624 words and complies with the type-volume limit in Fed. R. App. P. 27(d)(2)(A). The document was prepared using Microsoft Word 365 in 14-point, Garamond font, and it complies with the typeface and typestyle requirements of Fed. R. App. P. 27(d)(1)(E).

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CERTIFICATE OF SERVICE

On January 10, 2020, I filed the foregoing document with this Court using the CM/ECF system. All counsel in these consolidated cases are registered CM/ECF users and will be served via the CM/ECF system.

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