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

MOTION BY INTERVENORS FOR EXPEDITED CONSIDERATION OF THIS CASE AND AN EXPEDITED BRIEFING SCHEDULE

Pursuant to Federal Rule of Appellate Procedure 27 and Rule 27 of this Court, Intervenors the Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc. (collectively, "Movants") respectfully move for expedited briefing and oral argument in the above-captioned case and in all cases consolidated herewith.[1] Movants propose the following schedule for expedited briefing in this case and the consolidated cases:

[1] Consolidated cases include *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-

February 10, 2020	Petitioners' Opening Brief(s)
March 11, 2020	Respondents' Brief
March 18, 2020	Respondent-Intervenors' Brief(s)
March 25, 2020	Petitioners' Reply Brief(s)
April 1, 2020	Deferred Joint Appendix
April 6, 2020	Final Form Briefs

Further, Movants respectfully request that oral argument be scheduled as soon as practicable upon completion of briefing, and within the spring 2020 term. This proposed schedule is in line with the schedule proposed by Respondents in their motion to expedite these consolidated proceedings, filed on December 18, 2019. Dkt. No. 1820782.

Without expedition, Movants' member companies will suffer irreparable injury. The regulatory uncertainty inherent in protracted litigation over these important issues will drive up costs for manufacturers and consumers alike. While this case remains pending, California may soon begin to enforce its own tailpipe greenhouse gas (GHG) emissions standards on Movants' member companies, despite its lack of a required preemption waiver under Section 209(b) of the Clean Air Act. Moreover, California recently announced that it will ban State purchases of automobiles sold by Movants' members because these companies do not "recognize" California's authority to set GHG standards, despite the clear statement of the responsible federal agencies that it lacks the legal basis to set such standards.

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.

Finally, given the well-recognized fact that automobile manufacturing is a highly regulated, long lead-time industry, and the disruptive effect that a failure to resolve this case will have on the planning, cost, manufacturing, and distribution of models that will ultimately be offered for sale, Movants and the public alike have a strong interest in the prompt resolution of this case.

Movants have consulted with counsel for Petitioners. Petitioners in Case Nos. 19-1230, 19-1239, 19-1243, and 19-1246 state that they oppose the motion and intend to file a response. Petitioners in Case Nos. 19-1241, 19-1242, and 19-1245 state that they oppose the motion. Petitioner in Case No. 19-1249 did not provide a response.[2]

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

[2] As noted above, Respondents have also filed their own motion for expedited consideration on December 18, 2019. Dkt. No. 1820782. Movants concur with that motion.

August 24, 2018.[3] There are two major components to the ONP Rule: first, NHTSA affirmed that federal law preempts state regulation of tailpipe GHG emissions standards; and second, EPA finalized its withdrawal of a preemption waiver that it had previously granted to California under Section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b).[4]

I. The One National Program and Prior Rulemakings

For over 40 years, motor vehicle fuel economy was regulated solely by the NHTSA through the Corporate Average Fuel Economy (CAFE) program. This changed in 2004. At that time, the California Air Resources Board (CARB) began rulemaking to regulate GHG emissions from automobiles, which is essentially equivalent to regulating fuel economy. Twelve states adopted California's regulations pursuant to Section 177 of the Clean Air Act. 42 U.S.C. § 7507. Then, following *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA also moved to regulate GHG emissions from vehicles, whose main constituent is tailpipe carbon dioxide (CO2) emissions.[5] Automakers were thus left facing GHG and fuel economy

[3] *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").

[4] Part Two of the SAFE Vehicles rulemaking is not at issue here. That portion of the rulemaking is forthcoming and is expected to establish uniform national fuel economy and GHG standards for model years 2021–2026.

[5] As the ONP Rule explains, any substantial control of vehicular greenhouse gas emissions from conventional vehicles requires control of carbon dioxide

requirements not only from two federal agencies but also from thirteen states throughout the country.

Those competing regulatory requirements set the stage for the "One National Program," which was adopted in 2009. Through One National Program, EPA and NHTSA committed to issuing their emissions regulations jointly, and CARB agreed to facilitate the program by deeming automakers who complied with federal regulations to comply with state regulations as well. This unified, national program thus removed the specter of overlapping and inconsistent standards regulating tailpipe CO2 emissions and motor vehicle fuel economy. This regulatory certainty is extremely important for the auto industry, which is widely recognized as a highly regulated, long lead-time industry.[6]

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emissions—a matter of chemistry and engineering not disputed by CARB, California's vehicle emissions regulatory agency. *See* 84 Fed. Reg. at 51,315.

[6] For this reason, Congress has sought to accommodate auto manufacturers' need for advanced planning by including various "lead time" provisions in EPCA and the Clean Air Act. *See* 49 U.S.C. § 32902(a) ("At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year."); *id.* § 32902(b)(3)(B) ("The Secretary shall … issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years."); *see also* 42 U.S.C. § 7507(2) (requiring two-year lead time before any other state can adopt California standards). These regulations recognize that compliance with new fuel economy standards is a multi-year process for the auto industry.

II. The Current Rulemaking

On August 24, 2018, EPA and NHTSA issued the 2018 NPRM discussed above. While the federal rulemaking was pending and discussions between the agencies and California were underway, California promulgated a rulemaking that could 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 emission 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, if the federal standards are amended—despite the requirement that it do so under Section 209(b) of the Clean Air Act. Consequently, the industry is again faced with the very problem that the Obama Administration recognized and sought to protect the industry from—"inconsistent standards with different levels of stringency, along with duplicative or confusing compliance programs and incompatible enforcement policies." Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 Harv. Envtl. L. Rev. 343, 358 (2011).

The ONP Rule was published on September 27, 2019. In the portion of the rule being challenged in this action, NHTSA reaffirmed its long-held position that

"a State or local requirement limiting tailpipe carbon dioxide emissions from automobiles has the direct and substantial effect of regulating fuel consumption and, thus, is 'related to' fuel economy standards." ONP Rule, 84 Fed. Reg. at 51,313. NHTSA also concluded that "State or local limitations or prohibitions on tailpipe carbon dioxide emissions from automobiles directly conflict with the objectives of EPCA" because "State requirements, made based on State-specific determinations unbound by the considerations in EPCA, frustrate NHTSA's statutory role." *Id.* at 51,314. NHTSA incorporated its EPCA preemption determination in appendices to the fuel economy standards in the Code of Federal Regulations. *See, e.g.*, 49 C.F.R. § 531.7; 49 C.F.R. pt. 531, app. B.[7]

This challenge was commenced on October 28, 2019, when Petitioners filed a "protective" petition for review.[8] This Court granted Movants' motion for leave

[7] In the ONP Rule, NHTSA made it clear that EPCA did not prohibit California and the opt-in States from continuing to adopt and enforce emissions regulations that did not "directly or substantially" impact the federal fuel economy regulatory program, 84 Fed. Reg. at 51,319, and that if regulations that controlled CO2 emissions and other GHG emissions, any severable non-preempted provisions would not be invalidated under EPCA. *Id.* at 51,318 ("[S]ome greenhouse gas emissions from automobiles have no relation to fuel economy and therefore may be regulated by States and local governments without running afoul of EPCA preemption.").

[8] Petitioners explained that their petition for review is "protective in nature" because they "believe that Congress has vested the federal district courts with exclusive original jurisdiction to review NHTSA's action." Dkt. No. 1813218. In addition to this "protective" petition, Petitioners have challenged NHTSA's final action in the U.S. District Court for the District of Columbia. *See, e.g.*,

to intervene on November 21, 2019. Also in November 2019, the Court consolidated seven subsequently filed petitions for review related to the ONP Rule with the above-captioned proceeding. These later-filed proceedings also challenge EPA's withdrawal of California's Section 209(b) preemption waiver, in addition to protectively challenging NHTSA's preemption determination.

III. Recent Actions Taken by California

Over the past several months, California has made clear that it is prepared to enforce its tailpipe GHG emissions regulations, despite the ONP Rule and the pendency of this litigation. On August 5, 2019—shortly before the ONP Rule was published—CARB sent a letter to all automakers regarding the State's GHG program. *See* Exhibit 1, California Air Resources Board, Letter Regarding Greenhouse Gas Program Compliance Path for Model Year 2020 Vehicles (Aug. 5, 2019) (the "CARB Letter"). In the letter, CARB informed automakers that in order 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. *Id.* The CARB Letter gave automakers only eleven days to decide whether to make this declaration of compliance.

California v. Chao, No. 1:19-cv-02826-KBJ (filed Sept. 20, 2019). All three cases challenging NHTSA's final action in the district court have been consolidated and are subject to a pending motion to dismiss or transfer to this Court.

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 suggested to automakers that, if California were eventually to prevail, it might try retroactively to 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. *See* Exhibit 2, California Department of General Services, News Release: State Announces New Purchasing Policies to Reduce Greenhouse Gas Emissions from the State's Vehicle Fleet (Nov. 15, 2019). One of the new policies—scheduled to take effect on January 1, 2020—will prohibit any state agency from purchasing vehicles from a manufacturer that does not "recognize [CARB's] authority to set greenhouse gas and zero emission vehicle fuel

standards." *Id.* at 1; *see also* 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, "Carmakers that have chosen to be on the wrong side of history will be on the losing end of California's buying power").

ARGUMENT

Federal courts "shall expedite the consideration of any [civil] action" for "good cause." 28 U.S.C. § 1657(a). Expedited consideration is appropriate here because the "delay will cause irreparable injury" to Movants' members, and because the rulemaking "under review is subject to substantial challenge," insofar as eight separate petitions for review have been filed and the parties to the pending cases include 35 states, several federal agencies, and an array of industry participants. *See* U.S. Court of Appeals for the D.C. Circuit, *Handbook of Practice and Internal*

Procedures at 34 (Dec. 1, 2019). Moreover, expedition is warranted because the public has an "unusual interest in prompt disposition" of this matter. *Id*.

I. Movants Face Irreparable Harm if Resolution of this Case Is Delayed.

Expedition is appropriate here in order to reduce the imposition of significant, unrecoverable costs on Movants' members.

Protracted litigation over the ONP Rule will continue to undermine the regulatory certainty provided by a unified, national standard. Because the automotive manufacturing planning, development, and production process takes so much lead time, a single national standard enables Movants' 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, Movants' members will continue to face multiple, overlapping, and inconsistent regulations, and 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.

Undertaking the measures needed to comply with this bifurcated and uncertain regulatory regime will drive up costs to consumers due to the loss of economies of scale, increase administrative and transactional costs, and cause potential disruptions to vehicle sales distribution networks. Prompt disposition is

particularly important as Movants' members prepare to certify their fleets for Model Year (MY) 2021, a process that requires Movants' members to make irreversible decisions about their models and fleet mix by October 2020 at the latest.

In addition to the special, increased costs that regulatory uncertainty imposes upon this long lead-time industry, California's recent regulatory and purchasing actions pose further harm to Movants' members. Despite lacking a waiver from the 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. This posturing has tangible and immediate consequences for Movants and their members: as noted above, California will shortly bar every agency of the government of California from purchasing vehicles from Movants' 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. What's more, CARB has suggested that, if Petitioners prevail in this litigation, it may retroactively enforce its regulations for the time during which this litigation was pending.

These policies put Movants' members in an impossible position: the federal government has not granted California a waiver under the Clean Air Act to regulate tailpipe GHG emissions, and it has promulgated a rulemaking declaring that

California's program is preempted under EPCA. Despite this, California is demanding that automakers recognize its authority to regulate tailpipe GHG emissions or permanently lose State business and risk being subject to State enforcement.

The harm from California's current legal positioning, as articulated in this litigation, is real and immediate. The government of California is a large purchaser of automobiles, including from Movants' 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 one report. *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 set to take effect in less than two weeks, Movants' 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 determined in this matter remains undecided, the greater financial harm that will be caused to Movants by way of the permanent loss of the opportunity for California's patronage.

In addition to this new policy, the CARB Letter has injected even more uncertainty into the regulatory climate. Knowing that the federal government was

soon to reaffirm its policy on EPA waiver and EPCA preemption, the CARB Letter instructed automakers—under a remarkably short eleven-day deadline—to notify CARB of their intent to comply with California's GHG standards, or permanently lose regulatory flexibilities such as credit banking. 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.

If the ONP Rule is upheld, then the legal effect of the CARB Letter will be clear: California's tailpipe GHG program will be preempted by federal law. But while resolution of this case is pending, Movants' members must make complex decisions without this regulatory certainty while also facing the possibility of State enforcement actions. Prompt resolution of this case is thus necessary to provide Movants' members with a clear answer regarding California's authority to regulate and to reduce irreparable economic harm that will occur as a result of this uncertainty.

II. The Rule Is Subject to Substantial Challenge.

Expedition is also warranted because the ONP Rule is "subject to substantial challenge." *D.C. Circuit Handbook* at 34. While Movants firmly dispute the merits of these pending petitions, the fact remains that eight separate actions have been filed by a wide array of states, nongovernmental organizations, and industry participants challenging the ONP Rule, while the federal government, a number of other states, and the automotive industry oppose, or have sought to oppose, these petitions. These actions represent a true challenge to the Rule, if only on the basis of the number of actions filed and the breadth of the involved parties. Accordingly, this prong of the expedited consideration test is satisfied.

III. The Public Has an Interest in the Prompt Resolution of this Case.

Given the ubiquity of automobiles in American life and the effect that this case will have on automobile prices and sales, the public has "an unusual interest in prompt disposition" of this case. *D.C. Circuit Handbook* at 34. Indeed, for many Americans, their automobiles are either their largest or second largest asset, and the price and availability of new vehicles is highly and directly relevant to consumers.

The effect of delayed resolution of this case will be most strongly felt in automobile sales. In 2018 alone, the U.S. auto industry sold 17.2 million light vehicle units. *See* Alliance of Automobile Manufacturers' Comments on the 2018 NPRM at 2 (Oct. 29, 2018), Dkt. No. NHTSA-2018-0067-12073. As providers of

automobiles to the American driving public, Movants' members know that consumers have high expectations: they want models that are safe, reliable, energy-efficient, clean, smart, and affordable. The resolution of this case—and the regime for setting fuel economy and greenhouse gas standards that result—will affect how Movants' members are able to balance all of these competing objectives of, and meet the resulting economic demand from, consumers. Prompt resolution would provide regulatory certainty, and allow Movants' members to move forward with new investments and offer vehicles at affordable prices. Protracted litigation, on the other hand, could stall innovation, thus reducing choice for consumers and driving up purchasing costs. Expedition will help to reduce these costs to the public and to the industry by providing regulatory certainty much earlier than if this case were to proceed under a standard briefing schedule.

Two Administrations have understood that state GHG regulations of tailpipe CO2 emissions are preempted by federal law, and one Administration of the other political party has emphasized the risks of a balkanized regulatory regime for the automotive industry. Without expedition, automakers must make production planning decisions based on those competing federal and state regulations—planning decisions which cannot be reversed without material financial costs to Movants' member companies and to the public.

CONCLUSION

For the foregoing reasons, the Motion for Expedited Consideration of this Case and an Expedited Briefing Schedule should be granted.

Dated: December 24, 2019

Respectfully submitted,

/s/ *Raymond B. Ludwiszewski*

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion for Expedited Consideration of this Case and an Expedited Briefing Schedule complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 3,583 words. I further certify that this Motion 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: December 24, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2019, I electronically filed the foregoing Motion for Expedited Consideration of this Case and an Expedited Briefing Schedule 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*

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