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

REPLY OF THE COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION AND THE AUTOMOTIVE REGULATORY COUNCIL IN SUPPORT OF THEIR MOTION TO EXPEDITE

These cases warrant expedited consideration. The Coalition for Sustainable Automotive Regulation and the Automotive Regulatory Council, Inc.[1] ("Movants") are not, as Petitioners insist, faced with mere regulatory uncertainty. Rather, California's recent attempts to enforce its preempted GHG and ZEV standards—and to punish automakers supporting one national standard—are directly related to this lit-

[1] The Automotive Regulatory Council, Inc. was formerly known as the Association of Global Automakers, Inc. *See* Notice of Name Change, Dkt. No. 1823691.

igation and create uncertainty that is materially different from that inherent in a typical regulatory dispute. Resolving this case expeditiously will determine who has authority to regulate emissions and, by extension, mitigate the irreparable harm to Movants' members from immense, unrecoverable production costs and from California's recent actions.

The public also has an unusual interest in expedited consideration—not just because the automotive industry is a vital economic sector, but also because the outcome of these cases will directly affect consumers. The public interest favors maintaining the *status quo* of unified national standards, just as it favors expedited consideration here.

ARGUMENT

I. Movants Have Shown Irreparable Injury from Delay of This Litigation.

Protracted litigation over the ONP Rule will cause irreparable injury to Movants' members. Because auto manufacturing is an unusually long lead-time industry, with production and distribution of MY2021 vehicles to begin in mere months, Movants' members will soon be facing an urgent choice: spend unrecoverable capital trying to comply with two competing regulatory regimes—even though one may be later deemed illegal—or continue to support a unified national standard and face California's punitive policies, which also carry serious financial consequences for Movants' members.

Petitioners insist that Movants have failed to establish irreparable injury. They argue that mere "legal uncertainty" is not enough to constitute irreparable injury, and that Movants have identified no harm beyond this "bare" uncertainty. Public-Interest Pet'rs' Opp'n to Mots. Expedite 10-11, 13-14; State & Local Gov't Pet'rs' Opp'n to Mots. Expedite 15-22; Indus. Pet'rs' Opp'n to Mots. Expedite 2. Petitioners also claim that any uncertainty will not be resolved in *this* litigation, but only after Respondents issue new federal standards and any proceedings challenging those standards have concluded. Public-Interest Opp'n 11-13; State & Local Gov't Opp'n 16-17; Indus. Opp'n 2-3.

Petitioners are wrong on both counts. Not only have Movants identified real and irremediable injuries that go well beyond legal uncertainty—including substantial financial losses that cannot be recouped by "adequate compensatory or other corrective relief," *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)—but these harms are also clearly traceable to the merits of this litigation. A decision resolving the key question here—whether California lacks authority to set GHG and ZEV standards—will also determine whether Movants' members will need to expend considerable resources to comply with two regulatory frameworks rather than one, and will likewise decide whether California can enforce its novel punitive policies against automakers that have not acceded to its

preempted authority. The standard for showing irreparable injury to support expedition, while demanding, does not require more.

A. Movants Face More than "Legal Uncertainty" if Expedition Is Denied.

Movants have shown that delay of these proceedings will cause irreparable harm that far exceeds mere "legal uncertainty." While Movants agree that most cases challenging agency action involve at least "some level of regulatory uncertainty," State & Local Gov't Opp'n 15, this is not one of those typical cases. Soon, Movants' members will be required to make substantial financial commitments regarding upcoming models and fleet mix—commitments that will have an enormous price-tag if automakers must prepare for two complex and conflicting regulatory regimes, and a higher price-tag still if they must make further changes and incur, for example, supplier cancellation costs as the litigation proceeds. If one of these regimes is later deemed unlawful, Movants' members will suffer a financial loss that is both immense and irretrievable. This is enough to show irreparable injury. *See Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) ("Normally the mere payment of money is not considered irreparable, but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable." (citation omitted)).

But the substantial, unrecoverable expenditures of Movants' members in preparing for multiple regulatory outcomes is not the only injury Movants will suffer if these cases are delayed. Recent actions by California have made clear that automakers who have not agreed to comply with its preempted GHG and ZEV regulations will be "on the losing end" of California's regulatory and buying power. Movants' Mot. Expedite 10 (quoting Governor Newsom). Indeed, California has already followed through with this threat: the State's January 2020 purchasing policy, *requiring* state agencies to purchase vehicles only from automakers that "recognize [CARB]'s authority" to regulate emissions, will cost Movants' members millions of dollars in lost sales. *See id.* at 9-10, 13.[2] How California can deliberately and openly set out to punish Movants' members and then claim Movants suffer no injury is mind-boggling.

Petitioners assert that California's purchasing policy "ha[s] nothing to do with this litigation" because the policy is "not at issue" here. State & Local Gov't Opp'n 21. But the fact that the policy is not being challenged in these cases does not mean

[2] The policy does not, as Petitioners maintain, merely "set priorities" for purchasing decisions. State & Local Gov't Opp'n 21. The policy states, "Beginning January 1, 2020, state agencies are *required* to purchase vehicles from … CARB-aligned OEMs[] that recognize California's authority to set vehicle emissions standards." Cal. Dep't of Gen. Servs., Vehicle Manufacturer Purchasing Restrictions, https://tinyurl.com/w7dg9x9 (emphasis added).

that the two are unlinked. To the contrary, California has stated that the purchasing policy and other recent actions are "a direct response" to Movants' decision to "side with the Trump administration" in these cases. Media Advisory, CARB, *Mary Nichols to Explain Why CARB Is Not Attending the 2019 Los Angeles Auto Show* (Nov. 20, 2019), https://tinyurl.com/yxyr5jj6. Moreover, a favorable decision in this litigation will directly impact the legal legitimacy of the purchasing policy: if this Court decides that California is preempted from setting GHG and ZEV standards, then a policy punishing automakers for failing to respect authority that California lacks is necessarily nugatory.

California's other recent actions are no less injurious. Weeks before the ONP Rule was expected to issue, CARB sent a letter to all automakers requiring them to certify compliance with its regulations or lose the ability to generate and trade credits under California's banking credit system. Movants' Mot. Expedite 12 & Ex. 1 ("CARB Letter"). In September, CARB agreed—for now—that it would not enforce California's regulations during the litigation period, but warned automakers that the State could retroactively enforce the standards for each year the lawsuits continued. *Id.* at 9. And as recently as this month, a bill before the State legislature proposed to strip Californians of the ability to earn clean car rebates if they bought from automakers siding with Respondents. *See* Laurel Rosenhall & Rachel Becker, *Beyond Lawsuits, CA May Weaponize Electric Car Rebates in Its Emissions Battle*

Against Trump, CalMatters (Sept. 17, 2019), https://tinyurl.com/y3mg6fsb. Although the bill has been pulled from consideration, its message rings clear: California is willing to go beyond the existing legal challenges to oppose the ONP Rule—and financially injure automakers seeking to clarify their legal rights.

Petitioners argue that neither the CARB Letter nor the threat of retroactive enforcement can be part of the irreparable-harm calculus. According to Petitioners, the CARB Letter simply "extended a deadline for automakers to make a choice they had always had: how to comply with California's standards." State & Local Gov't Opp'n 20. And with respect to retroactive enforcement, Petitioners maintain that it is too "speculative" in this case to qualify as a concrete injury—despite that it is also, apparently, "the default rule." Public-Interest Opp'n 11. Petitioners are wrong on both scores.

First, the CARB Letter is not as innocuous as Petitioners claim. Movants' members who refused to certify compliance within the eleven-day timeframe set by CARB lost the ability to generate or use any credits in MY2020, which will make it harder—not easier—for industry to satisfy California's separate standards if Petitioners prevail. *See* Movants' Mot. Expedite 12. Put differently, the CARB Letter was not asking automakers to "make a choice they always had"; it was forcing them to choose between supporting California and supporting one national standard, and risk the financial consequences of choosing "wrong." Second, California's warning

that it could enforce its regulations retroactively can hardly be considered "speculative." By its own admission, California intends to punish automakers that disagree with its legal position, and there is every indication it will carry out these threats if able to do so. Meanwhile, as Petitioners double-down on trying to delay this litigation, the costs of these non-speculative threats to Movants' members—plus the costs of imminent compliance decisions and of their continuing loss of sales to a major customer—continue to accumulate with each passing day.[3]

B. Expediting *This* Case Will Prevent Irreparable Injury.

Petitioners insist that "the outcome of *this* litigation cannot directly affect automakers' obligations" to follow federal emissions standards, Public-Interest Opp'n 11, and that "regulatory uncertainty over those standards will not be resolved" if expedition is granted here, State & Local Gov't Opp'n 16. But Petitioners misunderstand the nature of Movants' injury. While it is true that Respondents have not

[3] In the same breath in which they oppose expedition, Petitioners argue that the most "[]expedient" way to proceed is to hold these cases in abeyance until the D.C. District Court has reviewed NHTSA's portion of the ONP Rule. Public-Interest Opp'n 16-17; *see* Public-Interest Pet'rs' Mot. Abeyance 12-13. But that court is nowhere near to deciding the motion to dismiss or transfer currently before it, let alone the merits. In fact, the court only recently scheduled a hearing for Defendants' motion, setting it for April 16—three full months from now. Minute Order, *California v. Chao*, No. 19-cv-2826-KBJ (Jan. 15, 2020). Given this development, the irreparable harms that Movants articulate are certain to attach if abeyance is granted—and become even more costly.

yet published new federal standards—although the standards, now under final review, are shortly forthcoming, *see* Office of Mgmt. & Budget, *Pending EO 12866 Regulatory Review* (Jan. 14, 2020), https://tinyurl.com/rnjhr4p—Movants do not argue that their irreparable injury stems from the uncertainty over the *content* of those standards. Rather, their injury is caused by the uncertainty over *who* can regulate emissions in the first place. The Court's decision here will settle this uncertainty: it will determine whether there is a unified national standard or a balkanized, two-tiered system.

Although the significance of a unified national standard escapes Petitioners, the Obama Administration understood it well when negotiating the One National Program in 2009. One former White House official observed that if federal and state regulators acted independently, they would likely "produce 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). This approach, in turn, would produce concrete harms, including "rais[ing] the costs to industry" and "compromis[ing] the potential benefits … for consumers and the public." *Id.*

These are precisely the sort of irreparable injuries—recognized by automakers and the Obama Administration alike—that Movants seek to avoid. While litigation

persists, Movants' members must prepare to comply with multiple competing regulatory frameworks, which will seriously increase costs to both consumers and manufacturers.[4] Expedition will alleviate these costs.[5]

II. The Public Has an Unusual Interest in Expedition.

Petitioners also insist that the public lacks "an unusual interest" in expedition. Public-Interest Opp'n 14. They assert that Respondents, not Petitioners, upset the *status quo*, and they dismiss as irrelevant the importance of the automotive industry to the general public. Both arguments are unavailing.

First, Petitioners distort the history of this case, insisting that Respondents upended the existing regulatory framework by promulgating the ONP Rule, *see* Indus. Opp'n 4—in the process, revoking "longstanding state laws" regulating emis-

[4] The real reason for Petitioners' opposition to expedition and their desire to hold their own petitions in abeyance has recently been made clear—and that reason cannot be found anywhere in their filings with this Court: "Our strategy is to … not precipitate a Supreme Court taking of this case until Mr. Trump is out of office." Tony Barboza & Anna Phillips, *She Helped Make California a Clean Air Leader. Now Trump Could Upend that Legacy*, L.A. Times (Jan. 10, 2020), https://tinyurl.com/tkcs33f (quoting CARB Chair Mary Nichols).

[5] Petitioners also argue that Movants "use the strength of Petitioners' arguments" to support expedition. State & Local Gov't Opp'n 22. This misreads Movants' motion. For expedition, this Court requires a showing that the case is "subject to substantial challenge." U.S. Court of Appeals, D.C. Circuit, *Handbook of Practice & Internal Procedures* 34 (Dec. 1, 2019). Movants do not claim that Petitioners' arguments have legal merit, only that the ONP Rule is subject to multiple challenges.

sions, Public-Interest Opp'n 1, and contravening Congress's "express[] authoriz[ation]" of a bifurcated regulatory regime, State & Local Gov't Opp'n 5. But contrary to Petitioners' narrative, the decades-long *status quo* is a unified, national program regulating automotive fuel economy. For over forty years, NHTSA was the sole regulator of motor-vehicle fuel economy, in consultation with other federal agencies and using criteria set by Congress. This is consistent with Congress's express preemption of state fuel-economy regulations under the Energy Policy and Conservation Act. *See* 49 U.S.C. § 32919. Similarly, under the Clean Air Act, states are expressly preempted from setting emissions standards not related to fuel economy, *see* 42 U.S.C. § 7543(a), although California may obtain a waiver under certain circumstances. But while Congress permits EPA to waive preemption, there are strict limits on EPA's authority to do so. *See id.* § 7543(b)(1). The *status quo*, therefore, is a unified regulatory framework at the federal level. And the public interest generally favors maintaining the *status quo*, particularly while litigation is pending. *See, e.g.*, *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1094 (D.C. Cir. 1981).

Second, it is not simply the size of the regulated industry that warrants expedition, but its ubiquity in American life. To be sure, this case concerns a significant industry, one that contributed $162.4 billion to the U.S. economy in 2018.[6] But more

[6] U.S. Bureau of Econ. Analysis, *GDP by Industry*, Line 21 (Oct. 29, 2019), https://tinyurl.com/yxydv44x.

importantly, it affects nearly every person in this country: 95% of American households own a car,[7] there are more than 250 million registered vehicles in the country,[8] and American consumers purchased over 17 million new light-duty vehicles last year.[9] The outcome of these cases will govern how automakers balance the numerous and sometimes competing objectives that affect the purchasing decisions and pocketbooks of hundreds of millions of Americans. *These* effects—not just the size of the industry—give the public an "unusual interest in prompt disposition" of these cases. *D.C. Circuit Handbook* 34.

[7] U.S. Dep't of State, *Does Everyone in America Own a Car?*, https://tinyurl.com/ssglfdl.

[8] U.S. Dep't of Transp., *National Transportation Statistics*, Table 1-11 (2018), https://tinyurl.com/qrbsvsn.

[9] Alliance of Automobile Manufacturers' Comments 2 (Oct. 29, 2018), Dkt. No. NHTSA-2018-0067-12073.

CONCLUSION

For these reasons, this Court should grant Movants' motion to expedite.

Dated: January 17, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in Support of Motion to Expedite complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,597 words. I further certify that this Reply complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: January 17, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2020, I electronically filed the foregoing Reply in Support of Movants' Motion to Expedite 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.

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