

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

**PETITIONERS' SECOND SUPPLEMENTAL RESPONSE TO  
REQUEST FOR BRIEFING PROPOSALS**

**INTRODUCTION AND BRIEFING PROPOSAL**

On February 4, 2020, this Court ordered the parties to submit briefing proposals by March 5, 2020. The parties submitted a joint proposed briefing format and schedule on that date. Doc. No. 1832077. On April 3, 2020, Petitioners filed a supplemental response to the Court's request for briefing proposals, requesting an amendment to the schedule presented in the previously

submitted joint proposal. ECF No. 1836717. No party opposed that request. *See id.* at 2. The Court has not entered a briefing order to date.

In light of the lengthy and extraordinary effects of the COVID-19 pandemic on Petitioners and their counsel, and other circumstances described herein, Petitioners respectfully ask the Court to enter the proposed briefing schedule set forth below in lieu of the schedule set forth in Petitioners' prior supplemental response. Specifically, Petitioners propose a deadline for their opening briefs that is 60 days later than the parties proposed in their joint submission on March 5 and 39 days later than Petitioners proposed in their April 3 supplemental submission. The proposed numbers of briefs and words are unchanged from prior submissions.

<b>Brief or Filing</b>	<b>Date Due</b>	<b>Words</b>
Petitioners	Tuesday, July 21	35,000 total, shared between up to 4 briefs
Amici curiae supporting Petitioners and amici curiae supporting neither party, if any	Tuesday, July 28	
Respondents	Monday, October 5	35,000 total
Amici curiae supporting Respondents, if any	Tuesday, October 13 (due to holiday)	
Intervenors supporting Respondents	Monday, October 19	24,500 total, shared between up to 3 briefs
Petitioners (reply)	Monday, November 9	17,500 total, shared between up to 4 briefs
Deferred Appendix	Monday, November 16	
Final briefs	Monday, November 23	

## BACKGROUND

As noted above, on March 5, 2020, all parties jointly submitted a proposed briefing format and schedule, pursuant to which Petitioners' opening briefs would have been due May 22, 2020. Doc. No. 1832077. Shortly thereafter, however, it became clear to Petitioners that the proposed May 22, 2020 deadline for their opening briefs would be unworkable, in light of the substantial and adverse effects on Petitioners and their counsel from the COVID-19 pandemic. Notably, the San Francisco Bay Area counties, where several of Petitioners' counsel reside, issued shelter-in-place orders on March 16, 2020, and the State of California issued a statewide stay-at-home order on March 19, 2020. Meckenstock Decl., ¶ 15. These orders shuttered day-care centers, schools, and other businesses and organizations upon which Petitioners' counsel and their families depended. *Id.*

Counsel for State and Public Interest Petitioners reached out to counsel for Respondents on March 24, 2020 and proposed moving the deadline for Petitioners' opening briefs out by 60 days to July 21, 2020.<sup>1</sup> *Id.* at ¶ 16. Respondents took the position that it was premature to assess how much additional time was warranted

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<sup>1</sup> State Petitioners' counsel observed that the United States Court of Appeals for the Ninth Circuit had issued an order providing automatic 60-day extensions of time, upon request, due to the pandemic's impacts in the States within that circuit. *See* U.S. Court of Appeals for the Ninth Circuit, "COVID-19 Notice", available at <http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/COVID-19%20Notice.pdf> (last visited May 2, 2020).

but ultimately agreed not to oppose an immediate request for a 21-day extension without prejudice to Petitioners' (or any party's) ability to seek additional time in the future. *Id.* at ¶ 17. Accordingly, on April 3, 2020, Petitioners filed a supplemental response to the request for briefing proposals, asking that the Court add 21 days to the schedule provided in the parties' joint proposal, such that Petitioners' opening briefs would be due June 12, 2020. Doc. No. 1836717.

Since that April 3, 2020 filing, the constraints on State Petitioners' counsel due to the pandemic have not subsided.<sup>2</sup> Shelter-in-place and stay-at-home orders have been extended and remain in effect, either with no end date or with an end date of June 30, 2020. Meckenstock Decl., ¶ 19. Those extensions, combined with related announcements from businesses and organizations, have confirmed that the constraints on Petitioners' counsel will continue for some time, likely through the full period for preparation of Petitioners' opening briefs. *Id.* Similar orders and closures are affecting many members of State Petitioners' coalition outside of California as well, and, of course, the pandemic's dramatic impacts on health and

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<sup>2</sup> Petitioners' initial supplemental response—in which they sought a 21-day extension—correctly indicated that Petitioners' counsel have been impacted by illnesses, as well as by school and business closures and other pandemic impacts. Because these counsel have recovered, Petitioners are not reiterating that basis for extension here but note, nonetheless, that illnesses did significantly slow expected progress on briefs in this case during March and April.

well-being, daily activities, physical work spaces, and family care demands (including support for elderly parents) continue.

In addition, since the filing of the first supplemental response on April 3, 2020, conflicting deadlines for complex and substantive filings have arisen in another matter being handled by the lead attorney for State Petitioners here. *Id.* at ¶ 20. Specifically, the United States, plaintiff in the other matter, filed a second summary judgment motion on April 20, 2020 and will not agree to extend the deadline for defendant California's opposition past May 18, 2020. *Id.*

In light of these circumstances, Petitioners approached Respondents on April 23, 2020 for their positions on additional time for Petitioners' their opening brief. Respondents have asked that their position be represented as follows:

The United States recognizes the unprecedented nature of the current public health crisis and did not oppose Petitioners' request for a 21-day extension of the deadline for their merits brief. Petitioners' current request would extend the deadline for their merits brief to nearly five months after the date of the parties' jointly submitted briefing schedule. The United States believes that the current unopposed deadline of June 12 is sufficient in light of the amount of time Petitioners have already had to draft their merits briefs, the time they have remaining, and the issues the United States anticipates Petitioners will address.

On April 30, 2020, Petitioners reached out to Respondent-Intervenors for their position. Respondent-Intervenor States indicated they do not consent to the additional time proposed herein; Respondent-Intervenors Coalition for Sustainable Automotive Regulation and Automotive Regulatory Council oppose the additional

time; and Respondent-Intervenor American Fuel and Petrochemical Association takes no position.

### **BASES FOR THE REQUESTED EXTENSION OF TIME**

The bases for State Petitioners' request for additional time to prepare opening briefs are two-fold: substantial impacts from the COVID-19 pandemic on State Petitioners' counsel and new, conflicting deadlines for substantive and consequential filings in another matter.

The lawyers handling this case for California have all been affected by the dramatic effects the pandemic has had on the personal and professional lives of so many Americans. Meckenstock Decl., ¶¶ 11, 12. Some of these impacts have been particularly substantial on the two attorneys leading California's team—Jonathan Wiener (lead counsel for the Energy Policy and Conservation Act portions of the case) and Elaine Meckenstock (lead counsel for the Clean Air Act portions of the case as well as overall lead counsel for State Petitioners).

Both Mr. Wiener and Ms. Meckenstock have developed deep and substantial understandings of the legal and factual issues in this complex case over extended periods (including development of comments on the proposed actions in late 2018) and have significant experience litigating similar matters. *Id.* at ¶ 4. This expertise is not readily replaceable. *Id.* Both of these attorneys, however, have had their capacity to work on this case severely constrained. *Id.* at ¶ 5.

Due to a daycare center closure and the San Francisco shelter-in-place order, Mr. Wiener is working from home while simultaneously caring for an infant and a three-year old. *Id.* at ¶ 6. His capacity to work has been substantially reduced to half-time or less. *Id.* The daycare center has indicated it will remain closed through at least the end of June, so these constraints will continue to slow the preparation of Petitioners' opening brief for the foreseeable future. *Id.* at ¶ 19. While Mr. Wiener is doing what he can to delegate work (in this matter and other matters) to other attorneys, no one has his background and depth of knowledge on the Energy Policy and Conservation Act issues that are the crux of Petitioner's challenge to the National Highway and Traffic Safety Administration's regulation. *Id.* at ¶¶ 4, 6. Moreover, many attorneys in the California Attorney General's Office are also managing family responsibilities (including home childcare and/or schooling) or are covering for co-assigned colleagues who are, limiting the office's ability to shift work to other attorneys. *Id.* at ¶ 6. Thus, the constraints on Mr. Wiener's ability to work at the levels anticipated when the original joint scheduling proposal was submitted are consequential for the ongoing preparation of the State Petitioners' brief.

Similarly, Ms. Meckenstock cannot simply delegate the drafting of the Clean Air Act sections of State Petitioners' brief, or the coordination of the overall briefing effort, to other attorneys, due to her extensive background and depth of

knowledge of this case and these issues and the other constraints described above. *Id.* at ¶ 4. But she, too, has had her capacity to work diminished by the pandemic due to disruptions in services upon which she and her disabled partner previously relied. *Id.* at ¶ 7. As a result of these disruptions, Ms. Meckenstock's working time is constrained because she must undertake or assist with tasks and activities that were previously handled by her partner (with the assistance of others) or by businesses that are not currently operating. *Id.* Ms. Meckenstock's capacity to work on this case has been further reduced by the need to cover for co-counsel who are constrained due to the demands of home childcare and/or home schooling. *Id.* at ¶ 8.

In addition, Ms. Meckenstock now has conflicting deadlines for substantive filings in another complex matter in which she is also lead counsel. In *United States v. California* (2:19-cv-02142, E.D. Ca.), the plaintiff United States filed a second summary judgment motion on April 20, 2020, following resolution of a prior round of summary judgment motions on March 12, 2020. Meckenstock Decl., ¶¶ 9, 10. The United States has been unwilling to agree to an extension of time for defendant California's opposition in that case beyond May 18, 2020, and insists that California should have no more than two weeks, in early to mid-June, for its reply brief should the State file a cross-motion for summary judgment. *Id.* at ¶ 10. The briefing in that case is complex and consequential. *See id.* at ¶ 9, 10. As

a result of all these events, Ms. Meckenstock must now juggle her work as lead counsel in this case with her work as lead counsel in *United States v. California* (and work in other matters), alongside her significantly increased family and household responsibilities.

For the foregoing reasons, State Petitioners respectfully request that the Court issue an order establishing the briefing schedule outlined above (on page 2), with the deadline for all Petitioners' opening briefs in this case set as July 21, 2020. This is 60 days beyond the original, jointly proposed date of May 22, 2020 and 39 days beyond the unopposed June 12, 2020 date proposed in Petitioners' first supplemental response.

Dated: May 4, 2020

Respectfully Submitted,

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## ORAL ARGUMENT NOT YET SCHEDULED

**CERTIFICATE OF COMPLIANCE**

The foregoing response to an order complies with the typeface and volume requirements of the rules of this Court and Federal Rules of Appellate Procedure.

The document is set in Times New Roman font, 14-point, and contains 1,873 words according to the word-count feature of Microsoft Word.

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**CERTIFICATE OF SERVICE**

I filed the foregoing document, and accompanying declaration, with the U.S. Court of Appeals for the District of Columbia Circuit on May 4, 2020, using the CM/ECF system. All parties are represented by counsel that are registered CM/ECF users and will be served by the CM/ECF system.

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