

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

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

Intervenors the Coalition for Sustainable Automotive Regulation and the Automotive Regulatory Council, Inc. (collectively, "Intervenors") oppose Petitioners' second request for an extension of the briefing schedule in the above-captioned matter, as proposed in their Second Supplemental Response to Request for Briefing Proposals. Doc. No. 1841114. It is Intervenors' position that the existing proposed schedule, jointly agreed to and submitted by the parties on April 3, 2020, should govern these proceedings. *See* Doc. No. 1836717.

Timely resolution of the important regulatory and legal questions presented by this litigation is essential for the affected federal agencies, the states, the automotive industry, automotive consumers, and for the renewed economic health of the nation. Intervenors are sympathetic to the unprecedented challenges that the COVID-19 pandemic presents and to the reasons Petitioners' counsel present for requesting a further extension. However, having previously not objected to Petitioners' first requested extension for the same COVID-related reasons, and in light of the many months Petitioners have had to draft their opening briefs in the lawsuit they brought, Intervenors must balance their need to position themselves to aid the country in emerging from this catastrophe. The automotive industry is one of the most important industries in the United States, employing 10 million people.¹ Since mid-March, nearly every automaker has shut down North American production operations. New car sales are projected to decline more than 50 percent in April alone—the biggest annual drop in history.² To play its important role in assisting this country in emerging from the economic shock of the pandemic, the industry simply must know whether federal and state governmental agencies will have the redundant legal authority to enforce vehicle environmental regulations over

¹ Tony Romm, *A Massive Drop in Car Sales Sparks New Push in Congress to Aid the Auto Industry*, The Washington Post (May 6, 2020), <https://tinyurl.com/ybokzclm>.

² Joseph Szczesny, *U.S. New Vehicle Sales Expected to Drop by Half in April*, The Detroit Bureau (Apr. 29, 2020), <https://tinyurl.com/y7dzhoju>.

manufacturers, and what emissions and fuel economy rules apply to the vehicles and fleets it will be manufacturing and planning.

Additional delay in this already protracted litigation will only prolong this unwarranted regulatory uncertainty, thereby adding yet another significant variable to the already unprecedented uncertainty presently facing the industry. Extending this ambiguity will exacerbate existing financial burdens on the manufacturers and related industries—financial burdens that these industries are ill-equipped to continue to absorb after the all-encompassing economic devastation wrought by the COVID-19 pandemic. Intervenors respectfully request that this Court decline to extend these proceedings further and enter the briefing schedule jointly proposed by the parties on April 3, 2020 in order to bring resolution to this uncertainty; Intervenors believe the current proposed schedule continues to provide the parties with sufficient time to complete briefing on these critical issues.

BACKGROUND

On March 5, 2020, the parties jointly agreed to and submitted a proposed briefing format and schedule, pursuant to which Petitioners' opening briefs would be due on May 22, 2020. Doc. No. 1832077. On April 3, 2020, Petitioners filed a supplemental response to the Court's 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 on June 12, 2020. Doc. No. 1836717.

Respondents consented to this 21-day extension, and the request was not opposed by Intervenors. *Id.*

On May 4, 2020, Petitioners submitted a second response to the Court's request for briefing proposals, seeking a further extended deadline to July 21, 2020 for their opening briefs. Doc. No. 1841114. Petitioners' new proposal would extend briefing well into November 2020. *Id.* at 2. Both Respondents and Intervenors declined to join Petitioners' response and expressed their opposition to this request in Petitioners' filing. *Id.* at 5-6.

ARGUMENT

Intervenors recognize that the COVID-19 pandemic has caused universal and systemic disruptions to our daily lives and do not question the challenges faced by the lead attorneys for Petitioners. Indeed, dozens of key legal and business decision-makers for Intervenors' member companies and law firm lawyers face identical disruptive challenges and personal hardships such as daycare and home schooling of children in two-income households, daily care for aging parents, and the need to contend with other legal matters, as well. As such, Intervenors, while empathetic, nevertheless must oppose Petitioners' request for additional time to prepare their opening briefs.

As noted above, the parties jointly agreed to and submitted a briefing format and schedule on March 5, 2020, pursuant to which Petitioners' opening briefs would

have been due on May 22, 2020. Doc. No. 1832077. That initial deadline has already been extended at Petitioners' request by three weeks, meaning that Petitioners' opening briefs would now be due June 12, 2020. Doc. No. 1836717. This extension was agreed to by Respondents and not opposed by Intervenors.

As of this writing, more than two months have passed since the parties jointly submitted a proposed briefing schedule. The existing proposed extended deadline of June 12 provides Petitioners with still another month of drafting time. Petitioners will have had over three months from the time the parties agreed to and submitted a briefing schedule to prepare their opening briefs, and more than four months since the Court denied the parties' motions regarding expedition and abeyance. This is sufficient, even under the current challenging circumstances,³ and far more than the 40 days typically provided under this Court's rules. *See* D.C. Cir. Rule 31(a).

Another extension of the briefing schedule would work material and meaningful harm to Intervenors' member companies. As outlined in Intervenors' prior pleadings filed in this matter, Intervenors' member companies are currently subject to overlapping and inconsistent regulations, a state of uncertainty which will persist during the pendency of this litigation. *See* Doc. No. 1813676 at 20, Doc. No.

³ To the extent that counsel for Petitioners face personal and professional limitations on their individual time and ability to prepare Petitioners' opening briefs that cannot be surmounted, *see* Doc. No. 1841114 at 7-8, Intervenors respectfully submit that there are other attorneys within Petitioners' organizations that could assist in the drafting.

1821514 at 11, and Doc. No. 1824747 at 5. As automotive manufacturing reopens, the industry will be required to make substantial financial commitments towards upcoming models and fleet mix—commitments that will have an enormous price tag if automakers must continue to prepare for two complex and conflicting regulatory regimes. *See, e.g.*, Doc. No. 1824747 at 4. An additional extension will prolong this regulatory uncertainty, and ultimately deepen the financial burden placed on Intervenors' member companies.

These added costs and burdens come at a time when Intervenors' member companies—and manufacturers and related industries as a whole—can least afford further financial strain and added uncertainty. The industry is under extreme economic distress due to the COVID-19 pandemic. Stay-at-home orders issued by state governments have forced many auto manufacturers, suppliers, and dealerships to close for months.⁴ These closures, along with significantly reduced demand from consumers, have resulted in a massive reduction in vehicle sales since the onset of the COVID-19 pandemic. Indeed, according to J.D. Power, U.S. retailers have sold nearly 800,000 fewer vehicles than initially forecast since the pandemic began in March, and vehicle sales were down approximately 40 percent during the last week

⁴ *See, e.g.*, Tony Romm, *A Massive Drop in Car Sales Sparks New Push in Congress to Aid the Auto Industry*, The Washington Post (May 6, 2020), <https://tinyurl.com/ybokzclm>.

of April.⁵ Any extension of the existing regulatory uncertainty will only serve to further increase costs of planning, production, and compliance for Intervenors' member companies and the entire automotive industry at a time when the industry can least afford it.

Moreover, the automotive sector is an important industry and an enormous employer, and its financial health is crucial for any economic recovery in the wake of the COVID-19 pandemic. The industry employs 10 million workers in the United States across a range of disciplines—fully 5.1% of America's private-sector employment—and represents the largest domestic manufacturing industry.⁶ Manufacturers, including Intervenors' member companies, contributed \$162.4 billion to the U.S. economy in 2018, about 3 percent of U.S. gross domestic product.⁷ There is no doubt that an industry of this size and significance will be essential to this country's economic recovery in the coming months and years. For the automotive industry to fully contribute to the recovery, it must have (and is entitled to) certainty and clarity to guide its planning and production of future vehicles. The continued delay of this litigation, which as a consequence is a delay of the essential

⁵ *Id.*

⁶ *Id.*; see also Alliance of Automobile Manufacturers, "Economy," <https://autoalliance.org/economy/>.

⁷ U.S. Bureau of Econ. Analysis, GDP by Industry, Line 21 (Oct. 29, 2019), <https://tinyurl.com/yxydv44x>.

regulatory certainty that will result from its resolution, can do nothing but have severe (and unnecessary) negative economic repercussions throughout the industry and could delay or even prevent a full US economic recovery from the impacts of this pandemic.

Exacerbating the challenges faced by the automotive industry considering the uncertain regulatory framework and the economic havoc wreaked by the COVID-19 crisis are the actions of one of the principal Petitioners in this matter—the State of California. California seeks to enforce its separate regulatory regime despite COVID-19,⁸ despite the absence of the statutorily required waiver of preemption from EPA authorizing it to regulate greenhouse gas (GHG) emissions, and despite NHTSA’s assertion of preemption under the Energy Policy and Conservation Act of 1975. Further, as Intervenors have noted previously, California has established a policy that requires state agencies to purchase vehicles only from automakers that “recognize [CARB]’s authority” over GHG emissions—despite NHTSA’s preemption determination and EPA’s waiver withdrawal. *See* Doc. No. 1821514 at

⁸ CARB, *Message from Chair Mary D. Nichols and Executive Officer Richard W. Corey on CARB’s response to COVID-19*, <https://tinyurl.com/ybawrlah> (“CARB’s regulations continue to be in effect and deadlines apply.”); National Law Review, *California Regulatory Agencies Emphasize Continued Compliance During COVID-19 Response* (Apr. 7, 2020), <https://tinyurl.com/ycupfbkf> (“CARB has not established a process to consider enforcement discretion ... during the COVID-19 response.”).

9-10, 13.⁹ This policy—directly tied to the regulatory dispute at the heart of this case—has already cost Intervenors’ member companies profits from lost sales, and the financial punishment for following federal law will only increase if the briefing schedule is further extended. *Id.* at 13. In addition, California has suggested that, if Petitioners prevail in this litigation, the state may retroactively enforce its regulations for the time during which this litigation was pending. *Id.* at 12. Thus, the longer this case remains pending, the larger the “Sword of Damocles” that will hang over Intervenors and the automotive industry as a whole.¹⁰

CONCLUSION

Timely resolution of this important regulatory question is essential, for the automotive industry, for automotive consumers, and for the renewed economic health of the Nation. Intervenors do not discount the legitimate challenges that the lead attorneys for the Petitioners are facing during this difficult time. However, for the foregoing reasons and considering the several months Petitioners have had, and will still have, to draft their opening briefs, Intervenors oppose Petitioners’ second

⁹ See also 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>.

¹⁰ In contrast, further delay appears to be consistent with California’s enforcement and litigation strategy. See, e.g., Doc. No. 1821653; 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/tkcs33fd> (quoting CARB Chair Mary Nichols as stating that CARB’s “strategy is to ... not precipitate a Supreme Court taking of this case until Mr. Trump is out of office”).

request for a further extension of the briefing schedule, and respectfully request that the Court enter the parties' jointly proposed schedule submitted on April 3, 2020.

Dated: May 11, 2020

Respectfully submitted,

/s/ Raymond B. Ludwiszewski

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response complies with the type-volume limitations because it contains 1,971 words. I further certify that this Response 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: May 11, 2020

/s/ Raymond B. Ludwiszewski

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2020, I electronically filed the foregoing document 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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