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.	)	Case No. 19-1230 & Consolidated Cases
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al.,	)	
Respondents.	)	

INTERVENOR STATES' RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO HOLD CASE IN ABEYANCE

The Intervenor States oppose the request to hold this case in abeyance. The federal government asks for this case to be held in abeyance so that it may have time to decide whether to change course. Relevant here, holding the case in abeyance will give the federal government time to decide whether to grant California a waiver under Section 209(b)(1) of the Clean Air Act. But the federal government's consideration of whether to grant a waiver is a reason to *expedite* the resolution of this case—it is not a reason to refrain from deciding it.

To see why, recall that this case presents the question whether the Constitution forbids the federal government from granting a waiver under Section 209(b)(1). The answer to that question is "yes," because Section 209(b)(1) is unconstitutional. Section 209(b)(1) violates the equal-sovereignty doctrine by "allowing California to retain [a] piece of its sovereign authority"—the power to set emissions standards for new vehicles—that the Clean Air Act "strips from every other State." Br. of Intervenor States at 8, Doc. #1862459 (D.C. Cir., Sept. 21, 2020). If nothing else, it is an open and serious question whether Section 209(b)(1) is constitutional. It would behoove all the parties to know the answer to that question before, not after, the federal government considers again whether to grant California a waiver under Section 209(b)(1).

This Court has previously "decline[d] to exercise" its "discretion" to hold in abeyance a case presenting a legal question that would necessarily inform an agency's consideration of "potential regulatory changes." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426 (D.C. Cir. 2018) (*per curiam*). It should do the same here. That is especially so because the Court can provide the parties with an answer to the equal-sovereignty issue without straining the litigants' resources. There is little left to be done at this stage of the case, which has been "fully briefed" for months. *See Zamora-Mallari v. Mukasey*, 514 F.3d 679, 682 (7th Cir. 2008); *cf. Lead Indus. Ass'n*

v. EPA, 647 F.2d 1184, 1186 (D.C. Cir. 1980) (denying motion to hold case in abeyance filed after oral argument). The Court can, if it wishes, schedule argument at the next available opportunity and quickly issue a decision. And if the Court were to accept the Intervenor States' equal-sovereignty argument, a decision in this case would spare all the parties the many resources that would otherwise be wasted considering whether to issue an unconstitutional waiver to California.

In sum, the parties have fully briefed this case, which presents a critically important question of constitutional law that will inform the very act—the granting of a waiver to California—that the federal government seeks abeyance in order to consider. The Intervenor States respectfully ask the Court to deny the motion and to decide this case.

Dated: February 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32 (f) and (g), I hereby certify that the foregoing response complies with the limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(a)(2) because it contains 470 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2020, I caused the foregoing motion to be electrically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system. I further certify that a copy of the foregoing has been served via United States First Class Mail upon the following:

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