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, et al., Respondents.	No. 19-1230 (and consolidated cases)

REPLY IN SUPPORT OF
MOTION TO HOLD CASES IN ABEYANCE

On January 20, 2021, the President of the United States issued an Executive Order requiring the National Highway Traffic Safety Administration ("NHTSA") and the United States Environmental Protection Agency ("EPA") (collectively "Federal Agencies") to immediately review and potentially rescind or revise the joint agency action at issue in this case, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (the "One National Program Action" or the "Action"). In consideration of this Executive Order, the United States promptly requested that these consolidated cases be held in abeyance to prevent unnecessary adjudication of issues subject to that review and to ensure the integrity of the administrative process. Although this case encompasses ten different

petitions for review, no Petitioner opposes the United States' request for abeyance. Intervenor-Respondents representing the regulated industry – the Coalition for Sustainable Automotive Regulation and the Automotive Regulatory Council – likewise did not oppose abeyance and have since withdrawn from the litigation altogether.

The only parties disputing the prudence of abeyance at this time are State Intervenor-Respondents who support the One National Program Action. As further discussed below, their opposition does not justify proceeding in this litigation over the agreement of Petitioners, Respondents, and the regulated industry. State Intervenors have failed to demonstrate any prejudice from abeyance and, in any case, mischaracterize the issues presented in this case.

To begin, State Intervenors do not allege, let alone prove, that granting an abeyance here would be prejudicial to their interests. *See* Opp. at 1-3. This alone warrants rejecting their request. As this Court has made clear, "[t]o outweigh . . . institutional interests in the deferral of review" where an agency is considering amending the action under review, "any hardship caused by that deferral must be immediate and significant." *See, e.g.*, *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012) ("*API*") (quoting *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007)). State Intervenors have failed to demonstrate any hardship at all, so abeyance should be granted.

Even putting aside the lack of prejudice, State Intervenors' opposition to abeyance is unfounded. State Intervenors urge this Court to schedule argument and

move to decision so that the parties might know "whether Section 209(b)(1) is constitutional" "before" the government acts under it. Opp. at 2. But it is not the proper role of this Court to try to shape a potential forthcoming agency action through an advisory opinion. *Cf. Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (noting that federal courts are "without authority to render advisory opinions" (internal quotation marks omitted)).

The fact that State Intervenors seek an opinion on purported constitutional issues does not change the analysis. First, State Intervenors ask the Court to "provide the parties with an answer" to a question – the constitutionality of Clean Air Act Section 209 – that they can only speculate will be the subject of future agency action and litigation. Opp. at 2. But the Agencies' review is ongoing, and neither the parties nor the Court can predetermine its outcome. Abeyance would ensure the Court does not decide an issue that may not even arise, or which may end up being presented in a different context or pursuant to different administrative interpretations with a different administrative record.

Moreover, State Intervenors mischaracterize the matters actually at issue in this case and, therefore, the scope of any opinion that would result from continuing to litigate here. State Intervenors claim that "this case presents the question of whether the Constitution forbids the federal government from granting a waiver under Section 209(b)(1)." Opp. at 2. This is incorrect. In the challenged action, EPA did not grant a waiver under Section 209(b)(1); it withdrew portions of a waiver previously granted

to California in 2013. But EPA's basis for partially withdrawing the 2013 waiver notably did *not* include that such a waiver, or Section 209 as a whole, was unconstitutional. To the contrary, the One National Program Action left in place the portions of the 2013 waiver allowing California to set more stringent standards for passenger vehicle emissions of criteria pollutants, like particulate matter, and affirmed the applicability of Section 209 under such circumstances. *See* 84 Fed. Reg. at 51,341 n. 261 (noting that EPA "did not propose to withdraw the waiver and is not in this document withdrawing the waiver" applicable to California's criteria pollutant vehicle standards) & 51,331 ("[I]t is clear that EPA has authority to review and grant California's applications for a waiver based on its evaluation of the enumerated criteria in CAA Section 209(b).").

State Intervenors did not file a petition challenging the constitutionality of EPA's position in that regard, neither in the context of the partial waiver withdrawal here, nor when the waiver was initially issued in 2013 (nor indeed at any time over the last 50 years EPA has been issuing waivers under Section 209). So State Intervenors' claim that Section 209 as a whole violates the equal sovereignty clause – a position that would put it at odds with EPA, but to which EPA was not given an opportunity to respond – is not properly before the court.

Even if this Court were to proceed with litigation, "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463

U.S. 29, 50 (1983). Reaching a decision in this case would therefore require the Court to address *Petitioners'* numerous legal and factual challenges to both EPA's and NHTSA's stated bases for taking the One National Program Action – including Petitioners' challenges to NHTSA's "preemption" regulations under the Energy Policy and Conservation Act. State Intervenors' suggestion that continuing litigation could spare party resources by resolving a constitutional question not presented as a basis for decision by the agency and not raised by any Petitioner is pure fancy.

Furthermore, in relying on constitutional arguments as the reason to move forward with the litigation, Opp. at 2-3, State Intervenors flip constitutional avoidance on its head. It is a "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (internal quotation marks omitted). That prudence is all the more compelling when the question is whether this Court should press ahead with litigation *at all*. The answer, of course, is no, because the President has now directed the Federal Agencies to review the challenged Action. It is both prudent and efficient to let the administrative process play out and avoid deciding the issues raised in this litigation – especially the constitutional issues.

And while it is true that the parties have completed briefing, this does not compel spending additional time to argue and decide matters that may be mooted by the Federal Agencies' administrative reconsideration. Proceeding to oral argument in

this case raises the real prospect of prejudicing that ongoing administrative process, as it would require the United States to opine on matters under review before the Agencies have an opportunity to "crystalliz[e] [their] policy." *See API*, 683 F.3d at 387. For this reason, the Court has routinely granted abeyances where a challenged action is under administrative review, even if briefing has already concluded. *See North Dakota v. EPA*, D.C. Cir. No. 15-1381, ECF No. 1673072 (placing case in abeyance after briefing over the objection of intervenor-respondents).

Utility Solid Waste Activities Group v. EPA, 901 F.3d 414 (D.C. Cir. 2018), does not dictate otherwise. *See* Opp. at 2. In that case, oral argument had already been scheduled; abeyance was opposed by petitioners who alleged that they were "severely prejudice[d]" from a delay in adjudication; and the challenged rule had been promulgated according to a court-ordered schedule – none of which is the case here. *See Utility Solid Waste*, 901 F.3d at 420; *Utility Solid Waste Activities Group v. EPA*, D.C. Cir. No. 15-1219, ECF No. 1693942 at 10 (environmental petitioners' opposition to abeyance). State Intervenors' citations to a Seventh Circuit case, *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008), and D.C. Circuit case, *Lead Industries Association v. EPA*, 647 F.2d 1184 (D.C. Cir. 1980), are similarly misplaced. *See* Opp. at 2-3. Neither case concerned a challenge to agency action that was presently subject to reconsideration; neither concerned a case where briefing was concluded but oral argument was not yet scheduled; and in neither case was abeyance supported by both the petitioner and the respondent. *Cf. West Virginia v. EPA*, D.C. Cir. No. 15-1363,

ECF No. 1673071 (placing case in abeyance after seven-hour oral argument before the *en banc* court over the objection of intervenor-respondents).

For these reasons, the United States respectfully requests that the Court grant its motion to hold these cases in abeyance.

Respectfully submitted,

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/s/ Chloe H. Kolman

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in Support of Motion to Hold Cases in Abeyance complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond font, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 1,479 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in Support of Motion to Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 5th day of February, 2021.

/s/ Chloe H. Kolman
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