ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

Consolidated with Nos. 19-1239, -1241, -1242, -1243, -1245, -1246, and -1249

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,

ASSOCIATION OF GLOBAL AUTOMAKERS, INC., et al.,

Intervenors for Respondent,

STATE OF OHIO et al.,

Movant-Intervenors for Respondent,

MOTION OF PUBLIC-INTEREST PETITIONERS FOR ABEYANCE

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INTRODUCTION

With the support of all petitioners in these consolidated cases, petitioners in Case Nos. 19-1230 and 19-1243 (Public-Interest Petitioners) move to hold all the petitions for review in abeyance pending resolution of another consolidated proceeding, involving most of the parties here, in which the U.S. District Court for the District of Columbia is reviewing the foundational agency action at issue—an action that is not subject to direct review by this Court. Neither respondents nor their intervenors will suffer hardship from abeyance because the actions under review will remain in effect in the interim.

These petitions concern three actions published jointly by the National Highway Traffic Safety Administration (NHTSA) and the U.S. Environmental Protection Agency (EPA). *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (Final Rule). **First**, NHTSA issued regulations (the Preemption Rule) asserting that the federal Energy Policy and Conservation Act preempts state greenhouse-gas and zero-emission-vehicle standards for passenger cars and light trucks. *Id.* at 51,311–28. **Second**, EPA, relying on the Preemption Rule and a novel interpretation of Section 209(b)(1)(B) of the Clean Air Act, 42 U.S.C. § 7543(b)(1)(B), issued an order (the Waiver Revocation) that revoked portions of a federal-preemption waiver that had entitled the State of California to adopt and enforce its own greenhouse-gas and zero-emission-vehicle standards. Final Rule, 84 Fed. Reg. at 51,328–51,350. **Third**, EPA finalized a determination (the Section 177 Determination) announcing that, regardless of whether California has a valid Clean Air Act waiver of

preemption for vehicular greenhouse-gas standards, Section 177 of the Act, 42 U.S.C. § 7507, does not authorize any other State to adopt or enforce greenhouse-gas standards identical to California's standards. Final Rule, 84 Fed. Reg. at 51,350–51.

This Court may directly review EPA's two actions but not NHTSA's Preemption Rule. All the petitioners who, in an abundance of caution, filed protective petitions for direct review of the Preemption Rule in this Court are also plaintiffs or intervenors in one or more earlier-filed cases challenging the same rule in the district court. The district court has consolidated those cases in a single proceeding, and there is no reason to expect that proceeding to be protracted—indeed, at NHTSA's request, the district court already is poised to confirm whether it has jurisdiction to review the Preemption Rule. Given the "longstanding policy of the law to avoid duplicative litigative activity," *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (quotation omitted), this Court should hold the protective petitions for review of the Preemption Rule in abeyance until the district-court proceeding concludes.

This Court also should hold the petitions challenging the Waiver Revocation and Section 177 Determination in abeyance, because EPA relied on NHTSA's Preemption Rule as a basis for the Waiver Revocation and then relied on the Waiver Revocation to explain the Section 177 Determination. The agencies themselves have observed that it would be inefficient to sever judicial review of the different components of their jointly published action. The most sensible course is for this Court to hold the entirety of the consolidated petitions in abeyance pending resolution of the district-court proceeding.

BACKGROUND

A. The Clean Air Act authorizes California to adopt and enforce its own vehicular emission standards, and the Act allows some other States to adopt and enforce emission standards identical to those of California.

The State of California has regulated air-pollutant emissions from automobiles for more than sixty years. *See* Compl. ¶ 19, *Envtl. Def. Fund v. Chao*, D.D.C. No. 1:19-cv-02907-KBJ (filed Sept. 27, 2019) (Compl., attached hereto as Exh. A). In recognition of California's pioneering role as a regulator of automobile emissions, the federal Clean Air Act has from its inception preserved that State's authority to adopt and enforce its own vehicular emission standards. *See id.* ¶¶ 19–23. The Act's preemption provision, which otherwise prohibits states and localities from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles," 42 U.S.C. § 7543(a), carves out an exception for "any State which ha[d] adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966," *id.* § 7543(b)(1)—which only California had done. *See California v. EPA*, 940 F.3d 1342, 1345 (D.C. Cir. 2019).

The Clean Air Act compels EPA to "waive application of" this preemption for standards that California determines "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards" promulgated by EPA. 42 U.S.C. § 7543(b)(1). EPA may deny California a waiver only if it finds that (A) the State's determination is arbitrary and capricious, (B) California does not need its own standards "to meet compelling and extraordinary conditions," or (C) the State's standards do not

afford automakers enough lead time to develop and apply emissions-reduction technologies. *Ibid.*; *see also id.* § 7521(a)(2). The Act does not provide for revocation by EPA of a previously granted preemption waiver.

Although the Clean Air Act prohibits states other than California from developing their own vehicular emission standards, Section 177 of the Act allows some states to choose between California's vehicular emission standards and those of the federal government. 42 U.S.C. § 7507. Without approval from EPA, those states "may adopt and enforce for any model year standards relating to control of emissions" that are "identical to the California standards for which a waiver has been granted." *Ibid.*

The Clean Air Act vests this Court with jurisdiction and venue to directly review "any" final action EPA takes under the Act that is "nationally applicable" or as to which the agency "finds and publishes that such action is based on" "a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1).

B. The Energy Policy and Conservation Act directs NHTSA to establish standards for average fuel economy of passenger cars and light trucks.

In the wake of the 1973–74 oil crisis, Congress enacted the Energy Policy and Conservation Act to reduce domestic petroleum consumption by, among other things, improving automobile fuel efficiency. *See* Compl. ¶ 24. The statute instructs NHTSA to establish "a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year." 49 U.S.C. § 32901(a)(6); *see also id.* § 32902. NHTSA's standard, commonly known as the corporate average fuel economy (CAFE)

standard, reflects "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." *Id.* § 32902(f). Statutory text and history make clear that California emission standards for which EPA grants a Clean Air Act preemption waiver are "other motor vehicle standards of the Government" whose effect on fuel economy NHTSA must consider when setting CAFE standards. *See* Compl. ¶¶ 26–30.

The Energy Policy and Conservation Act includes a preemption section that bars any state "law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by" CAFE standards. 49 U.S.C. § 32919(a). Prior to taking the actions challenged in these petitions, neither NHTSA nor EPA had ever taken a final action predicated on the position that the Energy Policy and Conservation Act preempts state emission standards for which EPA has granted California a waiver of preemption pursuant to the Clean Air Act.

The Energy Policy and Conservation Act does not authorize direct review by the courts of appeals of all regulations issued under the fuel-economy chapter. Only regulations prescribed pursuant to six of the chapter's nineteen sections are subject to direct review, and the Act's standalone preemption section is not among the six sections listed. *See* 49 U.S.C. §§ 32909(a), 32919.

C. In 2013, EPA issued a preemption waiver allowing California to adopt and enforce greenhouse-gas and zero-emission-vehicle standards.

Since 1990, California has mandated that zero-emission vehicles comprise a small but increasing percentage of an automaker's fleet manufactured for use in the State. *See* Compl. ¶ 38. Zero-emission vehicles do not produce exhaust emissions of any air pollutant (or precursor thereto) subject to regulation under the Clean Air Act or California law. *See ibid.* EPA waived federal preemption of California's zero-emission-vehicle standards beginning in 1993. *See ibid.* ¶ 40.

In 2005, California took steps to regulate the greenhouse-gas emissions of passenger cars and light trucks. *See* Compl. ¶ 42. The Supreme Court determined in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that vehicular greenhouse-gas emissions are subject to regulation under the Clean Air Act to "protect[] the public's 'health' and 'welfare,'" and that such regulation does not conflict with NHTSA's "wholly independent" mandate under the Energy Policy and Conservation Act "to promote energy efficiency," *id.* at 532. Two district courts then held that the Energy Policy and Conservation Act does not preempt greenhouse-gas standards for which EPA has issued California a preemption waiver. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007). EPA waived Clean Air Act preemption of California's greenhouse-gas standards beginning in 2009. *See* Compl. ¶ 48.

In 2013, EPA waived preemption of California's Advanced Clean Cars Program, which includes greenhouse-gas and zero-emission-vehicle standards for passenger cars and light trucks of model years 2017 and later. *See* Compl. ¶ 51. More than a dozen states, which together with California make up over one-third of the domestic market for new passenger cars and light trucks, have exercised their prerogative under Section 177 of the Clean Air Act to follow California's lead. *See id.* ¶ 37.

D. In 2019, NHTSA and EPA jointly published the three actions at issue.

These petitions seek review of three final actions that NHTSA and EPA published jointly in September 2019. First, in the Preemption Rule, NHTSA issued regulations respecting preemption under the Energy Policy and Conservation Act. Final Rule, 84 Fed. Reg. at 51,361–63 (codified at 49 C.F.R. parts 531 and 533 and appendices thereto). The Preemption Rule asserts that the Energy Policy and Conservation Act preempts state greenhouse-gas and zero-emission-vehicle standards. *See id.* at 51,313–14.

Next, in the Waiver Revocation, EPA revoked parts of the Clean Air Act preemption waiver for California's Advanced Clean Cars Program that set greenhouse-gas and zero-emission-vehicle standards. EPA rested the Waiver Revocation on two "independent and adequate grounds." Final Rule, 84 Fed. Reg. at 51,350. EPA first reasoned that the Preemption Rule "renders EPA's prior grant of a waiver for those aspects of California's regulations that [the Energy Policy and Conservation Act] preempts invalid, null, and void." *Id.* at 51,338. While admitting that NHTSA's view of preemption is a "factor[] outside the statutory criteria" by which Clean Air Act waiver applications are

judged, EPA decided to rely on that factor to revoke a waiver in "the unique situation" where its "sister agency is determining, and codifying regulatory text to reflect, that a statute Congress has entrusted it to administer preempts certain State law." *Ibid.*

In the alternative, EPA stated that it had erred by finding in 2013 that California needed its own vehicular emission standards to meet compelling and extraordinary conditions. Final Rule, 84 Fed. Reg. 51,339–49. EPA interpreted Section 209(b)(1)(B) of the Clean Air Act, 42 U.S.C. § 7543(b)(1)(B), to bar California from setting any individual standards "that address pollution problems of a national or global nature, as opposed to conditions that are 'extraordinary' with respect to California in particular." Final Rule, 84 Fed. Reg. at 51,347. Based on that novel interpretation, EPA adjudged that California had not shown, with respect to greenhouse-gas or zero-emission-vehicle standards for model years 2021 through 2025, that "the emissions of California motor vehicles, as well as California's local climate and topography, are the fundamental causal factors for the air pollution problem" those standards were intended to address. *Ibid.*

Finally, in the Section 177 Determination, EPA announced for the first time that it interprets Section 177 of the Clean Air Act, 42 U.S.C. § 7507, not to allow other States to adopt or enforce vehicular greenhouse-gas standards identical to California's standards, even if California's preemption waiver remains intact. Final Rule, 84 Fed. Reg. at 51,350–51. EPA asserted—in reasoning that "comports with" its Waiver Revocation decision—that Congress meant to preclude states from adopting or enforcing standards

for "globally distributed pollutant[s]." *Id.* at 51,351; *see also ibid.* (invoking EPA's rationale for the Waiver Revocation as "further" justification for the Section 177 Determination).

E. Petitioners are challenging NHTSA's action in the district court and EPA's actions in this Court.

After EPA and NHTSA finalized their actions, all the Preemption Rule challengers (including most of the Public-Interest Petitioners) sought review of NHTSA's action in district court under the Administrative Procedure Act (APA).[1] "[O]ut of an abundance of caution," *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013), the same parties protectively petitioned for review of the Preemption Rule in this Court, to guard against the possibility that the district court is determined to lack jurisdiction to review it.[2] All those same parties, and a handful of others, also filed non-protective

[1] Compl., *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ, Dkt. 1 (filed Sept. 20, 2019, by California, 22 other states, and three major cities); Compl., *Envtl. Def. Fund v. Chao*, D.D.C. No. 1:19-cv-02907-KBJ, Dkt. 1 (filed Sept. 27, 2019, by nine public-interest organizations); Compl., *South Coast Air Quality Mgmt. Dist. v. Chao*, D.D.C. No. 1:19-cv-03436-KBJ, Dkt. 1 (filed Nov. 14, 2019, by three California regulatory agencies); Mot. of National Coalition for Advanced Transportation to Intervene as a Plaintiff, *California v. Chao*, D.D.C. No. 1:19-cv-02826, Dkt. 39 (filed Nov. 15, 2019); Mot. of Calpine Corp., Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition to Intervene as Plaintiffs, *California v. Chao*, D.D.C. No. 1:19-cv-02826, Dkt. 47 (filed Dec. 4, 2019).

[2] *Union of Concerned Scientists v. NHTSA*, D.C. Cir. No. 19-1230 (filed Oct. 28, 2019); *California v. Wheeler*, D.C. Cir. No. 19-1239 (filed Nov. 15, 2019); *South Coast Air Quality Mgmt. Dist. v. EPA*, D.C. Cir. No. 19-1241 (filed Nov. 15, 2019); *Nat'l Coal. for Advanced Transp. v. EPA*, D.C. Cir. No. 19-1242 (filed Nov. 15, 2019); *Calpine Corp. v. EPA*, D.C. Cir. No. 19-1245 (filed Nov. 25, 2019); *City & County of San Francisco v. Wheeler*, D.C. Cir. No. 19-1246 (filed Nov. 25, 2019); *see also Envtl. Def. Fund v. NHTSA*, D.C. Cir. No. 19-1200 (filed Sept. 27, 2019, and dismissed without prejudice Nov. 22, 2019).

petitions for review by this Court of EPA's Waiver Revocation and Section 177 Determination.[3] This Court has consolidated the eight petitions for review that challenge one or more of the agencies' jointly published actions.

On October 15, 2019, the United States served notice of a motion to dismiss or transfer two of the APA cases to this Court. The United States argued that the Energy Policy and Conservation Act confers exclusive jurisdiction on the courts of appeals to review the Preemption Rule. U.S. Mot. to Dismiss or Transfer at 12–18, *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ, Dkt. 42 (filed Dec. 3, 2019) (U.S. Mot. to Dismiss). Among other things, the United States observed that it "would be glaringly inefficient" for this Court to review the Preemption Rule and Waiver Revocation separately. *Id.* at 21; *see also* U.S. Reply in Support of Mot. to Dismiss or Transfer at 20, *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ, Dkt. 44 (served Nov. 27, 2019, and filed Dec. 3, 2019) (explaining that "bifurcated review of related proceedings is disfavored," as is "duplication of district court and court of appeals review").

Briefing on NHTSA's motion to dismiss or transfer concluded in the district court on November 27, 2019. The jurisdictional dispute is now ripe for resolution in that court, which has consolidated all the APA cases in a single proceeding. *See* Minute Order, *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ (Dec. 18, 2019).

[3] *See* all but the first and last petition for review cited in note 2, *supra*; *Sierra Club v. EPA*, D.C. Cir. No. 19-1243 (filed Nov. 22, 2019); *Advanced Energy Economy v. EPA*, D.C. Cir. No. 19-1249 (filed Nov. 25, 2019).

ARGUMENT

"In the exercise of a sound discretion [a court] may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and issues are the same." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937); *see also* D.C. Cir. Handbook 55 (Dec. 2019) (observing that this Court may "defer[] decision of a case pending disposition of another case … before another tribunal"). The decision whether to hold a case in abeyance "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance" between judicial economy and hardship to the parties. *Landis v. North Am. Co.*, 299 U.S. 248, 254–55 (1936). Judicial economy strongly favors holding these petitions in abeyance pending the district court's disposition of cases challenging the Preemption Rule, and an abeyance will not cause any parties hardship.

I. Judicial Economy Strongly Favors Abeyance.

This Court "often" holds petitions for review in abeyance "in light of other pending proceedings that may affect the outcome of the case before [it]." *Basardh*, 545 F.3d at 1069. An abeyance may be warranted if the other proceeding "may entirely, or partially," dispose of issues to be raised in a petition. *Ibid.* The APA proceeding pending in the district court should entirely or partially dispose of the issues that would be raised in the petitions for review of the Preemption Rule. And, because EPA relied on that rule as a basis for the Waiver Revocation and then relied on the Waiver Revocation to justify the Section 177 Determination, it would be inefficient to split up judicial review of the agencies' three actions. Considerations of judicial economy therefore favor an abeyance.

A. Petitions for review of NHTSA's action should be held in abeyance.

This Court should hold the protective petitions for review of the Preemption Rule in abeyance pending the district court's review of the same rule in an earlier-filed proceeding involving most of the same parties.

The district court must review the Preemption Rule first. "[P]ersons seeking review of agency action [must] go first to district court rather than to a court of appeals" unless "a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1287 (D.C. Cir. 2007) (Kavanaugh, J.) (quotation omitted). While the Energy Policy and Conservation Act gives the courts of appeals jurisdiction to directly review regulations prescribed pursuant to six specified sections of the Act, *see* 49 U.S.C. § 32909(a), regulations *not* prescribed pursuant to those sections must be reviewed initially in district court. *See Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 626–27 (2018) (*NAM*); *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 718–21 (D.C. Cir. 2016). The Preemption Rule is not prescribed pursuant to any of the six listed sections; if anything, NHTSA prescribed the rule pursuant to the Act's standalone preemption section, which Congress notably omitted from the list of sections for which it authorized direct review.[4]

[4] NHTSA has argued to the district court that the agency divested that court of jurisdiction by invoking, as purported authority for the Preemption Rule, a handful of the six sections of the Energy Policy and Conservation Act that *are* listed in the Act's direct-review provision. U.S. Mot. to Dismiss at 12–18. But an agency's mere "invocation" of inapposite statutory authority "does not control" whether that action is reviewable directly by a court of appeals. *NAM*, 138 S. Ct. at 630 n.8. A district court (*cont'd*)

Even if there were "serious doubt" as to which court can review the rule initially, *Basardh*, 545 F.3d at 1070, the relative progress of proceedings in the two forums weighs in favor of an abeyance. *See, e.g.*, *Westinghouse Broad. Co. v. NTSB*, 670 F.2d 4, 4 (1st Cir. 1982) (Campbell & Breyer, JJ.). Unlike in the district court, no party has moved that this Court determine its own jurisdiction to review the Preemption Rule. This Court is usually "reluctant to render a decision on … important jurisdictional questions without the benefit of briefing and oral argument." *Nat'l Juvenile Law Ctr., Inc. v. Regnery*, 738 F.2d 455, 467 (D.C. Cir. 1984). Nor would it "serve judicial economy" for the Court to resolve *sua sponte* a jurisdictional question that is ripe for disposition below. *United States v. Rostenkowski*, 68 F.3d 489, 490 (D.C. Cir. 1995). By the same token, it would be "a colossal waste of judicial [and party] resources" for this Court to order merits briefing on "the same issues about the same rule presented by the same parties" as in a pending district-court proceeding. *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1321 (11th Cir. 2016).

The district court's resolution of the jurisdictional issue may (and very likely will) be appealed to this Court upon entry of an appealable order. This Court then can act upon the appeals with the benefit of the district court's opinion, as well as proceedings below that "will sharpen and narrow the legal issues that must eventually be decided." *Green v. Dep't of Commerce*, 618 F.2d 836, 842 (D.C. Cir. 1980). The most sensible course is for this Court to hold the protective petitions for review of NHTSA's Preemption

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must review the Preemption Rule first because it is not "colorably authorized" by any statutory section listed in the direct-review provision. *Loan Syndications*, 818 F.3d at 723.

Rule in abeyance while the district court resolves the litigation before it. *See, e.g.*, *Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 154 n.2 (D.D.C. 2011) (noting that this Court held in abeyance a protective petition for review of an agency action while the district court decided that it had jurisdiction to review the action and resolved disputes on the merits).

B. Petitions for review of EPA's actions should be held in abeyance.

The petitions for review of EPA's two actions likewise should be held in abeyance because those actions are closely related to each other, and one of them (the Waiver Revocation) is predicated on NHTSA's Preemption Rule.

EPA premised its Waiver Revocation on NHTSA's decision to issue regulations respecting preemption under the Energy Policy and Conservation Act. *See* Final Rule, 84 Fed. Reg. at 51,338. EPA explained that, in the normal course, it had not reached and would not reach beyond the criteria listed in Section 209(b)(1) of the Clean Air Act in making a preemption-waiver decision. *See ibid.* But, EPA reasoned, this was a "unique situation" in which it was not "acting on its own" but as part "of a joint action in which [its] sister agency is determining, and codifying regulatory text to reflect, that a statute Congress has entrusted it to administer preempts certain State law." *See ibid.* If NHTSA's Preemption Rule is declared invalid, the Waiver Revocation cannot stand insofar as its reasoning depends on the Preemption Rule. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943).

EPA also offered an alternative basis for the Waiver Revocation—i.e., that California did not show a need for its own vehicular emission standards to meet compelling

and extraordinary conditions. *See supra*, page 8. But EPA used that theory to revoke California's preemption waiver only as to standards for model year 2021–2025 vehicles. Final Rule, 84 Fed. Reg. at 51,350. To the extent that EPA's action applies to emission standards for other model years, *see ibid.*, it depends exclusively on the Preemption Rule.[5]

EPA's alternative basis for the Waiver Revocation is closely related to the agency's Section 177 Determination: Both actions rest on the premise that greenhouse gases are "globally distributed pollutant[s]" that Congress did not intend for any state to regulate. Final Rule, 84 Fed. Reg. at 51,351; *see supra*, page 8. Indeed, much of EPA's rationale for the Section 177 Determination borrows directly from the agency's discussion of the Waiver Revocation. *See* Final Rule, 84 Fed. Reg. at 51,351.

Public-Interest Petitioners agree with the United States that it would be inefficient for a court to review separately the different elements of the agencies' jointly published action. It would be especially inefficient for this Court to proceed in a backwards fashion and decide whether EPA lawfully relied on NHTSA's action before obtaining (appellate) jurisdiction to decide whether NHTSA's action is itself lawful. Nor would it make sense for the Court to sever judicial review of two jointly published EPA actions that rely on a common premise. Instead, to further judicial economy, this Court should

[5] As discussed further in the motion for abeyance filed by the State of California and its co-petitioners, EPA has yet to clarify whether the Waiver Revocation operates to invalidate state emission standards for vehicles of model years other than 2021–2025. EPA's withholding of this basic information about the scope of its action is an additional reason to hold these petitions in abeyance, because petitioners will be prejudiced if they have to brief the merits of the Waiver Revocation before EPA clarifies its scope.

hold the entirety of the consolidated petitions for review in abeyance while the district court reviews the Preemption Rule in the first instance.

II. The Balance of Hardships Favors Abeyance.

Petitioners uniformly consent to abeyance because it will avoid duplicative proceedings and conserve their litigation resources. Moreover, insofar as the agency actions under review seek to invalidate state greenhouse-gas standards, those actions have no immediate impact on air pollution from vehicles. That is because the state greenhouse-gas standards at issue are no more stringent than the extant *federal* greenhouse-gas standards, *see* Final Rule, 84 Fed. Reg. at 51,311, which will "remain in effect unless and until" EPA takes final action to amend them, *California*, 940 F.3d at 1350 (quotation omitted).

Abeyance would not meaningfully harm respondents or their intervenors. *Cf. Devia v. NRC*, 492 F.3d 421, 427 (D.C. Cir. 2007) (finding "no case in which a court actually considered the hardship to a respondent (or an intervenor-respondent) of deferring a decision on a challenger's petition"). Automakers still must comply with the extant federal greenhouse-gas standards, irrespective of the present litigation. Further, because petitioners have neither sought nor obtained a stay of any of the challenged agency actions pending judicial review, this litigation does not require respondents or their intervenors "to engage in, or to refrain from, any conduct during the time the case is held in abeyance." *Ibid.* (quotation omitted). If anything, respondents and their intervenors will benefit from avoiding wasteful and duplicative expenditure of litigation resources.

By definition, an abeyance prolongs the period of uncertainty due to "unresolved judicial challenges." *Devia*, 492 F.3d at 427 (brackets omitted). But regulatory uncertainty alone is not a "real hardship," *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812 (2003), that suffices to deny an otherwise meritorious request for an abeyance. Regardless, any additional period of regulatory uncertainty should be brief. Public-Interest Petitioners and others filed complaints in the district court promptly upon issuance of the Preemption Rule, and NHTSA already would have answered the complaints on the merits had it not moved the district court to dismiss the complaints for want of jurisdiction. If the district court determines that it has jurisdiction to review the Preemption Rule under the APA, that court can be expected to resolve the merits on cross-motions for summary judgment based on "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Alternatively, if the district court concludes that it lacks jurisdiction, the complaints will be dismissed on that basis, and any abeyance in this Court will be fleeting.

Public-Interest Petitioners will continue to prosecute their case diligently in the district court, and that court has consolidated all the cases challenging the Preemption Rule in order "to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a)(3). The lack of real hardship to the parties in the interim further supports the request for an abeyance.

* * *

This motion to hold the consolidated petitions for review in abeyance is supported by all petitioners and opposed by respondents and intervenors for respondents.

CONCLUSION

This Court should hold these consolidated petitions for review in abeyance pending the district court's resolution of *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ, and consolidated cases. The parties should be directed to file motions to govern future proceedings in these petitions within 30 days of the operative final dispositions by the district court. *See, e.g.*, Order, *Sierra Club v. EPA*, D.C. Cir. No. 11-1263 (Dec. 7, 2011).

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CERTIFICATE OF COMPLIANCE

The foregoing motion contains 4,787 words and complies with the type-volume limit in Fed. R. App. P. 27(d)(2)(A). The document was prepared using Microsoft Word 365 in 14-point, Garamond font, and it complies with the typeface and typestyle requirements of Fed. R. App. P. 27(d)(1)(E).

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CERTIFICATE OF SERVICE

On December 26, 2019, I filed the foregoing document with this Court using the CM/ECF system. All counsel in these consolidated cases are registered CM/ECF users and will be served via the CM/ECF system.

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