

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

ANDREW R. WHEELER, *et al.*,

Respondents.

No. 19-1239
(consolidated with
No. 19-1230)

CITY AND COUNTY OF SAN FRANCISCO,

Petitioners,

v.

ANDREW R. WHEELER, *et al.*,

Respondents.

No. 19-1246
(consolidated with
No. 19-1230)

**REPLY IN SUPPORT OF STATE AND MUNICIPAL
PETITIONERS' MOTION TO HOLD CASE IN ABEYANCE**

State and Municipal Petitioners seek to hold these cases in abeyance while the U.S. Environmental Protection Agency (“EPA”) and the district court clarify—and possibly narrow—the questions to be presented to this Court. Respondents and Intervenors identify no significant hardship that outweighs the benefits of abeyance. The hardship they allege is caused by the unfinalized proposal to roll back federal standards, not by this lawsuit. And a decision here, whenever it occurs, will not redress that alleged hardship. Accordingly, State and Municipal Petitioners respectfully request that the Court grant their motion to hold these cases in abeyance.

ARGUMENT

I. THIS COURT SHOULD HOLD THESE CASES IN ABEYANCE UNTIL THE ISSUES ARE CLARIFIED BY EPA’S DECISION ON THE RECONSIDERATION PETITIONS.

This Court should hold these cases in abeyance until EPA acts on the pending reconsideration petitions, which ask EPA to clarify its action and, thus, the issues to be briefed and decided in these cases. Most significantly, the Final Actions are unclear as to whether EPA’s revocation of the 2013 waiver for California’s greenhouse gas emission and zero-emission vehicle standards applies only to model years 2021–2025 or extends to earlier model years as well. First Recon. Pet.

1. The First Reconsideration Petition sought clarity regarding this basic temporal scope; such clarity would elucidate, and potentially narrow, the issues to be

litigated. For example, if EPA's waiver revocation included model years earlier than 2021, additional issues would be inserted into this litigation, including the absence of any assertion of authority to take such action, inadequate notice in the Proposal, and disruption of settled expectations.

Respondents do not appear to contest the importance of clarity regarding the model years at issue. Instead, they claim the scope was clear and that the Final Actions "reference[] the invalidity of the waiver as a whole" with respect to EPA's reliance on NHTSA's preemption regulation. Respondents' Opp. 10-11. But the Final Actions nowhere use the phrase "as a whole" to describe the scope of EPA's waiver revocation. Respondents' claims of clarity also fail to explain the inquiries California received from regulated parties concerning affected model years, First Recon. Pet. 2, 8, or EPA's inaction on the reconsideration petition. EPA can settle the issues by deciding the reconsideration petition; that it has instead withheld a decision for over three months indicates the temporal scope of EPA's revocation is not as clear as EPA wants this Court to believe.¹

Respondents' post-hoc arguments, raised in their opposition brief, also suffer from some of the same ambiguity as the Final Actions. Respondents maintain that they "finalized (in substantial part) the same legal determinations proposed in the

¹ At the very least, EPA should not be heard to complain of delays in judicial review given its own delays acting on the reconsideration petitions.

August 24, 2018 proposed action.” Respondents’ Opp. 12. But EPA “propos[ed] to withdraw [the waiver for] model year (MY) 2021 through 2025,” regardless of the grounds for withdrawal, 83 Fed. Reg. 42,986, 43,240 (Aug. 24, 2018), and stated that revoking state authority for model years 2021 and later was substantially different from revoking that authority for *past or current* model years. 83 Fed. Reg. at 43,252. Put simply, Respondents’ claim that the actions finalized were substantially the same as those proposed cannot be reconciled with their claim that the waiver was revoked “as a whole” (including earlier model years).

Respondents’ post-hoc argument also neglects the fact that EPA concluded its discussion of its authority to revoke a waiver by stating that it had that authority “*for MY 2021-2025, ... consistent with the SAFE proposal.*” 84 Fed. Reg. at 51,377 (emphasis added). Thus, Respondents’ brief does not resolve the ambiguity of the Final Actions.

The reasons EPA provided for its action and its positions, including many positions that EPA had not announced until the Final Actions, also remain unclear. EPA’s action on the Second Reconsideration Petition may obviate the need for litigation on, or provide a clearer picture of, the alleged violations of notice and comment and reasoned decisionmaking requirements, further narrowing the scope of issues before the Court. See State & Mun. Pet. Mot. 16-19.

That EPA has not yet acted on the petitions is irrelevant. This Court has held cases in abeyance where EPA had not yet agreed to convene reconsideration proceedings. *See, e.g., Am. Trucking Ass'n v. EPA*, No. 97-1440, 1998 WL 65651, at *1 (D.C. Cir. 1998); *New York v. EPA*, No. 02-1387, 2003 WL 22326398, at *1 (D.C. Cir. 2003).

Lead Industries Ass'n v. EPA, which Respondents rely on heavily in their brief, actually proves this point. 647 F.2d 1184 (D.C. Cir. 1980). While the Court there denied a full abeyance, it did so only after putting the case on hold and giving EPA a date certain by which to decide whether to grant or deny the reconsideration petition—a de facto abeyance. *Id.* at 1186. That is little different from the relief Petitioners seek here. In contrast, the portion of *Lead Industries* that denied abeyance is inapplicable because (1) EPA had already denied the petition and the petitioner sought an abeyance pending review of that decision, and (2) the grounds for reconsideration and abeyance—“new information” allegedly undermining EPA’s analysis—differed from the grounds here.²

² To the extent *Lead Industries* recognized a desire for expeditious judicial review, the Court did not rely upon Section 307(b)(1), as Respondents assert. The statement was based on a different provision, inapplicable here, concerning petitions based on “new information” and expressly limiting the length of a stay of a rule’s effectiveness. *See id.* at 1186. In any event, as indicated in Petitioners’ motion, plenty of Clean Air Act cases have been held in abeyance pending EPA’s decision on a reconsideration petition, demonstrating that institutional interests in deferring review can outweigh any generalized interest in prompt resolution.

II. THIS COURT SHOULD HOLD THESE CASES IN ABEYANCE UNTIL THE DISTRICT COURT RESOLVES THE CHALLENGES TO NHTSA'S PREEMPTION REGULATION.

Respondents essentially agree that all parts of the Final Actions should be considered together because EPA relied on NHTSA's preemption regulation as one of its waiver revocation grounds. *See* Respondents' Opp. 15 ("judicial economy favors litigating the common questions in this Court"); Intervenors' Opp. 12 (describing issues as "inextricably intertwined"). The only dispute is over how that should be accomplished. Because jurisdiction over NHTSA's preemption regulation lies in the district court, the only way for this Court to consider the overlapping issues together is to hold this case in abeyance until the district court determines the validity of NHTSA's preemption regulation and any appeals can be consolidated with these cases.

Respondents assert that the district court lacks jurisdiction and that this Court should decide the jurisdictional question when it considers the merits (on an expedited schedule). Respondents are incorrect on both fronts.

As previously explained and as Respondents appear to concede, this Court should not decide the jurisdictional question in the context of this motion. *State & Mun. Pet. Mot.* 20-21 n. 9; Respondents' Opp. 2 (asserting the Court should resolve the question when it considers the merits). Rather, the district court should

decide that question, which, as a result of Respondents' motion, is already fully briefed and set for argument.³

Nonetheless, and solely to aid the Court in resolving this motion, Petitioners respond, briefly, to Respondents' and Intervenors' arguments, as follows. The district court has jurisdiction over challenges to NHTSA's preemption regulation under "the normal default rule ... that persons seeking review of agency action go first to district court" *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 719 (D.C. Cir. 2016) (internal quotation marks omitted). Respondents assert that the judicial review provision of the Energy Policy and Conservation Act, 49 U.S.C. § 32909(a)(1), creates an exception for NHTSA's preemption regulation. But Section 32909(a)(1), like all direct-review provisions, "is strictly limited to the agency action(s) included therein." *Id.* (internal quotation marks omitted). The provision includes no reference to preemption, preemption regulations, or the statute's preemption provision (Section 32919). The statutory sections that *are* enumerated in Section 32909(a)(1)— Sections 32901-32904 and 32908— "[n]owhere direct or authorize" NHTSA to interpret the preemption section or otherwise promulgate a preemption regulation. *See Nat'l Ass'n of Mfrs. v. Dep't of*

³ Petitioners have diligently pursued their claims against NHTSA in the district court. They filed their complaint the day after the Final Actions were signed, and the parties have fully briefed Respondents' motion to dismiss. The hearing on that motion is set for April 16, 2020. Respondents have not moved to expedite in that court.

Def., 138 S. Ct. 617, 630 (2018) (“*NAM*”). NHTSA’s preemption regulation is, thus, not among those for which Section 32909(a)(1) provides direct appellate review. *See id.*

Respondents’ arguments to the contrary boil down to a contention that the phrase “regulations prescribed in carrying out” means something broader than regulations prescribed under the enumerated sections—the language at issue in *NAM*. *See* Intervenors’ Opp. 10; Respondents’ Opp. 20. But Congress expressly provided otherwise when it inserted the phrase “carrying out” into Section 32909(a)(1).

Specifically, when the Energy Policy and Conservation Act was first enacted in 1975, its judicial review provision provided direct appellate review for “any rule prescribed under” several enumerated statutory sections. Pub. L. 94-163, 89 Stat. 871 (1975). When that judicial review provision was recodified into title 49 in 1994, Congress changed the language from “any rule prescribed under” to “a regulation prescribed in carrying out.” *See* Pub. L. 103-272, 108 Stat. 745, 1070 (1994). Congress directed that any recodification revisions “may not be construed as making a substantive change in the laws replaced.” 49 U.S.C. § 101 (note); Pub. L. No. 103-272, § 6(a), 108 Stat. 745, 1378 (1994). The 1994 recodification thus did not change the provision’s meaning or scope—as NHTSA itself has acknowledged. 60 Fed. Reg. 63,648, 63,649 (Dec. 12, 1995).

Thus, as before recodification, direct appellate review under Section 32909(a)(1) is only available for regulations prescribed under the enumerated sections—Sections 32901-32904 or 32908—none of which even colorably authorize preemption regulations or, indeed, discuss preemption at all. The district court, therefore, has original jurisdiction over challenges to NHTSA’s preemption regulation.

Respondents have not disputed that the lawfulness of NHTSA’s regulation is intertwined with the challenges to EPA’s waiver revocation. Still, Respondents insist that these cases should proceed to full briefing in this Court irrespective of the district court proceedings. The course Respondents propose—proceeding now to brief all issues, including the jurisdictional question discussed above—would be inefficient and wasteful. *See* Respondents’ Opp. 2, 15. Indeed, this course would be maximally disruptive if, as discussed above, this Court lacks jurisdiction to consider the merits of NHTSA’s preemption regulation in the first instance. In that likely event, the parties and the Court would have wasted substantial time and significant effort briefing and considering issues that must be left to the district court to resolve in the first instance.

The far more reasonable course is to allow the district court to decide the case before it and then to consolidate any appeals from that decision with these cases.

At a minimum, this Court should hold these cases in abeyance until the district court decides the jurisdictional question Respondents presented to it.⁴

III. NO HARDSHIP OUTWEIGHS THE BENEFITS OF ABEYANCE.

In the face of strong institutional interests in deferring review, Respondents and Intervenors have articulated no “immediate and significant” hardship that an abeyance would cause. *See Am. Petroleum Inst. v. EPA*, 683 F.3d, 382, 389 (D.C. Cir. 2012) (“*API*”).⁵ EPA and NHTSA identify no hardship to themselves, nor could they, since their actions remain in effect. Instead, the agencies refer only to the harm asserted by Intervenors, who complain of regulatory uncertainty for model year 2021. Intervenors’ Opp. 8, 17-18. But neither Respondents nor Intervenors explain how that uncertainty is tied to the requested abeyance. In fact, at present, automakers must plan to comply with federal greenhouse gas emission standards that are harmonized with the California standards at issue here. Any uncertainty about the future of those federal standards was created by Respondents’ proposed rollback and will not be resolved by this litigation.

⁴ If the court is disinclined to do so, it should direct the parties to brief jurisdiction and resolve that issue before making any decisions concerning whether and when to proceed to merits briefing.

⁵ As Respondents note, *API* and *Devia* concerned prudential ripeness. But considerations guiding whether to grant a motion for abeyance are similar to those relating to prudential ripeness. *See Devia v. NRC*, 492 F.3d 421, 427 (D.C. Cir. 2007).

Intervenors do not attempt to describe the specific impacts of an abeyance, leaving the extent of any impact speculative. Notably, automakers have been planning to comply with the model year 2021 federal standard (which has not changed) for more than five years.

Any uncertainty here is less burdensome than in countless cases in which regulated entities have to weigh the pros and cons of planning for, and beginning to comply with, challenged regulations. Automakers have had years to prepare to comply, the technology necessary to comply exists, automakers have been over-complying and have banked credits they can use in future years, and the California and federal standards remain harmonized. *State & Local Gov't Pets.' Opp. to Mots. for Expedited Consideration* (“Expedition Opp.”) 15-19.

Intervenors’ arguments that they are harmed by “California’s elective actions” also fall flat. *See* Intervenors’ Opp. 19. None of the so-called “elective actions” are at issue or will be resolved in these cases, and none impose an immediate and significant hardship on automakers. California’s regulations have always included a provision requiring automakers to tell the California Air Resources Board (“the Board”) how they plan to comply—whether via the federal standards or California’s. The August 2019 letter did not change this; it simply extended the timeframe for automakers to tell the Board which of the pre-existing compliance pathways they wanted to select for model year 2020, although the deadline for

such elections had already passed for some vehicle models. *See* Cal. Code Regs., tit. 13, § 1961.3(c)(1). The Board provided this extension at the request of automakers who recognized that, due to the proposed changes to the federal standards (which are not at issue here), it might be in their interests to begin accumulating credits for over-compliance with California's program. The letter simply extended the deadline for automakers to make a choice they had always had; it did little more than provide additional flexibility and make future, potential compliance easier. *See also* Expedition Opp. 19-20.

Intervenors also point to new purchasing requirements for California's state vehicle fleets. Intervenors' Opp. 18. These requirements merely set priorities for acquisitions for California's own state fleet, including limiting the purchase of internal combustion vehicles. Expedition Opp. 21-22. Their potential impact is greatly exaggerated; they do not penalize automakers for complying with federal law; and their applicability does not turn on the outcome of these cases. *See id.*

Likewise, California's 2018 regulatory amendments do not harm automakers. *See* Intervenors' Opp. 18. The amendments simply clarified what California stated when it adopted its standards—that compliance with federal standards that provide insufficient emissions reductions does not constitute compliance with California's standards. Expedition Opp. 11. These clarifying amendments did not change

California's standards, do not require EPA action, and do not create regulatory uncertainty.

In sum, none of the alleged harms constitute an "immediate and significant" hardship that might outweigh the benefit of abeyance here. *See API*, 683 F.3d at 389 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, State and Municipal Petitioners request that these consolidated cases be held in abeyance.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d) and D.C. Circuit Rule 27(a)(2), I hereby certify that the foregoing complies with all applicable format and length requirements, and contains 2,598 words as calculated by Microsoft Word, exclusive of the caption, signature block, and certificates of counsel.

/s/ Carolyn Nelson Rowan

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(c), I hereby certify that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which automatically sends a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

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