

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>		
STATE OF CALIFORNIA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:19-cv-2826-KBJ
)	and consolidated cases
ELAINE L. CHAO, et al.,)	
)	
Defendants.)	
<hr/>		

RESPONSE TO NOTICE OF DEVELOPMENTS IN RELATED LITIGATION

Defendants respectfully submit this response to Plaintiffs’ notice alerting the Court to an order issued by the D.C. Circuit in *Union of Concerned Scientists v. NHTSA*, No. 19-1230 and consolidated cases. Those closely-related cases are petitions for review of the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule Part One: One National Program (the “One National Program Action”), 84 Fed. Reg. 51,310 (Sept. 27, 2019). The One National Program Action is a joint rulemaking by NHTSA and EPA. The NHTSA component of the One National Program Action clarified that federal law preempts state standards limiting tailpipe greenhouse gas emissions. Plaintiffs refer to this NHTSA component as “the Preemption Rule.” The Preemption Rule is the same agency action that is being challenged in this Court.

Defendants in this Court have moved to dismiss the Amended Complaint because the D.C. Circuit possesses exclusive jurisdiction to review the Preemption Rule. That motion was fully briefed on December 3, 2019, and the Court has scheduled a hearing for April 16, 2020.

On December 26, 2019, Petitioners in *Union of Concerned Scientists* moved the D.C. Circuit to place that case into abeyance pending resolution of this proceeding. *See* Mot. of Public-Interest Petitioners for Abeyance, *Union of Concerned Scientists v. NHTSA*, No. 19-1230, Dkt. 1821672 (Dec. 26, 2019) (“Interest Group Motion”); Motion to Hold Case in Abeyance, *Union of Concerned Scientists*, No. 19-1230, Dkt. 1821653 (Dec. 26, 2019) (“State Motion”). Those abeyance motions raised the same arguments made by the Plaintiffs in opposition to Defendants’ motion to dismiss. Specifically, the Interest Group Motion argued that the D.C. Circuit may not directly review the Preemption Rule, and that instead those challenges must be brought in this Court—as they put it “[t]he district court must review the Preemption Rule first.” Interest Group Motion at 12 (arguing that the Preemption Rule “must be reviewed initially in the district court”); *see also id.* at 2, 10 (arguing that an abeyance should be granted in light of the pending motions to dismiss); *cf.* State Motion at 20-21 n.9 (arguing that the district court has jurisdiction, but urging that this issue was not before the court of appeals).

NHTSA opposed the request for an abeyance, advancing the same arguments (among others) that it presented in the pending motion to dismiss. *See* Opp. to Mot. to Hold Petitions in Abeyance at 15-21, *Union of Concerned Scientists*, No. 19-1230, Dkt. 1823683 (Jan. 10, 2020) (“Respondents’ Opp.”). On reply, the movants likewise advanced the same arguments with which they oppose NHTSA’s district court motion to dismiss, arguing at length that the D.C. Circuit lacks jurisdiction to conduct the initial direct review of the Preemption Rules. *See* Reply in Support of State and Municipal Pet. Mot. to Hold Case in Abeyance at 6-10, *Union of Concerned Scientists*, No. 19-1230, Dkt. 1824753 (Jan. 17, 2020) (“State Reply”); Reply of Public-Interest Petitioners in Support of Mot. for Abeyance at 4-7, *Union of Concerned Scientists*, No. 19-1230, Dkt. 1824754 (Jan. 17, 2020) (“Interest Group Reply”). The movants

also argued that, as a matter of judicial economy, the D.C. Circuit should review the Preemption Rule together with the EPA component of the One National Program Action. *See, e.g.*, State Motion at 20-21; State Reply at 6; Interest Group Motion at 15.

On February 4, 2020, the D.C. Circuit issued an order that in pertinent part denied Petitioners' motion for an abeyance. *See Order, Union of Concerned Scientists*, No. 19-1230, Dkt. 1826992 (Feb. 4, 2020). The Court directed the parties to submit a proposed format for the briefing of all issues within 30 days.

The D.C. Circuit's order supports Defendants' motion to dismiss. First, despite Plaintiffs' suggestion to the contrary, *see Notice, State of California v. Chao*, No. 19-cv-02826, Dkt. 28 (Feb. 6, 2020), the jurisdictional arguments were presented to the D.C. Circuit, as detailed above. Indeed, NHTSA specifically urged that an abeyance was not warranted because the D.C. Circuit, not this Court, has exclusive jurisdiction and the D.C. Circuit should be the one to decide this jurisdictional question. Respondents' Opp. at 15. The movants opposed this argument on its substance. *See State Reply at 6-10; Interest Group Reply at 4-7.* The D.C. Circuit did not find the movant's arguments that it lacks jurisdiction to provide a sufficient basis to defer proceedings in the court of appeals. This supports the conclusion that Defendants' jurisdictional arguments are correct or—at a minimum—are “colorable,” such that the D.C. Circuit has exclusive jurisdiction.

Second, the D.C. Circuit's decision means that regardless of what happens here, the parallel challenges to the Preemption Rule (as well as the EPA component of the One National Program Action) will go forward in the D.C. Circuit to full merits briefing and argument. As discussed in Defendants' motion to dismiss (and as Plaintiffs apparently agree), judicial economy supports resolution of the challenges to the One National Program Action in a single,

unified proceeding. By virtue of the D.C. Circuit's order, that proceeding is, and should be, in the D.C. Circuit.

Respectfully submitted,

Of Counsel:

JONATHAN C. MORRISON

Chief Counsel

KERRY E. KOLODZIEJ

Assistant Chief Counsel

MICHAEL KUPPERSMITH

Trial Attorney

Office of the Chief Counsel

National Highway Traffic Safety

Administration

JEFFREY BOSSERT CLARK

Assistant Attorney General

JONATHAN D. BRIGHTBILL

*Principal Deputy Assistant Attorney
General*

Environment and Natural Res. Div.

/s/ Benjamin R. Carlisle

DANIEL R. DERTKE

BENJAMIN CARLISLE

Environmental Defense Section

U.S. Department of Justice

Box 7611

Washington, D.C. 20004

(202) 514-0994

FEBRUARY 7, 2020

90-5-2-4-21567

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2020, I electronically filed the foregoing Notice with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/ Benjamin R. Carlisle