

ORAL ARGUMENT NOT SCHEDULED

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

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UNION OF CONCERNED SCIENTISTS,))
et al.,))
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Petitioners,))
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v.)	No. 19-1230, and
)	consolidated cases
NATIONAL HIGHWAY TRAFFIC))
SAFETY ADMINISTRATION, et al.,))
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Respondents.))
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**RESPONDENTS’ OPPOSITION TO PETITIONERS’
SECOND SUPPLEMENTAL RESPONSE TO REQUEST
FOR BRIEFING PROPOSALS**

Introduction

Petitioners’ Second Supplemental Response to Request for Briefing Proposals, ECF No. 1841114, seeks to unilaterally enlarge an already generous briefing schedule negotiated by the parties. This is no small request. Petitioners now seek nearly five months to prepare their briefs. That is on top of the nearly six months Petitioners had to review the challenged action *before* this Court’s initial deadline for briefing proposals and *before* the COVID-19 virus came on the scene.

Petitioners have premised their request primarily on the personal circumstances faced by two of the attorneys for one of the many petitioners in this case. Specifically, Petitioners highlight the COVID-19-related scheduling issues faced by the two lead attorneys in the California Attorney General's office. Respondents do not contest the veracity of the representations made by these two attorneys and are sympathetic to their personal difficulties, which are not dissimilar from the difficulties faced by many other attorneys nationwide, including some of Respondents' own staff.

That said, the schedule in this case affects much more than the workload and personal circumstances of two of Petitioners' lead attorneys. For example, the head of California's Air Resources Board was quoted in the *Los Angeles Times* at the start of this year as saying that the State's strategy "is to win, but to win in a way that does not precipitate a Supreme Court taking of this case until Mr. Trump is out of office."¹ In other words, California policymakers have publicly stated that they perceive it to be in their strategic interest to delay resolution of this case. And while this delay continues, California continues to pursue state-specific policy initiatives that, in the view of Respondents, fly in the face of the agency decision at issue here. See *infra*, n.3. Moreover, these disputed state actions all the while are causing automakers to grapple with a host of inconsistent regulatory requirements. Simply put, California (and, by extension, co-Petitioners) is thus continuing to this day to assert regulatory authority

¹ See <https://www.latimes.com/politics/story/2020-01-10/california-clean-air-case-supreme-court-mary-nichols>.

over a national industry that a joint final federal rule and action say is preempted and barred by federal law, while at the same time seeking to further extend and delay what has already been a generous and highly accommodating schedule in this case. This unjustified and prejudicial request should be denied by the Court.

In taking this position, Respondents emphasize that they are not contesting, and in fact are sympathetic to, the very real difficulties faced by many attorneys during the COVID-19 pandemic, including those discussed in Petitioners' motion. But the solution to that problem is not to force an unreasonably long schedule on the court and the parties that will have very real and prejudicial policy implications for other parties. Petitioners should instead look to other common-sense solutions, such as sharing the work more broadly among the many highly sophisticated Petitioners in this action, or re-assigning the work in a logical way within their respective offices.²

Accordingly, Respondents the National Highway Traffic Safety Administration and Deputy Administrator James Owens; the United States Department of Transportation and Secretary Elaine L. Chao; and the United States Environmental Protection Agency and Administrator Andrew Wheeler (collectively, "Respondents") oppose Petitioners' Second Supplemental Response to Request for Briefing

² The suggestion that this can't be done rings hollow when, for example, the California Attorney General's office has, while this extension motion has been pending, taken the lead on filing a new multi-state challenge to a major Clean Water Act rule, *California v. Wheeler*, No. 3:20-cv-03005-DMR (N.D. Cal.), and has informed the Department of Justice that that office intends to file a motion for a preliminary injunction within the next two weeks in that case.

Proposals, *see* ECF No. 1841114, and respectfully request that the Court enter the schedule submitted April 3, 2020, ECF No. 1836717.

Discussion

The circumstances posed by the COVID-19 pandemic are difficult and unprecedented. But the United States does not believe Petitioners' new proposed schedule is necessary to account for those circumstances. The parties already agreed to a lengthy briefing schedule. On March 5, 2020, pursuant to this Court's February 4, 2020 order, the parties submitted a joint proposed briefing format and schedule. ECF No. 1832077. The proposed schedule provided for Petitioners' opening briefs to be filed on May 22, 2020, with briefing to conclude on September 21, 2020. On April 3, 2020, Petitioners sought a 21-day extension of that joint schedule to account for additional constraints posed by the current COVID-19 pandemic. The United States did not oppose. ECF No. 1836717. Under that compromise proposal, Petitioners' brief would be filed on June 12, 2020, with briefing to conclude on October 13, 2020. *Id.* at 3.

Petitioners have now submitted a new unilateral proposal. This would extend briefing *another 39 days*. It would push off their opening brief to July 21, 2020, and the close of briefing to November 23, 2020. *See* ECF No. 1841114 at 2. This is unwarranted.

The Respondent Agencies signed "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" more than seven months ago on

September 19, 2019. *See* 84 Fed. Reg. 51,310 (Sept. 27, 2019) (the “One National Program Action”). Petitioners’ April 3rd proposal, to which the United States consented, gives Petitioners 99 days from the Court’s deadline for submission of briefing proposals in which to prepare their opening briefs. That amounts to a total of *eight-and-a-half months* since the Action’s issuance and since the first petition challenging these actions was filed.³ This timeframe already represents a significant expansion of the Court’s usual briefing intervals, even for complex cases.

The United States does not dispute that COVID-19 has placed additional burdens on Petitioners’, and all parties’, efforts to brief this matter. But Petitioners had six months to review the content of the rule and begin drafting their briefs *before* the current national emergency was declared. And under the current compromise schedule submitted April 3rd, they had another two months remaining before those briefs were due. Even under the present circumstances, this has been ample time to brief this matter – especially in light of the large group of counsel Petitioners have at their disposal to help share the work and the primarily legal and statutory issues to be briefed in this matter.

Furthermore, continued delay here complicates an already difficult situation for automakers operating in the United States. Automakers are presently making

³ That petition, Environmental Defense Fund, et al. v. NHTSA, D.C. Cir. No. 19-1200 (filed October 1, 2019), was voluntarily dismissed in favor of the above-captioned duplicative petition for review, No. 19-1230, in which the same petitioner joined. *See* ECF Nos. 1812993, 1817206.

investment and production decisions about the light cars and vehicles that are subject to the federal standard-setting authority that is the subject of this litigation. At the same time, California and other states continue to purport independent authority to regulate vehicle fuel economy and associated emissions⁴ – notwithstanding the fact that the One National Program Action preempted that authority. Given their choice to forgo a stay or injunction of the federal agency actions pending their challenge thereto, Petitioners' new extension request risks further prolonging their open contravention of duly enacted and applicable federal law.

Moreover, the challenges presented by COVID-19 also weigh in favor of swiftly advancing these proceedings. The delay to final judgment in this case is prolonging regulatory uncertainty at a time when the auto industry, like the rest of the nation, is facing unprecedented challenges to its operational and forward-planning capacity. Prompt resolution of the fundamental issue of regulatory authority raised in this case is essential to ensure that automakers have adequate lead time to comply

⁴ See, e.g., “More US states adopt tighter emission standards,” *Electrived.com* (Apr. 14, 2020), available at: <https://www.electrived.com/2020/04/14/washington-state-passes-zev-mandate/>; Washington clean car standards, Washington State Department of Ecology, available at: <https://ecology.wa.gov/Air-Climate/Air-quality/Vehicle-emissions/Clean-cars>; Rulemaking: Clean Cars Minnesota, Minnesota Pollution Control Agency, available at: <https://www.pca.state.mn.us/air/clean-cars-mn-rulemaking>; New Hampshire House Bill 1444, General Court of New Hampshire, available at: http://gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=2361&sy=2020&sortoption=&txtsessionyear=2020&txtbillnumber=HB1444; see also “California eyes fuel efficiency deals with Volvo as Trump rolls back mileage standards,” *The Hill* (March 31, 2020), available at: <https://thehill.com/policy/energy-environment/490436-california-eyes-fuel-efficiency-deal-with-volvo-as-trump-rolls-back>.

with nationally uniform federal standards. The One National Standard Action is designed to preclude the industry from facing competing regulations that threaten to exacerbate the already challenging market landscape created by COVID-19.

Accordingly, while the United States is sympathetic to the hardships imposed on individual counsel by this pandemic – circumstances that have also affected the work of counsel for the United States on this and other matters – it also imposes multiple hardships on a multi-billion dollar industry that favor swift resolution. Set against this industry-specific and national economic backdrop, the unopposed schedule proposed on April 3rd is expansive enough. It more fairly balances the need for prompt adjudication with the challenges of these times.

For these reasons, the United States respectfully requests that the Court enter the schedule set forth in Petitioners' Supplemental Response to Order Requesting Proposed Briefing Formats, filed on April 3, 2020, ECF No. 1836717.

DATED: May 11, 2020

Respectfully submitted,

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/s/ Chloe H. Kolman
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2020, copies of the foregoing Respondents' Opposition to Petitioners' Second Supplemental Response were served through the Court's CM/ECF system on all registered counsel.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN