

ORAL ARGUMENT NOT 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)

JOINT MOTION TO GOVERN FUTURE PROCEEDINGS

This joint motion to govern future proceedings is submitted by the undersigned Petitioners to these consolidated cases, along with the Federal Agency Respondents, and complies with the Court's February 9, 2022 Order.¹ Dkt. No. 1934435. The undersigned parties all agree that these

¹ The parties joining this motion are the State and Local Government Petitioners (Case Nos. 19-1239, 19-1241, and 19-1246) with the exception of the Commonwealth of Virginia, Public Interest Petitioners (Case Nos. 19-1230, 19-1243 and 20-1178), Industry Petitioners (Case Nos. 19-1242, 19-1245, 19-1249 and 20-1175), and Respondents National Highway Traffic Safety Administration and the United States Environmental Protection Agency, et al. Respondent-Intervenor States Ohio et al. filed a separate motion to govern. Dkt. No. 1942613. Respondent-Intervenor American Fuel & Petrochemical Manufacturers (AFPM) consents to the present joint

cases should continue to be held in abeyance pending resolution of the forthcoming challenges to the United States Environmental Protection Agency's final action entitled "California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption," 87 Fed. Reg. 14,332 (March 14, 2022). Continued abeyance would promote judicial economy and comport with common sense: This proposed approach would have the Court consider the parties' disputes in the context of a newly final agency action, not rescinded agency actions as Respondent-Intervenor States urge. And it would allow for the efficient resolution of any remaining issues, if necessary, upon the conclusion of that review.

BACKGROUND

These cases involve challenges to actions taken by the National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) in September 2019. "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program," 84 Fed. Reg. 51,310 (Sept. 27, 2019) ("the 2019 Actions"). Although the two

motion to govern requesting abeyance of all issues, *except* as to the constitutional issue as to which AFPM supports the position taken in Respondent-Intervenor States' motion to govern. *See id.*

agencies' actions were finalized in the same Federal Register notice, each agency took its own separate and distinct actions. NHTSA promulgated a rule declaring certain state laws preempted under the Energy Policy and Conservation Act of 1975. *Id.* at 51,311. EPA's action withdrew portions of a Clean Air Act Section 209(b) preemption waiver it had granted to California in 2013 for its zero-emission-vehicle and greenhouse gas emission standards, and announced an interpretation of Section 177 of the Clean Air Act that would prohibit other States from enforcing California's greenhouse gas emission standards. *Id.* at 51,328, 51,350. State and Local Government Petitioners, Public Interest Petitioners, and Industry Petitioners challenged those NHTSA and EPA actions in this Court.

On February 8, 2021, after merits briefing was complete but before oral argument was scheduled, the Court granted a motion filed by Federal Agency Respondents to hold these cases in abeyance pending the Federal Agency Respondents' implementation of an Executive Order directing them to immediately review and potentially rescind or revise the 2019 Actions. Dkt. No. 1884115. This Court's February 8, 2021 Order required the Federal Agency Respondents to file status reports at 90-day intervals, and to notify the Court and the parties within 7 days of any agency action resulting from their review of the 2019 Actions, or any determination that no action

will be taken. *Id.* This Court also directed the parties to file a motion or motions to govern further proceedings within 30 days of that notification.

Id.

NHTSA signed a repeal of its portion of the 2019 Actions on December 21, 2021. “Corporate Average Fuel Economy (CAFE) Preemption,” 86 Fed. Reg. 74,236 (Dec. 29, 2021).² The Federal Agency Respondents filed a notice on December 27, 2021, informing the Court of the signature of the NHTSA action but indicating that EPA had not yet concluded its reconsideration. Dkt. No. 1928287. In January 2022, Petitioners, Respondents, and Respondent-Intervenor States Ohio et al. all filed motions to govern requesting the case continue to be held in abeyance. Dkt. Nos. 1931687 (Ohio et al.), 1932370 (State and Local Gov’t Pet’rs), 1932382 (Federal Agency Respondents). On February 9, 2022, the Court granted the parties’ request that the Court continue to hold the cases in abeyance. Dkt. No. 1934435. The Court directed the Federal Agency Respondents to notify

² See 86 Fed. Reg. at 74,238 (emphasizing that NHTSA’s “final rule repeals all aspects of [its] SAFE I Rule, both the codified regulatory text and the accompanying pronouncements about the scope of CAFE preemption”). No challenges to NHTSA’s 2021 repeal have been filed. All arguments in Respondent-Intervenor States’ motion to govern pertain only to EPA’s reconsideration rather than NHTSA’s separate action. The United States submits that, accordingly, challenges to NHTSA’s portion of the 2019 Actions are moot.

the Court and the other parties within seven days of EPA's action, with motions to govern due within 30 days of that notification. *Id.*

EPA signed a final agency action rescinding its portion of the 2019 Actions on March 9, 2022, and that action was published in the Federal Register shortly thereafter. "California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision," 87 Fed. Reg. 14,332 (March 14, 2022). Consistent with the Court's February 9, 2022 Order, the Federal Agency Respondents notified the Court about EPA's action on March 15, 2022, and the undersigned parties are timely submitting this joint motion to govern. *See* Dkt. No. 1939146.

Respondent-Intervenor States Ohio et al., however, filed a separate motion asking the Court to take the cases out of abeyance and proceed to hear argument on the merits of the now repealed and rescinded 2019 Actions. Dkt. No. 1942613 (Apr. 2022 Ohio et al. Mot. to Govern). In their motion, Respondent-Intervenor States represent that "Ohio (along with a group of other States) will soon file a petition challenging [EPA's] rescission [of its portion of the 2019 Actions]." *Id.* at 3. The deadline for any party to file a petition for review challenging that EPA action is May 13, 2022.

ARGUMENT

It is well within the Court's authority and consistent with its past practice to hold proceedings in abeyance where doing so would promote justice, judicial economy, and expedient resolution of the cases on its docket. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). The Court has relied on this authority to hold proceedings in abeyance where petitions for review challenge an agency's rescission of its prior action, raising the possibility that the Court may vacate those agency actions. *See, e.g., American Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. Dec. 10, 2020) (Dkt. No. 1875192) (granting parties' joint motion to hold proceeding in abeyance pending resolution of later-filed challenges to subsequent agency action); *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Aug. 26, 2020) (Dkt. No. 1858346) (granting joint motion requesting that consolidated cases continue to remain in abeyance in light of challenges to agency action rescinding challenged actions).

Similar circumstances are presented here. Respondent-Intervenor States Ohio et al. have represented that they will file a petition challenging

the rescission of EPA’s portion of the 2019 Actions, and that such a challenge may “restore [those portions of the 2019 Actions] under review here.” Dkt. No. 1942613 at 3. Until either (1) this Court has disposed of any such petition challenging the rescission of EPA’s 2019 Action, or (2) the deadline to file a petition challenging the rescission of EPA’s 2019 Action has passed and no petition for review has been filed, abeyance is appropriate.

Continuing to hold these cases in abeyance will allow for the most efficient and orderly resolution of the legal issues raised here, conserving both the Court’s and the parties’ resources. This Court should consider the parties’ disputes not in the context of the rescinded 2019 Actions, which are not now and may never be operative, but in the context of any challenges – including that of Respondent-Intervenor States – to EPA’s 2022 action. If EPA’s 2022 action is upheld, the pending questions in this litigation will not need to be decided. But in the event parties successfully challenge EPA’s 2022 action and so “restore [portions of the 2019 Actions] under review here,” abeyance will allow the parties to consider at that time what issues remain to be decided by this Court and proceed swiftly to resolution. *See* Dkt. No. 1942613 (Apr. 2022 Ohio et al. Mot. to Govern) at 3.

Abeyance will not prejudice Respondent-Intervenor States. They previously asked this Court to hold this case in abeyance, and now assert that they will file a new challenge to EPA's recent rescission of its 2019 Action, raising their equal sovereignty argument directly. That petition would be the first to raise an equal sovereignty claim against Section 209 of the Clean Air Act (and to provide EPA an opportunity to address such a claim), despite the fact that EPA has granted over 100 waivers for California's vehicle and engine emission standards in the five-and-a-half decades that EPA has administered this provision of the Clean Air Act. Respondent-Intervenor States' ability to raise those same arguments as petitioners in the forthcoming litigation on EPA's action belies any argument that they will be prejudiced from the abeyance requested here, while their anticipated petition for review is resolved.

CONCLUSION

The undersigned parties respectfully request that this Court continue to hold this matter in abeyance until either: (1) the deadline to file a petition challenging the March 2022 rescission of EPA's 2019 Action has passed and no petition for review has been filed, or (2) this Court has disposed of any petition filed challenging the March 2022 rescission of EPA's 2019 Action,

with the Parties being required to notify the Court no later than May 30, 2022, as to whether any petition has been filed.

Dated: April 14, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,852 words. I further certify that this motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: April 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022 I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

I further certify that all parties are participating in the Court's CM/ECF system and will be served electronically by that system.

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