ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE, et al. Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al., Respondents.	No. 20-1145 and consolidated cases

Reply in Support of Respondents' Motion to Establish Briefing Schedule and Format in the Alternative

On September 14, 2020, Respondents National Highway Traffic Safety Administration ("NHTSA") and James C. Owens, Deputy Administrator; U.S. Environmental Protection Agency ("EPA") and Andrew Wheeler, Administrator; and U.S. Department of Transportation and Elaine L. Chao, Secretary (collectively, "Respondents" or "the Agencies") moved this Court, in the alternative, for entry of a briefing schedule and format that will allow the fair and efficient resolution of this case. *See* ECF No. 1861390 ("U.S. Motion"). All Petitioners save Petitioners Competitive Enterprise Institute, et al., filed an opposition on September 21, 2020. ECF No. 1862650 ("Pet. Opp."). That opposition does not rebut Respondents'

reasoned basis for its proposed schedule and format. So, should this Court wish to issue a briefing order at this time, Respondents' motion should granted.

I. Respondents' proposed schedule is in the best interests of the Court and the parties.

Like Petitioners, Respondents acknowledge that the joint EPA-NHTSA final action challenged here, known as the "SAFE II" rule, will present complex and highly technical issues for resolution by this Court. U.S. Mot. at 9. In a complex case such as this, both the parties and the Court benefit from a schedule that provides adequate time for litigants to thoughtfully distill and clearly present their arguments. No party benefits from hasty briefing in this case. Respondents' proposed briefing schedule ensures that Petitioners and Respondents will prepare briefs on a timeframe commensurate with the complicated nature of the subject matter and consistent with both Petitioners' and Respondents' expressed needs with respect to the coordination and review process that will accompany these briefs. *See* U.S. Mot. at 10 n.1, 11.

Petitioners state that they do not oppose granting Respondents a 90-day briefing interval if doing so still allows their preferred argument date. Pet. Opp. at 9. Respondents appreciate that Petitioners do not object to the reasonableness of this interval. But Respondents' individual deadline was not the sole element of the schedule that differs between Respondents' and Petitioners' proposals. *Contra* Pet. Mot. at 9 (claiming the other intervals in Petitioners' competing schedule were "unopposed"). Respondents, with Movant-Intervenor Alliance of Automotive

Innovation's support, also propose to allow all respondent-intervenors two weeks to file supporting briefs after Respondents' brief is filed. (Petitioners propose only one week. ECF No. 1860054 at 2.) A two-week interval is in the interest of the parties and the Court because it gives intervenors sufficient time to ensure their briefs further elucidate issues of particular concern to intervenors and do not merely repeat arguments made in the primary briefs.

Respondents also propose a full week for compilation of the Deferred Appendix (in contrast to Petitioners' four days), which will almost certainly be necessary given the voluminous nature of the record. *See* U.S. Mot. at 18; Pet. Opp. at 7 (noting that the record indices alone are more than 750 pages).

The specific 90-day briefing interval for Respondents that Petitioners now say they support is also not commensurate with that in Respondents' proposal because it would encompass six intervening federal holidays—including Thanksgiving, Christmas, and Inauguration Day—when the coordination and review process will be disrupted and it is reasonable to expect that very few employees at NHTSA, EPA or the Department of Justice will be available.

Respondents' schedule is neither unduly long nor prejudicial to the automotive industry, as Petitioners imply. *See* Pet. Opp. at 9-10. The first-filed petition in this case was filed on May 1, 2020.[1] ECF No. 1841600. Respondents' proposal would ensure

[1] The last was filed almost two months later, on June 29, 2020. ECF No. 1849778.

briefing is completed 13.5 months later, on June 14, 2021. U.S. Mot. at 18. For comparison, the "SAFE I" case, *Union of Concerned Scientists v. EPA*, D.C. Cir. No. 19-1230—which Petitioners cite in support, Pet. Opp. at 10—will complete briefing 12 months after the first-filed petition. *See* ECF Nos. 1813281 (first petition filed Oct. 28, 2019), 1843712 (ordering filing of final form briefs on Oct. 27, 2020). As SAFE I involves a narrower set of issues and implicates a much smaller portion of the record, these relative intervals are more than reasonable. In addition, Movant-Intervenor Alliance of Automotive Innovation, whose participating members produced more than 60 percent of the new cars and light trucks sold in the United States last year, ECF No. 1861402 at 4 n.2, supports *Respondents'*, not Petitioners', proposal.[2] *See* U.S. Mot. at 2.[3]

II. Respondents' proposed format and word limits are appropriate.

Respondents' proposal provides for more than 500 pages of briefing in this case, excluding any briefs filed by amici curiae. *See* U.S. Mot. at 18. That sum amply

[2] A second group of auto manufacturers seeking to intervene only as to remedy stated no position on Petitioners' proposal, *see* ECF No. 1860054 at 4, and opposed Respondents' proposal only "to the extent it excludes [their] participation in briefing." U.S. Mot. at 2.

[3] Petitioners assert that Respondents "wrongly accuse" Petitioners of short-circuiting negotiations over a briefing schedule before rushing to Court. Pet. Opp. at 5-6. Respondents disagree with Petitioners' characterization of the parties' aborted negotiations, but those issues are not relevant to the soundness of Respondents' proposal so we will not address them further here.

accommodates the distinct Petitioners groups and the complexity of the challenged rulemaking in this case while avoiding inundating the Court with gratuitous briefing.

Respondents' proposed word counts are commensurate with other complex cases. *See* U.S. Mot. at 9, 13-14. They maintain the proportions generally provided in the Circuit Rules for intervenors, amicus, and reply briefs. *See id.* at 20-21. And Respondents' proposed format does not preclude this Court from establishing specific word limits for particular petitioner and intervenor groups within the total word limit allotted, as Petitioners request. *See id.* at 20; Pet. Opp. at 2, 11.

Petitioners claim Respondents' proposed word count would "effectively preclude judicial review" of the challenged joint rulemaking. Pet. Opp. at 2. But Respondents' proposed word limits for opening briefs are already approximately two-and-a-half times the words allotted in a typical case—resulting in briefing that will total more than 500 pages, even excluding amicus briefs. Enlargements of the standard word limits provided by the Federal Rules "are granted only for extraordinarily compelling reasons." *See* D.C. Circuit Handbook at 41; D.C. Cir. R. 28(e)(1). With this standard in mind, Respondents have proposed enlarged word limits that duly reflect the size of the record this case, the complexity of the technical issues to be presented, and the presence of petitioners with opposing interests. But these factors do not countenance further enlarging Petitioners' collective word limit beyond the already generous 32,000 words in Respondents' proposal. Word limits larger than

that are rare even among the complex, multi-party challenges to agency action that regularly appear in this Circuit.[4] *See, e.g.*, U.S. Mot. at 13-14.

Neither of the Petitioner groups responding to Respondents' motion demonstrate the insufficiency of Respondents' proposed word counts. Petitioners CFDC, et al., state that they will address issues beyond those noted in Respondents' motion, but the additional issue they describe remains narrowly limited to the role of "ethanol-based fuels," *see* Pet. Opp. at 12, which CFDC can adequately address within the word allotment proposed by Respondents. And the fact that CFDC chose not to join the case as a respondent-intervenor as other petitioners did does not entitle them to additional words because they are "only" allowed opening and reply briefs. *Id.* at 13. Nor is Respondents' proposal unreasonable simply because CFDC expects that the "word count expectations of the other petitioning parties" will trump their own. *Id.* This Court is fully equipped to distribute the proposed word counts equitably between the parties.

For their part, Coordinating Petitioners fail to rehabilitate their need for substantial words to address specific topics like re-litigating EPA's Mid-Term

[4] Coordinating Petitioners confirm that further enlargement of their portion of the briefing is *not* necessary to allow these parties to address topics where they have distinct or competing interests and where this Court must hear from them individually. Their only justification for even larger word limits is their claim that this Court's review will be inadequate unless it considers 1000 pages addressing "every argument" that Petitioners can think to make. *See* Pet. Opp. at 16.

Evaluation or demonstrating standing. And Coordinating Petitioners fail to establish that their merits arguments generally warrant word counts in excess of what Respondents have proposed. They identify only a single decision in support of their contention that Respondents' word limits are insufficient: *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). *See* Pet. Opp. at 15-16. But *Coalition for Responsible Regulation* involved multiple sets of independent, complex challenges to a cascading series of different EPA greenhouse gas-related rules and regulations, including (1) an endangerment finding for greenhouse gases, (2) motor vehicle emission and fuel economy standards, and (3) two different rules implementing stationary source permitting requirements for greenhouse gases. 684 F.3d at 113. Each of these actions was promulgated in a different Federal Register notice, supported by its own administrative record, and involved the implementation or interpretation of a different Clean Air Act provision. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009) (endangerment finding); 75 Fed. Reg. 25,324 (May 7, 2010) (vehicle standards); 75 Fed. Reg. 31,514 (June 3, 2010) (stationary source "tailoring rule"); 75 Fed. Reg. 17,004 (Apr. 2, 2010) (stationary source "timing rule"). The cases were heard before the same panel, but were not briefed together. *See* Pet. Opp. at 15 (citing separate briefing orders). This case involves only one of those things: motor vehicle emission and fuel economy standards. The sum of the word counts allowed in the cases coordinated under *Coalition for Responsible Regulation* thus does not bear on what is reasonable in the single consolidated case at issue here.

Respondents' word count proposal is already substantially in excess of what is provided in a typical case. It takes appropriate account of the number of petitioners and the technical nature of the challenged joint action, and is comparable to word counts in other complex cases. As such, it is reasonable and should be granted.

CONCLUSION

For the reasons provided above and in Respondents' Motion in the Alternative, Respondents respectfully request that if the Court is inclined to establish a briefing proposal at this time, it grant Respondents' proposed briefing schedule and format.

DATED: September 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify that the foregoing complies with the type-volume limitation because it contains 1,711 words, according to the count of Microsoft Word.

/s/ Daniel R. Dertke
DANIEL R. DERTKE

CERTIFICATE OF SERVICE

I hereby certify that on September 28 2020, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system. I also hereby certify that the foregoing was served by electronic mail upon the following attorney of record, who is not registered with the Court's CM/ECF system:

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