ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE 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)

MOTION TO HOLD CASES IN ABEYANCE PENDING IMPLEMENTATION OF EXECUTIVE ORDER AND CONCLUSION OF POTENTIAL RECONSIDERATION

The United States, on behalf of Respondents National Highway Traffic Safety Administration ("NHTSA") and the United States Environmental Protection Agency ("EPA"), et al. (collectively "Federal Agencies"), hereby moves the Court to place these cases in abeyance, pending the Federal Agencies' implementation of an Executive Order signed on January 20, 2021. That Executive Order directs the Federal Agencies to immediately review and potentially revise or rescind the joint agency rulemaking at issue in this case (the "SAFE II Rule" or "Rule"). In light of this Presidential directive, the SAFE II Rule is under close scrutiny by the Federal

Agencies, and the positions taken by the Agencies in that rulemaking may not reflect their ultimate conclusions. The Federal Agencies should be afforded the opportunity to fully review the Rule consistent with the Executive Order and the Agencies' respective statutory authorities.

Accordingly, the United States respectfully requests that this Court hold these cases in abeyance and suspend the remainder of the briefing schedule while the Agencies conduct their review. The United States requests that the abeyance remain in place until 30 days after the conclusion of review and any resulting rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period. As discussed further below, such abeyance will promote judicial economy by avoiding unnecessary adjudication and will support the integrity of the administrative process.

Respondents contacted coordinating counsel for Petitioners and Respondent-Intervenors regarding their positions on this motion. Petitioners in four of the eight petitions consent to or do not oppose abeyance: Petitioners Competitive Enterprise Institute, et al. (No. 20-1145) consent to the motion for abeyance; and Petitioners the National Coalition for Advanced Transportation (No. 20-1174), Advanced Energy Economy (No. 20-1176), and Calpine Corporation, et al. (No. 20-1177), do not oppose the motion for abeyance. Petitioners in the remaining four petitions oppose abeyance, as follows. The State and Local Government Petitioners (No. 20-1167) oppose the motion for indefinite abeyance and plan to file a response but would not oppose a six-month extension to the briefing schedule. Petitioners South Coast Air

Quality Management District, et al., (No. 20-1173) oppose the motion for indefinite abeyance but would not oppose a six-month extension to the briefing schedule. Public Interest Organization Petitioners (Nos. 20-1168 and 20-1169) oppose the motion for indefinite abeyance and plan to file a response. Respondent-Intervenors Alliance for Automotive Innovation; Ingevity Corporation; and American Honda Motor Co., Inc. BMW of North America, LLC, Ford Motor Company, Rolls-Royce Motor Cars NA, LLC, and Volkswagen Group of America, Inc., state that they do not oppose abeyance.

BACKGROUND

On April 30, 2020, NHTSA and EPA jointly published a rulemaking entitled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks." 85 Fed. Reg. 24,174 ("SAFE II Rule" or "Rule"). The Rule established two consonant sets of vehicle regulations for passenger cars and light trucks. The first, issued by NHTSA, set corporate average fuel economy standards under the Energy Policy and Conservation Act. NHTSA's new fuel economy standards weakened the applicable standard for model year 2021 vehicles, which had been set in 2012, and set new fuel economy standards for model years 2022-2026. The other set of standards, issued by EPA, set vehicle greenhouse-gas emission standards under the Clean Air Act. These weakened the applicable standards for model years 2021 and later, which had also been set in 2012. The revised vehicle greenhouse-gas standards followed a January 2017 "Mid-Term

Evaluation" in which EPA affirmed the original 2022-2025 standards' feasibility and appropriateness,[1] as well as an April 2018 "Revised Mid-Term Evaluation" in which EPA withdrew its 2017 determination, 83 Fed. Reg. 16,077 (Apr. 13, 2018). *See generally* 85 Fed. Reg. 24,174.

The joint SAFE II Rule was immediately challenged in nine petitions for review – with some petitioners challenging the Rule on the basis that it is too stringent, others on the basis that it is not stringent enough. The petitions for review were consolidated under the lead case *Competitive Enterprise Institute v. NHTSA*, D.C. Cir. No. 20-1145. Merits briefing is presently ongoing, with the next brief – Respondents' brief – due on April 14th. Merits briefing is currently scheduled to conclude on June 15, 2021. ECF No. 1867064. Oral argument has not yet been scheduled.

On January 20, 2021, President Joseph R. Biden Jr. signed Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). The Executive Order establishes a policy to:

> listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce

[1] U.S. EPA, "Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation," available at: https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf.

> greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

Id. (Section 1). To that end, the Executive Order directs "all executive departments and agencies . . . to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id.*

That Executive Order specifically identified the SAFE II Rule as potentially in conflict with the new federal policy. *Id.* (Section 2). Under the Executive Order, the Federal Agencies, "as appropriate and consistent with applicable law, shall consider publishing for notice and comment a proposed rule suspending, revising, or rescinding" the SAFE II Rule "by July 2021." *Id.* at 7037-38 (Section 2(a) & 2(a)(ii)).

ARGUMENT

The Executive Order directing review of the SAFE II Rule marks a substantial new development that warrants holding this litigation in abeyance. Consistent with the inherent authority of federal agencies to reconsider past decisions, the Federal Agencies should be afforded the opportunity to respond to the Executive Order by reviewing the Rule in accordance with the new policies set forth in the Order. Abeyance will further the Court's interests in avoiding unnecessary adjudication, support the integrity of the administrative process, and ensure due respect for the

prerogative of the executive branch to reconsider the policy decisions of a prior Administration.

It is well-established that agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*"). Agencies' interpretations of statutes they administer are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "'[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations'" (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part))). Courts may defer judicial review of a final rule pending completion of reconsideration proceedings. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*").

With these principles in mind, and based on recent developments, abeyance is warranted in this case. The President of the United States has directed the Federal

Agencies to "immediately review" the SAFE II Rule, and to consider action "suspending, revising, or rescinding" it within the next six months. 86 Fed. Reg. at 7037-38 (Section 2(a) & 2(a)(ii)). Given this explicit direction, and the relatively short timeframe on which the Agencies are directed to conduct such a review, "[i]t would hardly be sound stewardship of judicial resources to decide this case now." *API*, 683 F.3d at 388. An abeyance would allow the Federal Agencies to "apply [their] expertise and correct any errors, preserve[] the integrity of the administrative process, and prevent[] piecemeal and unnecessary judicial review," *id.*, while furthering the policy set forth in the Executive Order. This is especially true where, as here, Petitioners' challenges are focused on a number of extremely detailed technical and record challenges. *See* ECF Nos. 1880153; 1880207; 1880213; 1880214.

Abeyance is also warranted to avoid filing briefs and holding oral argument in the midst of the new Administration's review and potential revision of the Rule at issue in this case. The Executive Order directs the Federal Agencies to propose an action "suspending, revising, or rescinding" the SAFE II Rule, if appropriate, "by July 2021." 86 Fed. Reg. at 7037-38 (Section 2(a)(ii)). Were the Court to deny this motion and proceed with briefing and oral argument, counsel for the United States would likely be significantly inhibited in their ability to represent the government's positions on the many substantive questions arising in the SAFE II Rule in light of the ongoing administrative process. Nor would it be proper for counsel to speculate as to the

likely outcome of that process, as any such speculation could call into question the fairness and integrity of the ongoing administrative process.[2]

For these reasons, this Court has routinely granted abeyance requests in litigation challenging agency rulemaking where a change in presidential administrations has prompted or directed the agency to reconsider the underlying action, including in the companion case challenging the first part of the Federal Agencies' two-part "SAFE" rulemaking. Like the SAFE II Rule, the first half of the SAFE rulemaking (known as the "One National Program Action") was specifically identified by the Executive Order as potentially in conflict with the new federal policy. 86 Fed. Reg. at 7037 (Section 2(a)(ii)). The Court placed that case in abeyance on February 8, 2021. *Union of Concerned Scientists v. NHTSA*, D.C. Cir. No. 19-1230, ECF No. 1884115; *see also, e.g.*, *Am. Petroleum Inst. v. EPA*, D.C. Cir. No. 13-1108, ECF No. 1675813 (challenges to Clean Air Act regulation of oil and gas sources placed in abeyance after presidential transition); *North Dakota v. EPA*, D.C. Cir. No. 15-1381, ECF Nos. 1673072 & 1688176 (challenges to Clean Air Act regulation of new power plants placed in abeyance after presidential transition); *Texas v. EPA*, D.C. Cir. No.

[2] That would be true even if briefing were delayed by six months, as some Petitioners propose. Resuming briefing at that time could pose significant complications as Respondents' briefing deadline would fall after the July 2021 date set forth in the Executive Order for issuing any proposed revision or rescission – meaning that Respondents would potentially have to brief this case in the middle of a new rulemaking proceeding.

17-1021, ECF No. 1715548 (challenges to Clean Air Act regional haze regulations placed in abeyance after presidential transition).

WHEREFORE, the United States requests that this Court hold these cases in abeyance while the Agencies conducts their review of the Rule, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period.[3]

Respectfully submitted,

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DATED: February 19, 2021

/s/ Chloe H. Kolman

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[3] Respondents are willing to provide status reports at regular intervals during the abeyance period (Respondents suggest every 120 days) if the Court would find that useful.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion to Hold Cases in Abeyance complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 1,973 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 19th day of February, 2021.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN