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)

REPLY IN SUPPORT OF
MOTION TO HOLD CASES IN ABEYANCE

On January 20, 2021, the President of the United States issued an Executive Order requiring the National Highway Traffic Safety Administration ("NHTSA") and the United States Environmental Protection Agency ("EPA") (collectively "Federal Agencies") to immediately review and potentially rescind or revise the joint agency rulemaking at issue in this case, the SAFE II Rule. In consideration of this Executive Order, the United States promptly requested that these consolidated cases be held in abeyance to prevent unnecessary adjudication of issues subject to that review and to ensure the integrity of the administrative process. Petitioners in half of the above-

captioned consolidated cases support or do not oppose abeyance. In two oppositions to the United States' motion, the remaining Petitioners ("Opposing Petitioners") concede that litigation in this case should not proceed for at least six months – and may be unnecessary even thereafter. These Petitioners do not establish any reason why the Court, faced with challenges to a Rule that may be revised or rescinded and where all parties agree litigation is not presently appropriate, should deviate from its standard practice of placing these cases in abeyance. Consequently, as further explained below, the United States' motion should be granted.

To begin, Opposing Petitioners do not disagree that the United States should be afforded a meaningful opportunity to fully review the SAFE II Rule in accordance with the Executive Order the President signed on the first day of his term. *See* State Opp. at 1, 3; Env. Opp. at 2; *see also* Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021). Nor do they dispute that requiring the Federal Agencies to brief this case "while they are reviewing the challenged standards" would interfere with "the important interests in conserving Respondents' and judicial resources." State Opp. at 1; *see also id.* at 6 (calling the United States' concerns about briefing during the administrative process "understandable"). The Court's inquiry need extend no further. Granting abeyance until the Agencies' administrative process concludes will ensure that this Court does not wade into controversies that will be resolved or mooted by that process. And only an abeyance extending to the conclusion of that process ensures that the Federal Agencies will not be required to take a position on

regulatory determinations while the Agencies are openly considering changes to those same regulatory determinations.

Granting the United States' motion would conform to this Court's routine practice. Normally, when an agency decides to review a challenged rule, this Court places the litigation in abeyance. It did just that in recent weeks in other pending cases – including those, like this one, involving rules named in the Executive Order as needing review. *See, e.g.*, *Union of Concerned Scientists v. NHTSA*, D.C. Cir. No. 19-1230, ECF No. 1884115 (challenges to SAFE I placed in abeyance on the basis of review under Executive Order 13990); *Envtl. Def. Fund v. Nishida*, D.C. Cir. No. 20-1360, ECF No. 1886335 (same for challenges to Clean Air Act rule about oil and gas sector); Executive Order § 2(a)(i), (ii). Indeed, *Union of Concerned Scientists* is a challenge to the first part of the Agencies' two-part "SAFE" vehicles rulemaking, which they completed in the Rule at issue here. While that case addresses a narrower set of issues, it similarly concerns the regulation of vehicle greenhouse gas emissions where pollution effects are compounding with each passing model year. *See* State Opp. at 4; Env. Opp. at 1-2.

Opposing Petitioners claim the abeyance granted in that case is distinguishable because Executive Order 13990 sets a proposal date for the "SAFE I" rule that is three months earlier than the one set for the SAFE II rule; the SAFE I rulemaking is less technical in nature, compared to SAFE II; and the SAFE I challenge is fully briefed. State Opp. at 5 n.2. But these differences affirm that abeyance is, if anything,

more appropriate in the SAFE II challenges here. If abeyance is not granted, both the Court and the parties will be required to expend significant resources delving into complex, record-specific issues that are unlikely to be replicated in a revision or replacement to the SAFE II Rule. The highly technical nature of the SAFE II Rule thus increases, rather than diminishes, the likelihood that matters raised in the current litigation will be mooted by the full administrative process. Likewise, the fact that SAFE II is not yet fully briefed only amplifies the concern that the Agencies will be required to take positions – not just at oral argument but in their merits brief – on issues that are presently being reconsidered. And Opposing Petitioners' reliance on a three-month difference in the rulemaking schedule between the two SAFE rules ignores the fact that the Executive Order has, in fact, put the reconsideration of *both* rules on a very aggressive schedule. Petitioners have provided no compelling reason to deviate from the sensible approach taken in *Union of Concerned Scientists* to hold further proceedings in abeyance until reconsideration is complete.[1]

Granting a routine abeyance here also would not terminate "judicial oversight," as Opposing Petitioners suggest. *See* State Opp. at 1. Cases in abeyance remain

[1] State Petitioners' claim that none of the recent cases placed in abeyance presents a comparable circumstance where "reconsideration may not moot the issues presented by the litigation" even if it results in a revised rule, State Opp. at 5, is particularly odd. In *all* of the instances where abeyance has been granted to allow review consistent with Executive Order 13990, that review could result in a revised rule that maintains some parts of the existing rule – and the attendant legal challenges – while revising others.

pending before this Court, so Petitioners would have no lesser access to judicial oversight or intervention than if the Court were to grant their novel suggestion of a six-month extension of the briefing schedule. Specifically, Petitioners do not justify why a motion to lift abeyance would present an undue burden in the entirely speculative circumstance that the Federal Agencies do not proceed with review and rulemaking as directed by the President.[2] The ability to move to lift the abeyance provides a satisfactory remedy for delays or administrative developments that remain, at this time, purely hypothetical. Indeed, the Court would be best positioned to determine whether a deviation from its standard abeyance practice is warranted if and when any delays or developments actually arise, at which time the Court could evaluate specific and concrete arguments from Petitioners about matters that they believe will not be mooted by the administrative process.

Opposing Petitioners' suggestion that the Court grant a six-month extension of the United States' briefing deadline is not a suitable replacement for abeyance. Simply delaying the Agencies' merits brief for six months would neither avoid unnecessary litigation nor safeguard the integrity of administrative processes. *See generally* State Opp. at 1-2, 6-7. Petitioners do not dispute that there is no realistic prospect that a

[2] Notably, if the resumption of litigation were prompted by a decision by the Agencies to *retain* the existing SAFE II Rule, that would mark the termination the Agencies' review and so would automatically trigger the parties' obligations to file motions to govern further proceedings.

rulemaking to revise or rescind the SAFE II Rule will be concluded within that six-month period. *See* State Opp. at 6-7; Env. Opp. at 2. Instead, they seek to distinguish between the Agencies' initial review of the Rule and the rulemaking process that is likely to follow. *Id.* But briefing this case is no less disruptive during the administrative "review" occurring now – which will include, if appropriate, drafting a proposed rule – than it would be during the part of the administrative process that will likely follow, when the Agencies will be seeking public comment on that proposal and drafting a final rule. For that reason, Opposing Petitioners are incorrect to claim that the United States' "understandable" and "important" interests in "conserving Respondents' and judicial resources" "can be addressed by a six-month extension." *See* State Opp. at 1, 6. Compelling the Agencies to juggle both a new SAFE II rulemaking and an over-length merits brief – and asking the Agencies to take positions on substantive issues raised in the litigation that may be the target of proposed revisions – is the opposite of both economy and prudence. *See* U.S. Mot. at 7-8.[3]

[3] Petitioners claim the United States could seek an abeyance six months from now if the Federal Agencies propose to revise the SAFE II Rule in July. State Opp. at 7. But if Petitioners concede this case should not be litigated now and also should not be litigated six months from now, except in the event of a speculative flaw in the administrative process, then the proper course is to grant abeyance now and address any possible grounds for resumption of litigation if they actually arise.

Opposing Petitioners also do not establish any comparative benefit that would warrant adopting their convoluted stay-by-extension. They say that the six-month delay would allow them to "assess [the Agencies'] proposal." State Opp. at 7. They would then "know," *id.*, how stringent any proposed standards would be and which model years they would cover – "critical factual information that is unavailable now," *id.* at 2. This information, in turn, would help them decide "whether and how this case should proceed to resolution." *Id.* at 7; *see also id.* at 4; Env. Opp. at 2-3. But this argument overlooks that a proposed rule is not final agency action. Agencies can – and often do – change course in their rulemakings in response to public comments. That reality has long been judicially recognized, most notably in logical-outgrowth cases. *See, e.g.*, *CSX Transp. Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009). As such, Opposing Petitioners are unlikely to be in a position six months from now to determine the ultimate fate of the Rule or of this litigation. In any event, the abeyance requested by the Agencies does not foreclose Opposing Petitioners from moving to lift the abeyance if they believe administrative developments so warrant.

Opposing Petitioners also do not establish that a six-month extension is preferable as a means to prevent delay. *See* State Opp. at 4, 5, & 7. Whether abeyance or extension is granted will have no impact on the administrative process itself, which is proceeding in accordance with the President's direction. (If anything, Petitioners' proposal is the one more likely to delay that process, as it risks requiring the Agencies to split their resources between the litigation and the reconsideration.) And

Petitioners do not establish how their proposed extension will meaningfully advance resolution in this case. Under Petitioners' proposed extension, briefing would not conclude before mid-December 2021. *See* ECF No. 1867064 (setting the current date for final form briefs as June 15, 2021). Given the complex and highly technical issues that make up the substance of this case, even a timely argument in early spring 2022 would be very unlikely to yield an opinion before fall of 2022 or winter of 2023. That would be more than a year – and perhaps 18 months or more – after the date in the Executive Order for issuing a proposed rule, if appropriate, rescinding or revising the SAFE II Rule. So it is not apparent that the judicial process would ameliorate pollutant conditions or address Opposing Petitioners' claimed injuries any faster than the administrative process.

It is also not apparent that using a briefing extension to forestall active litigation would, as Petitioners imply, limit any delays associated with resuming litigation after the period of dormancy. *See* State Opp. at 5, 7. The parties are no more or less likely to have a dispute about the need for further proceedings if the case is in abeyance than if it is not. Nor is it obvious that briefing would resume any faster; the arbitrary six-month extension of the present briefing schedule would more than likely still need to be adjusted through motions practice to account for holidays, counsel's schedules, and other unforeseen developments.

* * *

Opposing Petitioners agree with Respondents, Respondent-Intervenors, and Petitioners in four of these eight consolidated cases that litigation in this matter is not appropriate at this time and may not be appropriate at any point in the future. Because they have not demonstrated any undue burden from abeyance – or any meaningful comparative benefit from a briefing extension – Opposing Petitioners offer no compelling basis for departing from this Court's traditional abeyance practice. Accordingly, the United States respectfully requests that this Court hold these cases in abeyance while the Federal Agencies conduct their review of the SAFE II 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.

Respectfully submitted,

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DATED: March 8, 2021

/s/ Chloe H. Kolman

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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 2,121 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 8th day of March, 2021.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN