

## ORAL ARGUMENT NOT YET SCHEDULED

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

UNION OF CONCERNED	)	
SCIENTISTS, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Case No. 19-1230 &
	)	Consolidated Cases
NATIONAL HIGHWAY TRAFFIC	)	
SAFETY ADMINISTRATION, et al.,	)	
	)	
Respondents.	)	
	)	

**MOTION OF INTERVENOR STATES TO CONTINUE  
HOLDING CASE IN ABEYANCE**

Because one aspect of the challenged rule remains in effect, Ohio and the other intervening States propose that the case remain in abeyance.

These petitions challenge a rule issued through the joint efforts of the NHTSA and the EPA. *See* 81 Fed. Reg 51,310 (Sept. 27, 2019). The rule addresses numerous issues. But the States intervened to address just one. In particular, they intervened to defend the EPA’s decision to withdraw a waiver that the agency had previously granted to California. The EPA had previously issued the waiver under a provision of the Clean Air Act that allows California—and only California—to win

an exemption from the Act's preemptive force. The intervening States argued that this California-specific provision in the Clean Air Act violated the Constitution. Because agencies cannot enforce unconstitutional laws, and because the law allowing a California-specific exception was unconstitutional, the EPA had no choice but to withdraw the waiver.

When President Biden took office, the agencies began reconsidering the rule. NHTSA has concluded its review of the challenged rule. *See* 86 Fed. Reg. 74,236 (Dec. 29, 2021); ECF #1928287. But the EPA has not, and each agency acknowledges that its review has no bearing on the other's review. *See* 86 Fed. Reg. 74,236 n.5; 86 Fed. Reg. 22,422 n.3. Critically for present purposes, the EPA has not finished reviewing its prior decision to revoke California's special exemption from Clean Air Act preemption. Thus, the issue the intervening States joined this lawsuit to address remains a live one.

In like circumstances, this Court granted a request for abeyance. The EPA under President George W. Bush *declined* to exempt California from the Clean Air Act's preemption requirements. California challenged that denial. When President Barrack Obama took office, this Court held the case in abeyance while President Obama's administration reconsidered the denial. *See California v. EPA*, D.C. Cir.

No. 08-1178, ECF No. 1167136 (granting request). This case is the mirror image of that one.

Until the EPA completes its review, the case should remain in abeyance. Once that review is complete, the parties can evaluate whether anything remains of their arguments regarding California's status under the Clean Air Act.

Dated: January 21, 2022

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed R. App. P. 32 (f) and (g), I hereby certify that the foregoing response complies with the limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27 because it contains 370 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 21, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

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