ORAL ARGUMENT NOT YET SCHEDULED

IN THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN STATES TRUCKING ASSOCIATION, INC. AND CONSTRUCTION INDUSTRY AIR QUALITY COALITION, INC., Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondents.	Case No. 23-1143 and consolidated cases

PRIVATE PETITIONERS' RESPONSE IN OPPOSITION TO EPA'S MOTION TO HOLD CASE IN ABEYANCE

The Court should deny EPA's motion to hold this case in abeyance pending decisions in *Ohio v. EPA*, Case No. 22-1081, and *Texas v. EPA*, Case No. 22-1031. As the party seeking a stay of the briefing schedule—a schedule that EPA agreed to and jointly presented to this Court just a few months ago—EPA "bears the burden of establishing its need."

Clinton v. Jones, 520 U.S. 681, 708 (1997). And because a stay would prejudice petitioners, EPA "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). EPA's late-breaking motion falls well short of that high bar. Adhering to the agreed upon briefing schedule will not cause EPA any hardship or inequity. An abeyance would likely extend for months or years the resolution of this case, and with it the ongoing irreparable harm to petitioners caused by EPA's challenged waiver, all to await decisions that may ultimately have no bearing on the issues presented here.

Holding these cases in abeyance will substantially prejudice petitioners. So long as EPA's challenged waiver remains in effect, automakers must comply with California's electric-truck mandates in both California and other States that have opted into California's standards, decreasing petitioners' fuel sales and increasing the cost of conventional vehicles that petitioners need. California's mandates, moreover, become stricter over time. *See* Private Petrs' Br., ECF No. 2025410 at 12–13. Additional States, too, may soon adopt California's mandates, compounding their effect. So every day until this case is finally resolved, petitioners will suffer ongoing financial injuries that cannot be

remedied, and that harm will only increase in severity with the passage of time. EPA does not contest this harm. Rather, it says that any prejudice will not be "undu[e]" because decisions in *Ohio* and *Texas* "should be forthcoming within a matter of weeks or months." Mot. 9. But EPA offers no basis to think that either—let alone both—of those complex cases will be decided by this Court before next summer at the earliest. And that is not even accounting for the near certainty that the losing party will seek further review by the *en banc* Court and/or the Supreme Court.

And even if EPA's soothsaying proves correct, final briefing in this case—as currently scheduled—will not be complete until April 1, 2024, so an abeyance for "weeks or months" will, at a minimum, push argument into next term, with a final decision then likely delayed until spring or summer 2025. *See Handbook of Practice & Internal Procedures* § X, United States Court of Appeals for the District of Columbia Circuit (2021). All the while, petitioners will suffer ongoing irreparable harm.

EPA's request for this prejudicial stay is also untimely. Procedural motions were due on July 6, 2023. *See* Clerk Order, ECF No. 2002459. At the latest, EPA should have made its request for abeyance by August 28,

2023, when the parties' proposed briefing schedules were due. *See* Clerk Order, ECF No. 2009933. In fact, as EPA acknowledges, it considered "the possibility of [seeking] an abeyance before the briefing schedule was established," Mot. 1, but opted against doing so and instead negotiated and agreed to a joint briefing schedule, which the Court entered.

EPA has no legitimate excuse for waiting until now, after petitioners have already filed their opening briefs under the agreed schedule, to surface with its request for abeyance. It claims the similarity of issues was "not clear" at the outset of the case. Mot. 9. But EPA has known since at least early July, when the parties filed their issue statements, that this case would involve substantial overlap with related cases. For example, EPA knew that this case, like *Ohio*, would involve:

- "[w]hether Section 209(b) of the Clean Air Act violates the constitutional equal sovereignty doctrine," Illinois Soybean Ass'n et al. Non-Binding Statement of Issues, ECF No. 2006578 at 2; and
- "whether EPA exceeded its statutory authority … in concluding that … California needs the standards at issue to meet compelling and extraordinary conditions," American Fuel & Petrochemical Manufacturers et al. Non-Binding Statement of Issues, ECF No. 2006635 at 3.

On the latter question, EPA would also have known from the briefing in *Ohio* that the question implicates both the major-questions doctrine and

the federalism and constitutional avoidance canons. *See* Private Petrs' Brief, ECF No. 1990958 at 19–27, 52–54. EPA clearly knew from the outset that there would be "substantial overlap" with *Ohio*. Mot. 7.

The only overlap that could possibly have surprised EPA is that another one of petitioners' arguments, *see* Private Petrs' Br. 28–34, "relies on arguments made in the *Texas* case"—namely, that EPA lacks authority to mandate electric vehicles under Section 202(a) of the Clean Air Act. Mot. 6–7. EPA does not explain why this additional overlap materially changed the calculus, such that abeyance suddenly became justified.

Moreover, the untimeliness of EPA's motion is itself prejudicial. Had EPA sought and received a stay of proceedings before petitioners filed their opening briefs, petitioners would have been able to craft their opening briefs in light of the decisions in *Ohio* and *Texas*. That includes deciding which issues to raise in the limited space allotted. If, for example, the case had been stayed before petitioners filed their opening briefs and the *Ohio* or *Texas* Court then rejected petitioners' arguments on the overlapping issues, petitioners could have simply preserved those arguments for further review and focused their briefing on other issues.

If the Court were to grant abeyance now, EPA's unjustified delay would rob petitioners of this opportunity—the only potential benefit to petitioners of abeyance, and one that petitioners made a considered decision to forgo in favor of a speedier resolution.

EPA claims that abeyance "would also be consistent with this Court's past practice," Mot. 9, but none of the cases EPA cites involves such an untimely and prejudicial request: *Center for Biological Diversity v. EPA*, No. 15-1462, involved an abeyance motion well before briefing began; *South Coast Air Quality Management District v. EPA,* No. 16-1364, involved an unopposed abeyance motion; and in *RFS Power Coalition v. EPA*, No. 20-1046, EPA was alerted to the potential overlapping issues by a grant of certiorari only a few weeks before opening briefs were due. Here, EPA knew there would be substantial overlap from the outset.

Nor are there now any countervailing considerations that could outweigh the prejudicial effects of a stay. EPA will not be prejudiced by being required to proceed with the briefing schedule that it negotiated, agreed to, and then proposed to this Court. Nor is EPA prejudiced by

having to brief the overlapping issues. Repurposing arguments made in *Ohio* and *Texas* means less work for the agency, not more.

Moreover, the putative benefits of holding these cases in abeyance are speculative. There is no guarantee that either case will reach the merits of the overlapping issues because in both cases EPA relies on multiple threshold legal arguments that are not relevant here. EPA claims that these threshold issues also "could bear on the challenges here," Mot. 7, but that is wrong.

In *Texas*, EPA raised threshold issues regarding timeliness and preservation, and also contended at oral argument that EPA's authority to mandate electric vehicles was not at issue because the challenged rule was not a mandate. *See* EPA Br., ECF No. 1996730 at 34–40, 54–55; Private Petrs' Proposed Supp. Br., ECF No. 2017835. Here, there is no question petitioners' claims are timely and preserved, and California's rules explicitly require electric vehicles, so there is clearly a mandate.

In *Ohio*, EPA raised threshold questions regarding EPA's reconsideration authority, *see* EPA Br., ECF No. 1990904 at 53–58, and whether the case has become moot in light of the fact that the challenged waiver arguably terminates after model year 2025, *see* Private Petrs'

Proposed Supp. Br., ECF No. 2019761. Here, EPA's reconsideration authority is not implicated, and because California's standards continue through at least 2035, mootness is not an issue.

Threshold questions in *Texas* and *Ohio* regarding zone-of-interests and standing also do not support delay. If EPA chooses to make those arguments again, they will have to be judged on a case-specific basis. These consolidated cases, for example, involve petitioners who did not participate in the prior cases—including many who must purchase and use the trucks subject to California's standards—and who possess distinct interests.

At bottom, EPA's bid to save itself a few pages of briefing based on its conjecture that the *Texas* and *Ohio* Courts *might*—at some unknown future date—reach the merits of the questions presented in this case is hardly a "clear case of hardship or inequity" justifying an unquestionably prejudicial stay. *Landis*, 299 U.S. at 255.

* * *

For these reasons, private petitioners request that the Court deny EPA's motion to hold this case in abeyance.

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Respectfully submitted,

/s/ *Eric D. McArthur*

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Certificates of Compliance and Service

I certify that this filing complies with Fed. R. App. P. 27(d)(1)(E) because it uses 14-point Century Schoolbook, a proportionally spaced font.

I also certify that this filing complies with Fed. R. App. P. 27(d)(2)(A), because by Microsoft Word's count, it has 1,501 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Finally, I certify that on December 4, 2023, I filed the foregoing with the Court's CMS/ECF system, which will notify each party.

Respectfully submitted,

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