ORAL ARGUMENT NOT YET SCHEDULED

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

WESTERN STATES TRUCKING ASSOCIATION, INC., *et al.*, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 23-1143 and consolidated cases

OPPOSITION OF STATE PETITIONERS TO MOTION TO HOLD APPEAL IN ABEYANCE

State Petitioners made a strategic decision to proceed with briefing rather than asking the Court to hold this case in abeyance because they believed that the costs of delay exceeded the risks that related cases might be decided after Petitioners filed their opening briefs, thus giving EPA a strategic advantage. The parties discussed this issue, and all Petitioners and EPA agreed to a jointly proposed briefing schedule that would allow the case to be briefed and argued before this Court's summer

break. Now, in a Black Friday filing made weeks after State Petitioners State Petitioners filed their opening briefs, EPA seeks to undo that compromise. EPA's untimely motion is meritless and would unfairly tilt the procedural playing field in EPA's favor while adding (likely) months of delay. And, contrary to EPA's suggestions, State Petitioners' opening brief raised precisely the issues they discussed with EPA. EPA may not relish the prospect of having to respond to these arguments—many of which are very straightforward—but that is not a reason to wait.

As explained in more detail below, this Court should deny EPA's motion for the transparent gamesmanship that it is.

BACKGROUND

In 2023, EPA granted California a Clean Air Act waiver allowing it to impose a rule that will ban the sale of most conventional heavy-duty trucks. That "Advanced Clean Trucks" (ACT) rule requires manufacturers to transition from gasoline- and diesel-powered vehicles to "zero-emission" ones—starting next year. The rule is designed to force manufacturers to phase out most traditional heavy-duty vehicles by 2035. The Clean Air Act allows EPA to grant California a waiver of federal preemption to enact vehicle emission standards more stringent

than those imposed by the federal government, if—and only if—these standards satisfy the relevant statutory requirements. *See* 42 U.S.C. § 7543(b)(1).

The State Petitioners sued EPA, contending that the waiver is unlawful. First, the waiver violates the Constitution by giving California sovereign authority denied to all 49 other State. And second, the waiver allows California to impose standards for heavy-duty vehicles without following the Act's mandated lead time. *See* 42 U.S.C. § 7521(a)(3)(c).

EPA now moves to hold this appeal in abeyance. This motion comes long after this Court's July motion deadline, long after Petitioners filed their statements of issues, long after the Parties agreed on a briefing schedule, and weeks after Petitioners filed their opening briefs.

ARGUMENT

EPA mistakenly argues that, because the equal sovereignty issue here resembles issues argued in two pending cases before this Court, *see Ohio v. EPA*, Case No. 22-1081; *Texas v. EPA*, Case No. 22-1031, that this petition should be forced to wait in line. This argument is both wrong on the merits and procedurally improper. As explained below, (1) the overlap is limited; (2) the risk of delay is significant: and (3) EPA's motion comes

months too late and is unfair to State Petitioners.

1. The *Ohio* and *Texas* cases do not justify delaying this appeal because they are distinguishable. First, those petitions challenge a restoration of a previously rescinded waiver concerning a suite of 2012 rules governing light-duty vehicles. This petition, by contrast, challenges a 2023 waiver concerning heavy-duty vehicles and thus does not involve the questions of EPA's reconsideration authority or the questions of potential mootness raised at argument and in post-argument briefing in *Ohio*. Second, and more significantly, even if *Ohio* were to decide the equal-sovereignty issue (which is far from guaranteed), that is irrelevant to State Petitioners' argument that the ACT rule violates the Clean Air Act's heavy-duty vehicle lead time requirement. *See* 42 U.S.C. § 7521(a)(3)(c). As EPA has itself previously recognized, *see Comments of the Truck and Engine Manufacturers Association* (quoting 1994 EPA docket memorandum), this question is straightforward and controlled by binding circuit precedent. *See Am. Motors Corp. v. Blum*, 603 F.2d 978 (D.C. Cir. 1979). And time matters especially for this last point. The differences in lead times have real economic and logistical effects on manufacturers who may unnecessarily adapt to California's costly

standards pending the outcome of this litigation. And this Court has recognized the "need for expedition" when lead-time is at issue. *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973). Here, the Clean Air Act requires four years of lead time while the ACT rule provides only two.

Any light *Ohio* (or, much less likely, *Texas*) may shed here will almost certainly not resolve this case, meaning that then this case will be no further along on a dispositive issue, but will be long-delayed. That may be precisely the point. In *Ohio*, EPA and California have contended at argument that the petitioners' challenges had become moot because automakers had made all the decisions about what they would make and sell for the relevant model years. By seeking to kick resolution of the lead time issue, EPA appears to be attempting to set up a similar argument. This alone is a crucial reason not to delay.

But even if this were not the case, EPA knew what arguments State Petitioners were going to make when it agreed to the briefing schedule back several months ago, and nothing its motion justifies its attempt to move the goalposts now.

2. The risk of delay is significant. It is unclear when this Court

will decide the pending *Ohio* and *Texas* cases. EPA's argument that this Court could issue the decisions in the coming "weeks" or "months" is speculative and out-of-step with this Court's usual practice with larger cases. Federal appellate courts have full dockets presenting important and challenging questions of statutory and constitutional interpretation. Courts often take six months to a year to decide those cases. Sometimes they take even longer. The same could well happen here. And the risk of delay is heighted because EPA asks for abeyance pending *two cases* that are being decided by different panels of this Court.

3. Whatever one thinks of the substance of EPA's arguments, they are not properly before the Court. Petitioners are supposed to be masters of their own case. And State Petitioners decided that—rather than wait for *Ohio* or *Texas*, and rather than structure their petition, statement of issues, and briefs accordingly—they would instead seek a faster resolution of issues of significant impact to their economic and sovereign interests. EPA had an opportunity to push for a contrary position, either by filing a motion before the July deadline or by voicing opposition to Petitioners' proposed briefing schedule. It did neither. Instead, EPA waited months while the State Petitioners expended

significant resources drafting and filing their briefs and then waited a few weeks more, until the Friday of Thanksgiving week to file this motion—a day when most law and government offices are closed.

Contrary to EPA's contention, there is also nothing surprising about State Petitioners' brief. EPA knew from the day State Petitioners filed that they would raise the equal-sovereignty doctrine argument. And, again, the lead time argument is as EPA admits completely independent of the issues being litigated in *Ohio* and *Texas*. EPA should not be able to decide unilaterally that *this* unlawful agency action should be left in place to await adjudication because its other unlawful actions have also been challenged not now after opening briefs have been filed. As EPA itself admits, "abeyance at this juncture may be less common than abeyance at the outset of the case."

CONCLUSION

EPA's delayed motion for abeyance prejudices the State Petitioners. This Court should deny it.

Respectfully submitted,

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CERTIFICATE 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.

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

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