ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1145

Consolidated with Nos. 20-1167, 20-1168, 20-1169, 20-1173, 20-1174, 20-1176, 20-1177, and 20-1230

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.

STATE AND LOCAL GOVERNMENT PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION FOR ABEYANCE

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INTRODUCTION

State and Local Government Petitioners welcome Executive Order 13990, which directs the Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA) to review and potentially revise the standards challenged in these consolidated cases. However, the harms resulting from these unlawfully lax standards grow larger and larger with each passing model year of vehicle sales. The sheer magnitude of these accumulating harms, which include greenhouse gas emission increases greater than the *total* emissions of many States, warrants continued judicial oversight to ensure an opportunity for resolution if Respondents' review is delayed or leaves some of these harmful standards in place. State and Local Government Petitioners therefore oppose Respondents' request for an indefinite abeyance.

State and Local Government Petitioners would not, however, oppose a six-month extension to the existing briefing schedule. Under that approach, Respondents' brief would not be due until October 15, 2021, two and a half months after Respondents anticipate completing their review. *See* ECF Doc. No. 1866329 ("Respondents' Mot.") at 5 (review to be complete by the end of July, pursuant to the Executive Order). Respondents would not need to file a brief while they are reviewing the challenged standards, thereby safeguarding the important interests in conserving Respondents' and judicial resources. And,

by keeping a briefing schedule in place, this approach would facilitate timely judicial action, if such action is necessary, thereby protecting State and Local Government Petitioners' and the public's interests in avoiding increased pollution and oil consumption. All parties would remain free to bring future motions regarding alternative procedural paths forward (including indefinite abeyance) after Respondents complete their review and issue a notice of proposed rulemaking (if they do so). Consideration of any such motions would thus be informed by critical factual information that is unavailable now, including the extent to which any proposed rulemaking addresses all the standards and harms at issue in this litigation.

ARGUMENT

I. INDEFINITE ABEYANCE IS NOT APPROPRIATE IN THIS MATTER

State and Local Government Petitioners recognize that abeyance is common where a change in presidential Administrations prompts reconsideration of administrative positions. But this is not a typical case.

First, even small delays matter here because of the magnitude of the harms involved. The national greenhouse gas emission and fuel-economy standards at issue here address vehicles, which are the largest sources of greenhouse gas pollution and the largest consumers of oil in the nation. The challenged standards substantially weakened prior law for six model years of light-duty

vehicles, resulting, among other things, in dramatically increased emissions of harmful pollutants. These harms have already begun, and they grow larger with each vehicle model year as the gap widens between the pre-existing standards (which increased in stringency by 5% each model year) and the current standards (which increase by only 1.5% each model year). *See* 85 Fed. Reg. 24,174, 24,175, 25,106 (April 30, 2020). And the vehicles sold under the current, weaker standards will continue to emit these higher levels of pollution as long as they remain in use—for periods that run years, and often decades, into the future.

Executive Order 13990, titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," was adopted on the first day of the new Administration in recognition of the urgency of the climate crisis. State and Local Government Petitioners fully share that sense of urgency and wholeheartedly welcome the Administration's plans to review the current, unlawfully weak standards. But these standards will remain in place unless and until they are stayed or vacated by this Court or are replaced administratively through final agency actions. Despite State and Local Government Petitioners' efforts to advance this litigation more quickly, one or more model years of vehicles will likely be sold under the lax current

standards.[1] State and Local Government Petitioners therefore oppose any motion that would unnecessarily increase the potential for further delay, and they do so for the same reason they have consistently sought to resolve this case efficiently: to limit the number of model years during which more polluting vehicle fleets can be sold. Indefinite abeyance is inappropriate in the face of long-term impacts that increase in severity with each passing model year.

Second, because no rulemaking proposal has issued, it is unknown which model years might be covered by any future administrative action, let alone how stringent future standards might be. As a result, it is also unknown whether a future rulemaking can adequately and timely resolve Petitioners' challenges concerning all of the model-year standards at stake here. If it does not, and judicial review remains necessary, that review should occur without further delay. *See Teledesic LLC v. FCC*, 275 F.3d 75, 82-83 (D.C. Cir. 2001) (resolving "remaining challenges" to agency action after reconsideration where Court denied abeyance during that reconsideration). State and Local

[1] Under the prior Administration, Respondents filed incomplete certified indices of their administrative records, and the efforts to identify and address the omissions delayed further progress in the case by months. *See* ECF Doc. No. 1862650 at 7-8. Respondents also requested, and the Court granted, a more extended briefing schedule than the one Petitioners sought, which was designed to allow for oral argument during this Term. ECF Doc. Nos. 1861390 at 18; 1860054 at 11867064 at 3.

Government Petitioners should not bear the burdens and attendant delays of moving to bring this matter out of abeyance, obtaining a new briefing schedule, and then finally obtaining judicial relief, should that be necessary.

The examples cited in Respondents' motion do not support a contrary conclusion. *See* Respondents' Mot. at 8-9. None of the cited cases involved multiple national standards that cause more severe harms with each passing model year where any future rulemaking may not encompass all the model-year standards at issue.[2] Thus, none of Respondents' cases presents circumstances analogous to those of this case: where the Agencies' reconsideration may not moot the issues presented by the litigation, even if it results in some new standards for some model years. *Cf. Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (granting abeyance where "an already published proposed rule, if enacted, would dispense with the need for" judicial review). Here, the Agencies have not yet initiated new rulemakings or informed Petitioners or the public of the scope of standards they may seek to change. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426 (D.C. Cir. 2018) (rejecting agency's

[2] *Union of Concerned Scientists v. NHTSA*, D.C. Cir. No. 19-1230, is also distinguishable because there the Agencies are on a tighter schedule to complete their review (by the end of April), because any resulting administrative proceedings are unlikely to involve highly technical and time-consuming rulemakings of the kind at issue here, and because that case is fully briefed, which means it can proceed to argument without further delay should it be appropriate to lift the abeyance in the future.

request for abeyance to "consider[] potential regulatory changes" where the scope of agency reconsideration might not encompass the challenged rules).

II. A SIX-MONTH EXTENSION TO THE BRIEFING SCHEDULE WOULD ADEQUATELY SAFEGUARD RESPONDENTS' INTERESTS

State and Local Government Petitioners recognize Respondents' understandable concerns about continuing with briefing while they are reviewing the challenged standards. But those concerns can be addressed by a six-month extension to the current briefing schedule.

A six-month extension would "afford [the Agencies] the opportunity to respond to the Executive Order by reviewing the Rule in accordance with the new policies set forth in the Order," Respondents' Mot. at 5; "ensure due respect for the prerogative of the executive branch to reconsider the policy decisions of a prior Administration," *id.* at 5-6; and "avoid [any risk of] filing briefs and holding oral argument in the midst of the new Administration's review," *id.* at 7. There would likewise be no need for the Court to engage in "unnecessary adjudication" while Respondents conduct their review. *See id.* at 5. Respondents nonetheless express concern that a six-month extension "could pose significant complications" if Respondents had to brief this case in the middle of a new rulemaking. *Id.* at 8 n.2. But, if a new rulemaking is underway by July 31, 2021, Respondents would have adequate time to seek a further

extension or an indefinite abeyance for all, or appropriate parts, of this litigation before any brief would be due.

Indeed, if a rulemaking proposal issues by the end of July, *all parties* would have sufficient time to assess that proposal and its relationship to this litigation, and seek appropriate relief from the Court, before any briefs would be due. For example, all parties would know which model years the Agencies have included in their rulemaking proposal and would also know how stringent the Agencies propose to make those revised standards. That information is highly relevant to State and Local Government Petitioners' assessment of whether they can and should pursue additional relief in this litigation, such as a stay or vacatur of the standards applicable to any model years not covered (or insufficiently covered) by the proposal. And in the event a proposal has not issued by the end of July, that information would also be highly relevant to whether and how this case should proceed to resolution. A continuance of the briefing schedule would also have the advantage over an abeyance—including one with motions to govern due in six months—of leaving a briefing schedule in place.

In sum, a six-month extension would address Respondents' concerns and minimize the risk of further delays, without transforming *Respondents'* burden to establish that this Court should forgo its obligation to adjudicate these cases into *Petitioners'* burden to lift abeyance.

CONCLUSION

State and Local Government Petitioners respectfully request that the Court deny Respondents' motion for indefinite abeyance but would not oppose a six-month extension of the current briefing schedule.

Dated: March 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing opposition complies with the type-volume limitations of the applicable rules. According to Microsoft Word, the non-exempt portions of the opposition contain 1,631 words. I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced, 14-point typeface (Garamond).

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I hereby certify that on March 1, 2021, I electronically filed the foregoing opposition with the United States Court of Appeals for the District of Columbia Circuit via the CM/ECF system. All parties that are represented by counsel registered as CM/ECF users will be served by that system. I further certify that service will be accomplished via email for the following participant:

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