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DISTRICT COURT, DENVER COUNTY, COLORADO 1437 BANNOCK STREET DENVER, COLORADO 80202 **Plaintiff:** FREEDOM TO DRIVE INC. v. **Defendants:** THE COLORADO AIR QUALITY CONTROL COMMISSION	▲ **COURT USE ONLY** ▲
Attorneys for Defendants: PHILIP J. WEISER, Attorney General THOMAS A. ROAN, 30867* First Assistant Attorney General KUNAL A. PARIKH, 53867* Attorney General Fellow Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7th Floor Denver, CO 80203 Phone: (720) 508-6000 Email: tom.roan@coag.gov kunal.parikh@coag.gov **Counsel of Record*	Case No.: 2019CV34156 Div.: 259

DEFENDANT'S MOTIONS TO HOLD CASE IN ABEYANCE OR, ALTERNATIVELY, TO DISMISS

Defendant, the Colorado Air Quality Control Commission ("Commission"), by and through undersigned counsel of the Office of the Colorado Attorney General, move for an order holding this matter in abeyance. If the court denies the motion to hold the matter in abeyance, the Commission alternatively moves to dismiss Plaintiff Freedom to Drive's ("FTD") claims for lack of standing pursuant to C.R.C.P. 12(b)(1). If the Court denies the Commission's motion to dismiss all claims for lack of standing, the Commission alternatively moves to dismiss, pursuant to C.R.C.P. 12(b)(1), FTD's claims under C.R.C.P. 57.

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 § 1-15

Undersigned counsel for Defendant has conferred with Plaintiff's counsel about this Motion. Plaintiff's counsel opposes the relief sought in this motion.

INTRODUCTION

In this civil action for judicial review of final agency action, FTD challenges the Commission's adoption of revisions to the Colorado Low Emission Automobile Regulation, 5 Colo. Code Regs. § 1001-24, establishing a zero emission vehicle program in Colorado (hereinafter "ZEV Rule"). FTD raises claims under the Air Pollution Prevention and Control Act ("APPCA") § 25-7-120, C.R.S., the State Administrative Procedure Act ("APA") § 24-4-106, C.R.S. and Colorado Rules of Civil Procedure (C.R.C.P.) 57.

The Commission moves the Court to hold this matter in abeyance because issues critical to the disposition of this matter are already before the federal district court and the circuit court in the District of Columbia. FTD claims the Commission's action is preempted by actions taken by two federal agencies. For reasons explained below, this Court should allow the federal courts to resolve the preemption issue which, depending on the outcome, could be dispositive, leaving FTD's action moot.

Alternatively, because FTD lacks standing to bring any of its claims, this matter must be dismissed, with prejudice. If the Court finds FTD has standing, FTD has a "plain, speedy and adequate remedy" at law under § 24-4-106, C.R.S., so this Court lacks jurisdiction over FTD's claims pursuant to C.R.C.P. 57.

BACKGROUND

Zero Emission Vehicle Standards under the Clean Air Act

Section 177 of the federal Clean Air Act ("CAA") allows states to adopt emission standards for new vehicles sold within their borders. 42 U.S.C. § 7507. While the CAA generally prohibits Colorado and other States from adopting any standard relating to the control of emissions from new automobiles, the CAA makes an exception for standards that mirror standards adopted by the State of California for which the United States Environmental Protection Agency ("EPA") has waived application of CAA preemption. *See* 42 U.S.C. §§ 7543, 7507. In 2013, EPA waived application of federal preemption for a ZEV regulation adopted by California, 78 Fed. Reg. 2112 (Jan. 9, 2013). Colorado promulgated the regulation challenged in this case in accordance with that 2013 waiver.

Subsequent to the Commission's decision to adopt the ZEV Rule, the United States Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA") jointly promulgated revisions to federal rules governing new vehicle emission standards and fuel efficiency standards in an action titled "The Safer Affordable Fuel-Efficient ("SAFE") Vehicles Rule Part One: One National Program." 84 Fed. Reg. 51,310 (September 27, 2019); 84 Fed. Reg. 51,311–28, 51,361–63 (to be codified at 49 C.F.R. Parts 531 and 533, and appendices thereto); *see also* 49 U.S.C. § 32919(a). These rules establish new fuel economy and greenhouse gas emission standards for automobile and light duty trucks. EPA also took the unprecedented step of withdrawing the CAA preemption waiver it granted to the State of California in January 2013, purporting to preempt California's greenhouse gas and ZEV programs. *Id.*; *See also* First Amended Compl. ¶¶ 3, 19, 24.

For its part, NHTSA issued unprecedented regulations declaring state ZEV regulations preempted under a different federal statute, the Energy Policy and Conservation Act ("EPCA"). Federal Rule, 84 Fed. Reg. 51,311–28, 51,361–63 (to be codified at 49 C.F.R. Parts 531 and 533, and appendices thereto); *see also* 49 U.S.C. § 32919(a). NHTSA proclaimed that the Energy Policy and Conservation Act ("EPCA") preempts state and local greenhouse gas emissions standards as well as zero emission vehicle mandates. *Id.*; *see also* First Amended Compl. ¶¶ 21, 24.

EPA's waiver revocation, if effective, would invalidate the California ZEV regulation that heretofore has shielded Colorado's analogous ZEV regulation from the preemptive effect of the Clean Air Act. The first two claims pleaded by FTD rely on EPA's waiver revocation and NHTSA's new regulations to assert that Colorado's ZEV regulation is now preempted by the CAA and EPCA. First Amended Compl. ¶¶ 6a-b, 68–75.

The SAFE Rule has been challenged as unlawful by several parties, including the State of Colorado, and it is presently under review by in the U.S. Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction to review EPA's action. *See California v. Wheeler*, No. 19-1239 (D.C. Cir. Pet'n filed Nov. 15, 2019); *S. Coast Air Quality Mgmt. Dist. v. EPA*, No. 19-1241 (D.C. Cir. Pet'n filed Nov. 15, 2019); *Nat'l Coal. for Advanced Transp. v. EPA*, No. 19-1242 (D.C. Cir. Pet'n filed Nov. 15, 2019).

Separately, NHTSA's regulations have been challenged as unlawful by several parties, including the State of Colorado, and they are presently under review by the U.S. District Court for the District of Columbia, which has jurisdiction to review NHTSA's action. *California v. Chao*, No. 1:19-cv-02826-KBJ (D.D.C. filed Sept. 20, 2019); *Envtl. Def. Fund v. Chao*, No.

1:19-cv-02907-KBJ (D.D.C. filed Sept. 27, 2019); *S. Coast Air Quality Mgmt. Dist. v. Chao*, No. 1:19-cv-03436 (D.D.C. filed Nov. 14, 2019).

I. The Rulemaking

On August 16, 2019, following a lengthy rulemaking process, the Commission adopted the ZEV Rule. The Commission accepted oral and written testimony from several parties, including FTD, during a four-day hearing before adopting the ZEV Rule. First Amended Compl. ¶ 5.

The rulemaking process started during the Commission's May 10, 2019 meeting, at which time the Colorado Department of Public Health and Environment, Air Pollution Control Division (hereinafter, "Division") proposed revisions to Regulation 20 adopting the ZEV Rule, in compliance with Governor Jared Polis' Executive Order 2019-002. First Amended Compl. ¶¶ 49-51; *See also* 5 CCR 1001-24:E.I.B. Acknowledging the "cleaner air, improved public health, and less greenhouse gas pollution," as well as broad economic benefits, Governor Polis directed the CDPHE to develop and propose the rule by no later than May 2019. Executive Order 2019-002. The Commission approved the commencement of a rulemaking on this proposal, and notice was published in the Colorado Register. The ZEV rule was published on September 10 and became effective September 30, 2019. First Amended Compl. ¶¶ 2, 66.

II. The Rule

The Commission adopted a proposal offered by the Colorado Energy Office, the Colorado Department of Transportation, the Alliance of Automobile Manufacturers, and the Association of Global Automakers as an alternative to the original proposal offered by the Division. First Amended Compl. ¶¶ 56, 63. To ensure compliance with Section 177

requirements, the ZEV Rule incorporates by reference California's ZEV program, codified in the California Code of Regulations, Title 13 § 1962.2 and § 1962.3. 5 CCR 1001-24:C.III and D. The ZEV Rule also incorporates an early action credits program as well as a proportional credits program. 5 CCR 1001-24:C.IV-V. The ZEV Rule imposes no obligations on the manufacturers until model year 2023, to provide them with a two-year grace period pursuant to 42 U.S.C. § 7507. 5 CCR 1001-24:C I.

The ZEV Rule requires each vehicle manufacturer to provide a certain percentage of light-duty vehicles as zero emission vehicles, or ZEVs, beginning with the introduction of 2023 model year. *Id.* Under the ZEV Rule, manufacturers must meet a "ZEV Credit Percentage Requirement." *Id.* Each manufacturer meets the credit percentage requirement either by offering for sale a certain percentage of ZEVs or by expending credits awarded for previous sales. 5 CCR 1001-24:C III. In other words, for any manufacturer's total vehicle sales, a percentage of those sales must be ZEVs. The percentage is based on average previous sales and varies depending on the size of the manufacturer. The manufacturers satisfy their obligation when the correct percentage of ZEVs is delivered to a Colorado vehicle dealer. 5 CCR 1001-24:C.III.

For example, if the ZEV Credit Percentage Requirement were seventeen percent for model year 2023, a manufacturer offering for sale an average total of 100,000 vehicles in Colorado for the prior second, third and fourth model year, would have a ZEV credit requirement for that year in Colorado of 17,000 credits. ZEV vehicles earn manufacturers credits when they are offered for sale in Colorado. Battery-powered electric vehicles earn more credits because their battery range is greater than plug-in hybrids.

Under the ZEV Rule, manufacturers may earn "early" credits by offering ZEV vehicles for sale in Colorado earlier than required. 5 CCR 1001-24:C.V. Manufacturers may earn "proportional credits" based on each manufacturer's sale of ZEV's in California and Colorado. *Id.* For model year 2023 and beyond, if a manufacturer earns more credits than it needs to comply with Regulation 20, it may use those credits in a future year or sell the credits to other manufacturers. *Id.*

ANALYSIS

I. Case Should be Stayed Pending Resolution Of The Related Federal And State Litigation

This Court has discretion to stay proceedings before it. *Town of Minturn v. Sensible Hous. Co.*, 273 P.3d 1154, 1159 (Colo. 2012). The power to stay proceedings "is incidental to the power inherent in every court to control the disposition of cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* (quoting *Landis v. N. Amer. Co.*, 299 U.S. 248, 254 (1936)). In deciding whether to grant a stay, a court must "examine all the circumstances in the case before it" to determine how best to promote the ends of comity and judicial efficiency while minimizing prejudice to all parties involved. *In re Water Rights of United States (Water Rights)*, 101 P.3d 1072, 1081 (Colo. 2004); *see id.* at 1078–79.

In light of this totality-of-the-circumstances approach, the discretion involved in staying proceedings, and the broad and varied ends to be balanced, Colorado courts have not articulated a single, universally applicable test for determining when to grant a stay. However, a common situation in which courts have granted stay motions is when litigation is already underway in another forum involving closely related issues or parties. *See, e.g.*, *Town of Minturn*, 273 P.3d at 1159; *Water Rights*, 101 P.3d at 1080–84. In such cases, granting a stay can promote comity by

respecting the authority of the other forum; avoid the risk of inconsistent judgments; and promote judicial efficiency by avoiding "unnecessary duplication and multiplicity of suits" over the same issues. *Town of Minturn*, 273 P.3d at 1159 (quoting *Pub. Serv. Co. v. Miller*, 313 P.2d 998, 999 (Colo. 1957)).

In *Town of Minturn*, the Colorado Supreme Court identified several non-exhaustive considerations that may serve courts in determining whether to stay proceedings pending the resolution of related litigation in another forum, including: "expense and convenience, availability of witnesses, the stage to which proceedings in the first action have already progressed, and the possibility of prejudice resulting from the stay." 273 P.3d at 1159. And in *Water Rights*, that Court applied similar factors that had been identified by the U.S. District Court for the District of Colorado, including "comity, the extent of disputed factual (as opposed to legal) issues involved, the order in which the courts obtained jurisdiction, adequacy of relief available in [the other forum], avoidance of maneuvers to clog efficient judicial machinery, the need for comprehensive litigation, and the desirability of avoiding piecemeal litigation." *Water Rights*, 101 P.3d at 1081 (citing *Adolph Coors Co. v. Davenport Mach. & Foundry Co.*, 89 F.R.D. 148, 152 (D. Colo. 1981)). The Court also noted that "it is not a necessary prerequisite" to granting a stay "that the parties and issues in concurrent federal and state actions be identical." (citing *Landis*, 299 U.S. at 254). Thus, although the precise formulation of the factors has varied somewhat, the focus of stay determinations has remained on comity, judicial efficiency, and minimizing prejudice.

As discussed below, considerations of comity, judicial efficiency, and prejudice all favor granting a stay in this case pending the resolution of ongoing federal litigation over threshold legal issues related to FTD's claims based on federal law.

A. The Principal and Threshold Claims Pleaded in this Case Turn on Issues of Law that are the Subject of Active Litigation

This Court should stay this case because the threshold legal issues that it raises are already being actively litigated in other forums by the State of Colorado and many other parties. The disposition of FTD's first claim—that EPA's withdrawal of California's waiver in the Part One Rule deprives Colorado of authority to adopt or enforce a ZEV regulation—will be directly controlled by the ongoing challenge by California and other petitioners, including Colorado, to EPA's withdrawal of the waiver before the U.S. Court of Appeals for the District of Columbia Circuit. And the disposition of FTD's second claim—that the ZEV regulation is preempted under the Part One Rule and the interpretation of EPCA announced therein—will be substantially impacted by the pending challenge to the federal preemption regulation by California and other plaintiffs, including Colorado, before the U.S. District Court for the District of Columbia.

1. The Outcome of the Ongoing Federal Challenge to EPA's Withdrawal of California's Waiver Will Control the Disposition of FTD's First Claim

FTD's first claim is premised on EPA's withdrawal of California's waiver of preemption for its ZEV mandate under CAA Section 209(b). *See* First Amended Compl. ¶¶ 6a, 13, 16–19, 68–71. Several lawsuits challenging EPA's withdrawal of California's waiver are underway in the D.C. Circuit, including one suit in which the state of Colorado is a petitioner. *See* supra page 4. The State may not, as a defendant in this Court, mount a collateral attack on EPA's withdrawal

of California's waiver without upsetting Congress's carefully prescribed structure for judicial review of that federal action. And, because the disposition of FTD's first claim will depend entirely on the outcome of the ongoing federal litigation, it would be inefficient—indeed, counterproductive—for that claim to proceed in this Court before the federal litigation is resolved.

While state courts are presumptively competent to adjudicate federal questions, Congress may overcome that presumption by "affirmatively oust[ing] the state courts of jurisdiction over a particular federal claim." *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). In the Clean Air Act, Congress ousted every court other than the D.C. Circuit of jurisdiction to review challenges to nationally applicable final actions by EPA such as the withdrawal of California's waiver. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310, 51,351 (September 27, 2019) ("Pursuant to CAA section 307(b)(1), judicial review of this final action [EPA's withdrawal of the January 2013 waiver for California's greenhouse gas and zero emission vehicle programs] may be sought only in the United States Court of Appeals for the District of Columbia Circuit."); 42 U.S.C. § 7607(b)(1) ("A petition for review of . . . any . . . nationally applicable . . . final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia."). Under that scheme, which is designed to promote judicial efficiency and national uniformity, the D.C. Circuit is the sole arbiter of the question whether EPA's withdrawal of California's waiver is valid—a question of law that is the gravamen of FTD's first claim here. Thus, the ongoing federal litigation directly controls the disposition of FTD's first claim, and it would waste the resources of the parties and this Court to proceed with this case while that litigation is ongoing.

2. The Outcome of the Ongoing Federal Challenge to NHTSA's Preemption Rule Will Have Substantial Bearing on the Disposition of FTD's Second Claim

Disposition of FTD's second claim also should await the outcome of federal litigation. That claim relies on NHTSA's preemption regulation in the Part One Rule to assert that EPCA preempts all state ZEV regulations. First Amended Compl. ¶ 74 (citing 84 Fed. Reg. 51,314). Lawsuits challenging NHTSA's preemption action are well underway, including one in which the State of Colorado is a plaintiff. *California v. Chao,* No. 1:19-cv-02826-KBJ (D.D.C. filed Sept. 19, 2019). These lawsuits squarely raise the question posed by FTD's second claim: whether EPCA preempts state regulations adopting California's ZEV mandate. *See* Complaint, *California v. Chao*, No. 1:19-cv-02826-KBJ (D.D.C. filed Sept. 19, 2019) ¶ 9 ("NHTSA's position that the California standards . . . are preempted by EPCA contravenes EPCA itself, the Clean Air Act, and various amendments to both statutes."). That question implicates several areas of federal law, including federal preemption doctrine (which derives from the Supremacy Clause of the U.S. Constitution) and the interpretation of EPCA and the Clean Air Act.

As the Colorado Supreme Court has observed, "[t]he language and legislative history of the APA's judicial review provisions make clear that Congress intended to hold federal administrative agencies [such as NHTSA] answerable for their conduct only in federal courts." *Water Rights,* 103 P.3d 1080 (citing 5 U.S.C. §§ 702, 706); *see Fed. Nat'l Mortg. Ass'n v. LeCrone*, 868 F.2d 190, 193 (3d Cir. 1989) ("Congress implicitly confined jurisdiction [over APA suits] to the federal courts when it limited the waiver of sovereign immunity contained in section 702 of the Act to claims brought 'in a court of the United States.'"). Thus, this Court

lacks jurisdiction over NHTSA, the expositor of the preemption theory on which FTD's second claim rests.[1]

While this Court theoretically could resolve the preemption issue without directly reviewing NHTSA's action (which it is without authority to do), this would prejudice the parties with an interest in the preemption issue that are not represented in this case (including NHTSA itself), and it would create a substantial risk of conflicting judgments in state and federal court.

In order to avoid such conflicting judgments, "the principle of comity instructs state courts to give due regard to a federal court's interpretation of a federal statute." *Glukowsky v. Equity One, Inc.*, 848 A.2d 747, 755 (N.J. 2004). This application of comity is especially appropriate where, as here, litigation of a preemption claim is underway in a federal court, because preemption claims "are essentially ones of federal policy, so that the federal courts are particularly appropriate bodies for the application of preemption principles." *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 307 (3d Cir. 2004) (discussing federal courts' aptitude for resolving preemption claims in the context of applying *Burford* and *Younger* abstention). Sections IV.B and IV.C below further discuss how staying this case until the ongoing litigation in the federal district and appellate courts will best serve comity and judicial efficiency.

There is, in addition, a piece of pending state-court litigation whose disposition will bear on the outcome of this case. Whether FTD has standing to challenge the ZEV regulation presents

[1] NHTSA has challenged the federal district court's jurisdiction to review its preemption rule, and moved to dismiss the cases challenging that rule or transfer them to the D.C. Circuit. *See* Mot. to Dismiss or Transfer, *California v. Chao*, No. 1:19-cv-19-2826-KBJ (filed Oct. 15, 2019). NHTSA contends that authority to review its preemption regulation arises not under the APA, but under EPCA's judicial review provision, 49 U.S.C. § 32909(a). But even under EPCA's review provision, jurisdiction lies exclusively in a federal court (the D.C. Circuit). Thus, regardless of how the federal district court rules on NHTSA's motion to dismiss or transfer, a federal court will have exclusive jurisdiction to review the preemption regulation, and review in state court will remain inappropriate.

substantially the same question as whether an FTD member, the Colorado Automobile Dealers Association ("CADA"), has standing to challenge Colorado's LEV regulation. *See* Order Granting Defendants' Motion to Dismiss, *Colorado Automobile Dealers Association v. The Colorado Department of Public Health and Environment, et al.*, 19CV30343 (Dist. Denver, July 8, 2019). This Court dismissed CADA's challenge on the ground that it had not suffered an injury-in-fact to a legally protected interest, and CADA has appealed the standing question to the Colorado Court of Appeals. Because CADA now argues that its standing to sue is impacted by EPA's waiver withdrawal and NHTSA's preemption regulations, Opening Brief of Plaintiff-Appellant Colorado Automobile Dealers Ass'n at 44-45, *Colo. Auto. Dealers Ass'n v. Colo. Dep't of Pub. Health & Env't, et al.*, No. 19CA1386 (Colo. App. Nov. 7, 2019), the Colorado Court of Appeals may decide to stay the LEV case pending resolution of the federal litigation, for similar reasons to those set forth in this motion. But, assuming the LEV litigation were to proceed in the court of appeals, its pendency would provide all the more reason for this Court to stay the ZEV litigation, because the outcome of CADA's appeal will have substantial bearing on the threshold and jurisdictional question of FTD's standing.

B. Comity, Federalism, and Avoidance of Conflicting Judgments Warrant a Stay

As the Colorado Supreme Court has observed, "[i]t seems that horn book law would prevent a conflict of decisions of two courts of concurrent jurisdiction." *Pub. Serv. Co.*, 313 P.2d at 999. And, as discussed in Section IV.A above, there is a substantial risk of conflict with federal court decisions if this Court decides whether EPA's withdrawal of California's waiver effectively invalidates Colorado's ZEV standards or whether EPCA preempts those standards. "Because of this avoidable potential for conflict between federal and state courts,

comity . . . favors the award of a stay in this case" while the federal litigation is pending. *Water Rights*, 101 P.3d at 1083.

The Colorado Supreme Court applied this reasoning in *Water Rights*, which is closely analogous to this case. *Id.* at 1083–84. There, the Court upheld a stay of proceedings in state water court to quantify the water rights reserved by the federal government while the related question of the reservation's compliance with the federal APA was litigated in federal court. *Id.* The Colorado Court found that considerations of comity supported the grant of a stay to avoid conflict with federal court decisions. *Id.* at 1083. And in discussing why the state water court's stay was appropriate even though it "obtained jurisdiction over the . . . case before the federal case was initiated," the Supreme Court emphasized "the fact that the federal court has the sole authority to resolve the federal claims." Here, the federal courts likewise have sole authority to resolve the federal claims, and some of the federal actions (those challenging NHTSA's preemption regulation) were filed well before this case and have already undergone significant briefing. *See, e.g.*, *California v. Chao*, No. 1:19-cv-02826-KBJ (D.D.C. filed Sept. 19, 2019).

Indeed, comity favors a stay even more strongly in this case than in *Water Rights*. First, the issues on review in federal court are more closely related to the claims in this case, which would amplify the consequences of an inconsistent ruling. For instance, as noted above, the outcome of the federal-court challenges to EPA's waiver revocation will directly control the disposition of FTD's first claim.

Second, the questions of federal law raised by this case directly implicate issues of particular federal concern. As discussed above, Congress granted the D.C. Circuit exclusive jurisdiction to review the EPA's withdrawal of California's waiver, *see* 42 U.S.C. § 7607(b)(1),

and it granted the federal district courts exclusive original jurisdiction to review NHTSA's preemption rule under the federal APA, 5 U.S.C. § 702. These provisions for exclusive review in federal courts indicate a special federal interest in uniform resolution of these issues of federal law, as suggested in *Water Rights*, 101 P.3d at 1083, and preserve the federal government's sovereign immunity in state court, *see Fed. Nat'l Mortg. Ass'n*, 868 F.2d at 193. And as noted in *Hi Tech Trans*, 382 F.3d at 307, resolution of preemption claims in federal court is particularly appropriate because they "are essentially ones of federal policy."

C. A Stay Will Promote Judicial Efficiency

A stay will straightforwardly promote judicial efficiency by avoiding duplicative litigation in state court of issues that will inevitably and definitively be decided by federal courts. As discussed above, the D.C. Circuit is the only court with authority to review EPA's withdrawal of California's waiver. Likewise, federal district courts are the only forums with authority to review NHTSA's preemption regulation, and are Congress's preferred forums to decide the underlying question of EPCA's preemptive effect. *See supra* Section IV.B. Since these questions are the subject of active litigation in the appropriate federal forums, litigating them in parallel in this Court can only waste judicial resources. A stay would therefore minimize "expense" and maximize "convenience." *Town of Minturn*, 273 P.3d at 1159; *see also Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606, 616 (2012) (noting that it "would seem to be inefficient" to proceed with litigation implicating an agency action in a forum where the agency is not a party).[2]

[2] Other efficiency-related considerations, such as availability of witnesses, are largely irrelevant here because the questions presented are either purely legal or can be resolved on the basis of the relevant administrative records, obviating the need for extensive fact-finding or witness testimony in any forum.

Finally, "the need for comprehensive adjudication and the desire to avoid piecemeal litigation" counsels in favor of staying all further proceedings in this case. *Water Rights*, 101 P.3d at 1084. As in *Water Rights*, federal courts have exclusive jurisdiction over federal claims that are closely related and antecedent to the claims raised here. Accordingly, this Court alone cannot comprehensively adjudicate the challenges to the Colorado ZEV regulation, and "dual proceedings are necessary." *Id.* The interest in comprehensive disposition of litigation does, however, favor staying consideration of FTD's remaining claims, *see* First Amended Compl. ¶¶ 6c–e, 76–91. Addressing some claims now and others later would create piecemeal litigation and could complicate and delay the appeals process if this Court rules on some claims before others.

D. Granting a Stay Will Not Prejudice FTD or Cause Undue Delay

A stay will not prejudice FTD or cause undue delay in this proceeding. This case was initiated just three weeks ago on October 29, 2019, and no administrative record has been filed and no briefing has taken place. Enforcement of Colorado's ZEV regulation – the validity of which is at issue in this case – will not begin until Model Year 2023 (*i.e.* covering new cars that will go on sale in 2022), and therefore, there is no urgent need to resolve FTD's challenge to the ZEV regulation to prevent some of the alleged harms from that regulation. *See* 5 CCR § 1001-24:C.I. Rather, the implementation schedule of the ZEV regulation affords the parties and this Court ample time to stay this proceeding pending other existing litigation that may directly affect the disposition of this case. Accordingly, a stay will not cause prejudice or undue delay, and any speculation of prejudice to FTD is outweighed by the significant interests of comity and judicial efficiency present here. *See Water Rights*, 101 P.3d at 1081.

II. ALTERNATIVELY, CASE SHOULD BE DISMISSED FOR LACK OF STANDING

A. Legal Standard for Standing

FTD asserts this Court has jurisdiction pursuant to § 24-4-106(4), C.R.S., which affords adversely affected or aggrieved parties the right to challenge a final agency action. First Amended Compl. ¶¶ 10, 12. FTD also asserts the court has jurisdiction under Rule 57, C.R.C.P. *Id.* ¶ 13. To establish standing for judicial review of final agency action under the APA, FTD has the burden to prove subject-matter jurisdiction and standing. § 24-4-106(4), C.R.S.; *Trinity Broad. of Denver, Inc. v. City of Westminster,* 848 P.2d 916 (Colo. 1993). FTD must meet the two-part test announced in *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (1977). *See Marks v. Gessler*, 350 P.3d 883, 899–900 (Colo. App. 2013) (plaintiff must satisfy APA standard in addition to the two-part test); *see also* § 24-4-106(4), C.R.S. (plaintiff bears the burden of stating facts in the complaint upon which he or she has been adversely affected or aggrieved, the reasons entitling him or her to relief, and the relief which he or she seeks).

To establish standing for judicial review of final agency action, FTD must allege facts in its Complaint establishing it has been adversely affected or aggrieved. § 24-4-106(4), C.R.S. Under the *Wimberly* test for standing, the plaintiff must have: (1) suffered an injury-in-fact; and (2) that injury must have been to a legally protected interest. 570 P.2d at 539. Here, to establish injury-in-fact, FTD must be able to demonstrate the administrative action has either caused or threatens to cause an injury. *Marks,* 350 P.3d at 900, citing *Bd. of Cty. Comm'rs, LaPlata Cty. v. Colo. Oil & Gas Conservation Comm'n,* 81 P.3d 1119 (Colo. App. 2003). FTD's allegations of fact are not given a presumption of truthfulness in the consideration of a motion to dismiss under

Rule 12(b)(1), and this Court need not accept as true Plaintiff's conclusions of law. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

B. FTD Has Not Established Injury-In-Fact

The first prong of the *Wimberly* test requires "a concrete adverseness which sharpens the presentation of issues that parties argue to the courts." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004), citing *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (internal quotation omitted). "Standing is conveyed by neither the remote possibility of a future injury nor an injury that is overly 'indirect and incidental' to the defendant's action." *Id.*

FTD's Complaint fails to satisfy the injury-in-fact requirement because its claims are based on "the remote possibility of a future injury," that is "indirect and incidental to the defendant's action." *Hickenlooper v. Freedom from Religion Found., Inc*., 338 P.3d 1002, 1007 (Colo. 2014); *see also Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890-91 (Colo. 2001) (an alleged injury that is indirect and incidental to the defendant's action is insufficient to establish standing.); *see also 1405 Hotel, LLC v. Colorado Econ. Dev. Comm'n*, 370 P.3d 309, 316 (Colo. App. 2015).

FTD appears to rely on its members to establish standing. *See* First Amended Compl. ¶¶ 65(c)-(g). But FTD has failed to demonstrate that any one of its individual members has suffered an injury sufficient for standing. In order for an organization to claim associational standing, it must meet the following requirements: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to its purpose; and (3) neither the claim asserted, nor the relief requested requires the participation of its individual members.

Colorado Union of Taxpayers Found. v. City of Aspen, 2018 CO 36, ¶ 10, 418 P.3d 506, 510. FTD's standing fails because none of its members has suffered an injury-in-fact. *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 199-200 (D.C. Cir. 2011) (Plaintiff lacked standing to challenge the EPA's action by failing to identify a single member who was or would be injured by EPA's action).[3]

FTD alleges the ZEV Rule will result in an increased cost of vehicles for its members, less vehicle dealer stock, and fewer choices. First Amended Compl. ¶ 65(c) and (d), (e), (g). FTD also alleges the cost of fuel and electricity will increase. First Amended Compl. ¶ 65(f). FTD essentially alleges ZEVs will be more expensive than the rest of the fleet. Critically, and fatally to its Complaint, FTD fails to allege how the Commission's action in adopting the ZEV Rule will directly result in such increased costs. There are many intervening market and regulatory forces affecting the cost of vehicles, gasoline and electricity. These alleged injuries are the kind of remote, incidental and indirect consequences that fail to establish injury-in-fact for FTD or its members. Further, FTD has failed to allege how adding a small fraction of ZEV's to the market will affect the cost of other vehicles, or the cost of fuel, or the cost of electricity, much less how it injures FTD members. For these reasons, FTD's allegations fail to meet the injury-in-fact standard. *New York State Auto. Dealers Ass'n v. New York State Dep't of Envtl. Conservation*, 827 F. Supp. 895, 900 (N.D.N.Y. 1993).

[3] Colorado standing jurisprudence does not duplicate all the features of federal standing doctrine. However, similar considerations underlie both Colorado and federal standing law, and the Colorado courts frequently consults federal cases for persuasive authority. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, FN 7 (Colo. 2000) (citing *Maurer v. Young Life*, 779 P.2d 1317, 1324 n. 10 (Colo. 1989)).

Here, FTD's alleged injuries are not particular to the individual members of the organization. With the possible exception of a single vehicle dealer member, FTD also fails to distinguish any injuries its members would allegedly experience from any injuries expected to be borne by the general public. First Amended Compl. ¶ 65(d). Because the ZEV Rule imposes no duty on vehicle dealers (only on manufacturers), this FTD member can claim no injury, other than the same alleged costs every other member of the public would experience, even assuming FTD's claims are true. In *Hickenlooper v. Freedom from Religion Found., Inc*., the court stated that "because judicial determination of an issue may result in disapproval of legislative or executive acts, this constitutional basis for standing ensures that judicial 'determination may not be had at the suit of any and all members of the public.'" 338 P.3d 1002, 1006 (Colo. 2014) (citing *Wimberly*, 570 P.2d at 538 (internal quotes omitted)).

Instead, even taking FTD's alleged injuries as true, and assuming the cost of vehicles, gasoline or electricity were to increase, all members of the public would bear that cost. That is not a sufficient legal interest to support standing. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 575 (1992) ("It is an established principle…that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."). Therefore, FTD has failed to establish injury-in-fact.

Finally, no member of FTD has suffered an injury because no member has any duty under the ZEV Rule. *CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n,* 610 P.2d 85, 91-92 (Colo.1980) (plaintiff has standing to initiate a pre-enforcement challenge to the validity

of a Commission regulation "if he is subject to its demands.") The demands of the ZEV Rule fall on vehicle manufacturers, not FTD members. Manufacturers have a duty to sell a certain number of ZEV vehicles beginning in model year 2023. Manufacturers have accepted that burden. The ZEV Rule creates no duty for any member of FTD. FTD represents no vehicle manufacturer. First Amended Compl. ¶¶ 4; 8. Because FTD is not subject to the demands of the ZEV Rule, it can claim no injury-in-fact.

C. FTD Has Not Established Injury to a Legally Protected Interest

The injuries FTD alleges to have suffered do not establish standing because they do not establish injury-in-fact and because the harm it alleges is not protected by a statutory or constitutional provision. *Wimberly*, 570 P.2d at 539; *Bd. of County Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1053 (Colo. 1992). In other words, the Plaintiff must allege harm to a legally protected interest. A legally protected interest may be tangible or economic such as "one of property, one arising out of contract, one protected against tortious invasions, or one founded on a statute which confers a privilege." *Wimberly*, 570 P.2d at 537 (*quoting Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939)). The right may protect something intangible such as an interest in free speech or expression, or an interest in having a government that acts within the boundaries of our state constitution. *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995).

FTD has no legally protected interest harmed by the Commission's adoption of the ZEV Rule. The alleged injury does not confer standing under *Wimberly* unless the economic interest harmed is protected by the constitution or statutory provisions under which an agency acts. *Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n*, 620 P.2d 1051, 1057 (Colo. 1980).

Here, the Commission acted under the APPCA to adopt regulations. *See* §§ 25-7-103, 105(1), 106 and 109(1)(a) and (2), C.R.S. The Commission is unaware of any provision in the APPCA that is designed and intended, expressly or implicitly, to protect FTD or its members from the alleged harm. Section 177 of the CAA, 42 U.S.C. § 7507, establishes Colorado's option to regulate vehicle emissions, even if it creates an economic burden, provided the Commission adopts standards identical to California standards for which a waiver has been granted for such model year, and establishes a two-year lead-time in its rule. 42 U.S.C. § 7507. The ZEV Rule complies with both requirements. *See* 5 CCR 1001-24:C.I. There is nothing in Section 177, express or implied, which may be reasonably construed to protect the interests of FTD or its members. Instead, the primary concern of Congress was to protect manufacturers from multiple state standards.

> The harm for which plaintiffs seek redress is the inherent consequence of Congress' passage of § 177. By permitting states like New York to adopt California's new vehicle emission standards, Congress implicitly accepted the consequences of that action which were that automobile dealers in such adopting states would be limited to selling California certified vehicles and consumers in such states would be limited to registering only those vehicles.

New York State Auto. Dealers Ass'n, 827 F.Supp. at 902.

FTD represents members with broader interests, but all of the interests boil down to cost and available vehicle choice. Even if those interests are harmed by the ZEV Rule, those harms are an inherent consequence of Congress' enactment of Section 177, and a policy choice, as the court recognized in *New York State Auto. Dealers Ass'n. Id.* Thus, instead of creating a legally protected interest for FTD members, Congress determined the consequences associated with the emission standards and the changes to the kinds of automobiles that would be available in those states are an acceptable trade for the reduced emissions. *See New York State Auto. Dealers Ass'n*,

827 F.Supp. at 902. Congress has "effectively sacrificed" the interest of FTD and its members "in favor of the legitimate police powers of the states." *Id*.; *see also* Order Granting Defendants' Motion to Dismiss, *Colorado Automobile Dealers Association*, 19CV30343 at 4 (Even if the claimed injuries asserted by the Plaintiff are sufficiently distinguishable from those asserted in the federal district case, and even if those allegations are sufficient to constitute cognizable injuries-in-fact, the Court is not persuaded that the asserted injury is to a legally protected interest.). Therefore, FTD cannot satisfy the second criterion of the standing test established in *Wimberly*. 570 P.2d at 539.

D. Judicial Review under the APA Precludes Jurisdiction under C.R.C.P. 57

FTD makes claims under the APA, § 24-4-106, C.R.S., the APPCA, § 25-7-120, C.R.S., as well as C.R.C.P. 57. Section 25-7-120(1) of the APPCA provides that "[a]ny final order or determination by the division or the commission shall be subject to judicial review in accordance with the provisions of this article and the provisions of article 4 of title 24, C.R.S." Pursuant to Section 120(1), the Commission's action adopting a ZEV program for Colorado is a final determination which is subject to judicial review. Any party which is adversely affected or aggrieved may seek judicial review. § 24-4-106(4), C.R.S.

If the Court were to conclude that FTD has standing, its claim for a declaratory judgment should be dismissed because the plaintiff's only recourse would be to pursue judicial review under Section 24-4-106(4). Where the APA provides FTD with adequate remedies, the provisions of C.R.C.P. 57 are inapplicable. *Envirotest Systems, Corp. v. Colorado Dept. of Revenue*, 109 P.3d 142, 145 (Colo. 2005), citing *Jeffrey v. Colorado State Dep't of Soc. Servs.*, 599 P.2d 874, 881 (Colo. 1979); *Purcell v. Colorado Div. of Gaming*, 919 P.2d 905, 907 (Colo.

App. 1996); *see also Collopy v. Wildlife Commission*, 625 P.2d 994, 1004 (Colo. 1981). Review under Section 24-4-106(4) precludes a declaratory judgment action because relief under the former is adequate to address FTD's claims.

Here, the remedy FTD seeks is to have the ZEV Rule declared invalid on the ground that it is preempted by the Joint Rule. First Amended Compl. at ¶ 13, Claims 1 and 2. The APA expressly grants the Court broad powers of review and remedies to impose in the event of an error by an agency, including the power to review the constitutionality of a rule and, if found unconstitutional, to set aside such rule, and restrain its enforcement:

> If the court finds… that the agency action is contrary to constitutional right, power, privilege, or immunity… then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review…and afford such other relief as may be appropriate.

§ 24-4-106(7), C.R.S. There should be little question as to whether the Court could fashion an adequate remedy to address any deficiencies in the ZEV Rule. *Board of County Com'rs of Gilpin County v. City of Black Hawk*, 292 P.3d 1172, 1176 (Colo. App. 2012) (APA provides adequate relief for constitutional challenges to rule-making action, precluding claim under C.R.C.P. 57.)

FTD asserts it is entitled to a declaratory judgment on its claim that the Commission's action is preempted "in light of the waiver revocation rules," asserting its claims under the APA and Rule 57 are not duplicative. Compl at ¶ 13.[4] FTD cites *CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n*, 610 P.2d 85 (Colo. 1980) for the proposition that a Declaratory

[4] The waiver revocation rules to which FTD refers are the joint rules adopted by the Environmental Protection Agency establishing a new greenhouse gas standard for light duty vehicles, revoking the 2013 waiver enabling California to establish separate greenhouse gas standards and a zero emission vehicle program, and the National Highway Transportation and Safety Agency expressly preempting states from adopting emission standards for vehicles. 84 Fed. Reg. 51310 (9/27/19).

Judgment is an appropriate procedure by which to seek review of a regulation. There, the court held two parties could seek a declaratory judgment challenging regulation, concluding that a party need not risk violating a regulation before seeking a declaratory judgment as to its validity. 610 P.2d at 92. But FTD has initiated a timely challenge to the ZEV Rule under the APA, so there is no basis to conclude that FTD must run the risk of violating ZEV before challenging it. More importantly, the ZEV Rule created no duties for FTD, so there is no risk of a violation.

CONCLUSION

Based on the foregoing analysis, the Commission respectfully requests that the Court enter an order holding this matter in abeyance until such time as the federal courts resolve the preemption issues. If the Court denies that motion, the Commission respectfully requests that the Court dismiss all claims because FTD lacks standing. If the Court concludes FTD has standing, the Commission respectfully requests that the Court enter an order dismissing its claim under Rule 57, C.R.C.P.

Respectfully submitted this 22nd day of November, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANT'S MOTIONS TO HOLD CASE IN ABEYANCE OR, ALTERNATIVELY, TO DISMISS** upon all parties herein electronically via the Colorado Courts E-File system this 22nd day of November, 2019 addressed as follows:

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E-filed pursuant to C.R.C.P. 121 1-26. A duly signed original is on file at the Colorado Department of Law

/s/ Barbara Dory
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