

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.

NATIONAL HIGHWAY TRAFFIC
SAFETY ADMINISTRATION, *et al.*,

Respondents.

Case No. 19-1230 (and
consolidated)

**INDUSTRY PETITIONERS' RESPONSE IN OPPOSITION
TO MOTIONS TO EXPEDITE**

Petitioners National Coalition for Advanced Transportation (Case No. 19-1242); Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition (Case No. 19-1245); and Advanced Energy Economy (Case No. 19-1249) (collectively, "Industry Petitioners") oppose Federal Respondents' motion to expedite (ECF Doc. 1820782) and Respondent-Intervenors' motion for expedited consideration and an expedited briefing schedule (ECF Doc. 1821514) for the reasons described in the responses in opposition filed by the State and Local Government Petitioners and Public-Interest Petitioners.

To conserve the resources of this Court and the other parties, Industry Petitioners do not repeat the background descriptions of the challenged federal

actions or the arguments presented by the State and Local Government Petitioners and Public-Interest Petitioners in their oppositions. However, because Respondents and Respondent-Intervenors each argue that expedition is warranted due to the regulatory uncertainty created by this litigation and its impacts on automakers (see Resp. Mot. at 5-6; Interv. Mot. at 11-12, 14-16), Industry Petitioners file this separate response to place those impacts within the context of the broader harms to industry flowing from the Respondents' actions to upset the existing regulatory framework, both in the challenged actions and in proposed changes to the federal greenhouse gas ("GHG") emission and fuel economy standards.

As representatives of industry, whose members include automakers directly impacted by the challenged federal actions and major corporations and utilities heavily invested in the electrification of transportation, Industry Petitioners share an interest in timely and careful resolution of the questions presented by these cases. But the mere existence of regulatory uncertainty while litigation is pending is not a sufficient basis for expedition; if it were, expedition would be granted, not "very rarely",¹ but in nearly every case challenging industry regulations. Additionally, the proffered uncertainty and any alleged harm automakers might face from needing to make decisions while these cases are pending (Resp. Mot. at 6; Interv.

¹ Handbook of Practices and Internal Procedures for the U.S. Court of Appeals, District of Columbia, at 34 (as amended through December 2019).

Mot. at 16) are the outcome, not of Petitioners' filing these lawsuits, but of Respondents' actions to upend the existing regulatory framework.

Contradicting the only two federal courts which have reviewed the question to-date,² Respondent National Highway Traffic Safety Administration ("NHTSA") adopted a new interpretation of the Energy Policy and Conservation Act as preempting California's GHG emission and zero-emission vehicle ("ZEV") standards and the identical standards adopted by other states (the "Section 177 States"), even though EPA has expressly authorized those standards by waiving preemption under Section 209 of the CAA and by approving State Implementation Plans that incorporate them. Based in part upon NHTSA's interpretation, Respondent EPA then, for the first and only time in the 50-year history of Section 209, withdrew a waiver of preemption it had previously granted to California under that section. EPA and NHTSA have also proposed changes to the existing federal GHG emission and fuel economy standards, but the agencies have not yet taken action to finalize those changes.

² *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mtn. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007) (holding that the Energy Policy and Conservation Act does not preempt greenhouse gas emission standards for which the Environmental Protection Agency ("EPA") has issued California a waiver of preemption under Section 209 of the Clean Air Act ("CAA")).

Industry Petitioners and their members have made significant investments to advance the development and deployment of electric vehicles, advanced transportation technologies and related infrastructure. By upending the regulatory framework upon which those investments were premised, the challenged federal actions and proposed changes to the federal GHG emission and fuel economy standards harm Industry Petitioners.³

Although these harms are real, these cases are not “extraordinary” (Resp. Mot. at 1) and do not warrant consideration on an extraordinarily truncated schedule. Respondents filed the certified index to the administrative record just yesterday (on January 9, 2020; ECF Doc. 1823461), yet they propose submission of opening briefs one month from today’s date (on February 10, 2020). Resp. Mot. at 7. Given the number of Petitioners in these cases and the need for Petitioners to coordinate with each other to avoid duplication of argument, such an accelerated schedule would unduly impair Petitioners’ ability to present their case against the challenged federal actions and obtain redress for the harms flowing from them.

³ See Attachment to Docketing Statement of Petitioner National Coalition for Advanced Transportation (“NCAT”), ECF Doc. 1821356 at 3-5 (describing harm to NCAT’s members, including automaker Tesla, Inc.); Brief Statement of Petitioner’s Standing (Item 5(e)) attached to docketing statement of Petitioner Advanced Energy Economy (“AEE”), ECF Doc. 1821665 at 2-3 (describing harm to AEE members that made investments in reliance upon California’s authority to establish its own standards); Petitioners’ Addendum to Docketing Statement, ECF Doc. 1822475 at 3-6 (describing harm to electric utilities and their customers).

At the very least, the Court should not set a schedule for briefing and argument of these cases prior to resolution of the challenges to NHTSA's preemption regulation now pending in the U.S. District Court for the District of Columbia.⁴ Proceeding with expedited consideration of these cases risks squandering the resources of the parties and the Court, in the event they should respectively proceed to brief and consider questions concerning the legality of NHTSA's preemption regulation, when those questions may first be decided by the District Court. Nor would it serve judicial economy to expedite consideration of questions raised solely with respect to Respondent EPA's actions, as those actions are premised in large part on the legality of NHTSA's preemption regulation. Instead, the Court should refrain from establishing a schedule for briefing and argument in these consolidated cases until the District Court either decides that it lacks jurisdiction to hear the challenges pending before it or issues a decision on the merits.

For the foregoing reasons, the Court should deny the motions for expedition.

⁴ *California v. Chao*, D.D.C. No. 1:19-cv-02826-KBJ.

Dated: January 10, 2020

/s/ Stacey L. VanBelleghem

Stacey L. VanBelleghem
Devin M. O'Connor
Ethan Prall
LATHAM & WATKINS, LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
(202) 637-2200
stacey.vanbelleghem@lw.com

Robert A. Wyman, Jr.
LATHAM & WATKINS LLP
355 South Grand Avenue
Suite 100
Los Angeles, CA 90071-1560
(213) 485-1234

*Counsel for Petitioner National
Coalition for Advanced Transportation*

Respectfully submitted,

/s/ Kevin Poloncarz

Kevin Poloncarz
Donald L. Ristow
Jake Levine
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, 54th Floor
San Francisco, CA 94105-2533
(415) 591-7070
kpoloncarz@cov.com

*Counsel for Calpine Corporation,
Consolidated Edison, Inc., National
Grid USA, New York Power Authority,
and Power Companies Climate
Coalition*

/s/ Jeffery Scott Dennis

Jeffery S. Dennis
Managing Director and General
Counsel
Advanced Energy Economy
1000 Vermont Ave. NW Suite 300
Washington, D.C. 20005
202.383.1950
jdennis@aee.net

*Counsel for Advanced Energy
Economy*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that this document complies with the type-volume limitations because, according to the word processing system used to create it, it contains 1,011 words, excluding the portions that do not need to be counted.

Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that this document complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: January 10, 2020

/s/ Kevin Poloncarz
Kevin Poloncarz

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will cause all registered CM/ECF users to be served by the CM/ECF System.

Dated: January 10, 2020

/s/ Kevin Poloncarz
Kevin Poloncarz