ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

UNION OF CONCERNED SCIENTISTS, et al., Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al., Respondents.	No. 19-1230, and consolidated cases

OPPOSITION TO
MOTIONS TO HOLD PETITIONS IN ABEYANCE

INTRODUCTION

Petitioners have it backwards. They ask this Court to stay its hand until the district court adjudicates which court has jurisdiction over *one portion* of the challenged joint agency action. But this Court has *exclusive jurisdiction* over the entire decision. There is no dispute that the court of appeals has exclusive jurisdiction to review the Environmental Protection Agency's independent determination in the One National Program Action ("Action"), 84 Fed. Reg. 51,310 (September 27, 2019). Petitioners further cannot contest that review of EPA's determination by the court of appeals is

necessary for them to obtain the overall relief. So delay of this proceeding does not enhance judicial efficiency. It would impede it.

In the Action, EPA determined that California failed to establish the elements required under the Clean Air Act ("CAA") for a state to regulate tailpipe greenhouse gas emissions from automobiles. EPA's CAA grounds for its decision are exclusively this Court's to review. So one way or another, the D.C. Circuit will need to resolve petitions relating to the Action. And, as EPA and NHTSA (the "Agencies") explained in their motion seeking expedited consideration, prompt consideration of Petitioners' challenges is essential. Automakers, states, and the public alike share an unusual and strongly compelling interest in the prompt disposition of these petitions.

Petitioners dispute that this Court is the proper forum for considering NHTSA's portion of the Action. NHTSA promulgated regulations clarifying that the Energy Policy & Conservation Act ("EPCA") preempts state standards relating to fuel economy (the "Preemption Regulations"). Under 49 U.S.C. § 32909, that portion of the Action, too, is exclusively reviewable in this Court. But even if Petitioners were correct (and they are not), their argument does not support abeyance. At a minimum, this Court can and should expeditiously resolve those jurisdictional questions while it simultaneously reviews the merits of EPA's portion of the Action. This Court regularly does that with such jurisdictional questions.

Undisputedly, there is work for this Court to do. It alone will review EPA's determination. Along the way, this Court can and should resolve jurisdiction over

NHTSA's portion of the Action, as well. Petitioners' efforts to delay these proceedings pending dismissal of challenges improperly filed in district court – and pending the speculative resolution of administrative petitions for reconsideration – should be rejected.

BACKGROUND

A. The Clean Air Act.

The CAA authorizes EPA to regulate emissions from new motor vehicles and new motor vehicle engines. 42 U.S.C. § 7521(a). EPA balances factors such as technological feasibility, the cost of compliance, the lead time necessary for compliance, safety, energy impacts, and the impact on consumers with respect to cost and vehicle choice. *See, e.g.*, 83 Fed. Reg. 42,986, 43,228-229 (Aug. 24, 2018). So EPA must ensure these standards are not too low, but not too high. In the wake of *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA adopted Federal tailpipe greenhouse gas emission standards for passenger cars and light trucks for model years 2017-2025 jointly with NHTSA's fuel economy standards. 77 Fed. Reg. 62,624 (Oct. 15, 2012).

The CAA preempts States from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a). EPA can waive that prohibition for any State "which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to

March 30, 1966,[1] if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). But EPA cannot grant such a waiver if the EPA Administrator finds that either "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with [42 U.S.C. § 7521(a)]." *Id.* EPA determined that California did not meet that statutory test.

Challenges to final actions that are nationally applicable, or as to which EPA has made and published a finding that the final action is based on a determination of nationwide scope or effect, must be brought exclusively in the D.C. Circuit. 42 U.S.C. § 7607(b)(1). EPA made such a finding here. 84 Fed. Reg. at 51,351. The Act also provides that filing an administrative petition with the Agency for reconsideration of "any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review[.]" *Id.*

[1] Given this timing criterion, only California is eligible to apply for such a waiver from EPA and develop its own standards. *See* 84 Fed. Reg. at 51,331-32 n.218. Pursuant to CAA Section 177, other States may adopt standards if "(1) such standards are identical to the California standards for which a waiver has been granted for such model year and (2) California and such State adopt such standards at least two years before commencement of such model year." 42 U.S.C. § 7507.

B. The Energy Policy and Conservation Act.

NHTSA sets fleet-wide average fuel economy standards that apply to all cars or light trucks sold by a manufacturer in a given year, called "corporate average fuel economy," or "CAFE," standards. NHTSA sets these standards at the level which NHTSA determines is the "maximum feasible average fuel economy level" for a given model year. *Id.* § 32902(a).

NHTSA is the exclusive regulator of the fuel economy of vehicles sold in the United States. Without exception, when "an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered [by such Federal standard]." 49 U.S.C. § 32919(a).

Under 49 U.S.C. § 32909(a)(1), a regulation "prescribed in carrying out any of sections 32901–32904 or 32908" may be reviewed only through a petition in the court of appeals.

C. Factual and Procedural Background.

Various Petitioners have filed parallel complaints in district court asserting that the Preemption Regulations are unlawful. These complaints have been consolidated under *California v. Chao*, No. 1:19-cv-2907 (D.D.C.). On October 15, 2019, the Agencies served a motion to dismiss for lack of jurisdiction, or in the alternative to

transfer to this Court. Pursuant to Local Rule, they submitted the fully briefed motion to the district court on December 3, 2019. *Id.* at Doc. 29.

In addition, interested parties have submitted to EPA three administrative petitions for reconsideration of EPA's portion of the Action. Petitioners point to two of these administrative petitions, filed by the State of California, as establishing the need for abeyance here. California's administrative petitions seek, in pertinent part: (1) "clarification and reconsideration" of the model years affected by EPA's withdrawal of the California waiver, *see* State & Mun. Pet. Mot. at 13-16; and (2) reopening of public comment on legal bases for the final rule that it contends were not discussed in the proposed rule (including EPA's authority for revoking a pre-existing waiver and EPA's "rationale" for considering the effect of EPCA preemption on the waiver), *see id.* at 16-19.

ARGUMENT

I. PETITIONERS' SUBMISSION OF PETITIONS FOR RECONSIDERATION DOES NOT WARRANT ABEYANCE.

There is no dispute that the court of appeals has exclusive and immediate jurisdiction to review EPA's action withdrawing California's CAA waiver. Judicial review of EPA's action is necessary for the Petitioners to obtain the overall relief they seek—regardless of what court has jurisdiction over NHTSA's portion of the Action. Petitioners' requests for administrative reconsideration do not alter this calculus because well-established case law rejects such petitions as a reason for delay and

abeyance of important cases. Accordingly, this Court should proceed with review here.

A. The Clean Air Act provides for judicial review notwithstanding pending petitions for agency reconsideration.

Under the CAA, pending petitions for agency reconsideration do not interrupt judicial review. In contrast to other statutes, the CAA's judicial review scheme emphasizes the importance of prompt review. Section 307(b)(1) provides that the "filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review." 42 U.S.C. § 7607(b)(1). This Court has held that this language shows "a strong congressional desire" that judicial review happen "expeditiously." *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1184, 1186-87 (D.C. Cir. 1980); *see Ala. Power Co. v. Costle*, 636 F.2d 323, 344 (D.C. Cir. 1979). Thus, while traditional principles of administrative law provide that judicial review of a rule should not move forward while a petition for agency reconsideration remains pending, the CAA "reflects a departure from [this] ordinary tolling rule" and provides for judicial review of a rule immediately, without regard to the pendency of any petition for reconsideration. *Ass'n of Battery Recyclers, Inc. v. EPA*, No. 12-1028, 2012 WL 2373298, at *1 (D.C. Cir. June 25, 2012).

Accordingly, this Court has repeatedly denied opposed motions for abeyance pending EPA's disposition of administrative petitions for reconsideration of CAA

rules. In *NRDC v. EPA*, for example, the petitioner sought an abeyance on the grounds that it had filed an administrative petition for reconsideration asserting that another government agency was investigating whether there were "serious errors" in the scientific studies on which the rule was based. 902 F.2d 962, 974 (D.C. Cir. 1990), *vacated in part by* 921 F.3d 326 (D.C. Cir. 1991). The Court held that this "alleged 'new information'" was "too speculative to provide grounds for delaying [ ] decision" on the petition for review. *Id.* The Court reached the same result in *Lead Industries*, denying an opposed motion for abeyance where the petitioner's purported basis for reconsideration of the rule did not "raise[] substantial questions about the validity" of EPA's action. 647 F.2d at 1187.

Petitioners' authorities do not demonstrate otherwise. In asserting that abeyance is warranted here, they cite first to three cases in which abeyance was granted only after EPA decided reconsideration of part or all of the challenged action was warranted. *See* State & Mun. Pet. Mot. at 12-13; *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008) (noting that petitions were held in abeyance after EPA agreed to take comment on new provisions that were being challenged); *New York v. EPA*, No. 02-1387, 2003 WL 22326398, at *1 (D.C. Cir. Sept. 30, 2003) (denying mandamus petitions and holding petitions in abeyance because EPA had granted reconsideration and the ensuing delay was not extraordinary); *see also Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386-87, 389 (D.C. Cir. 2012) ("*API*") (concluding the petitions were prudentially unripe and should be held in abeyance where EPA had issued a new

proposed rule pertaining to the challenged action). But EPA has not granted or initiated reconsideration as to any aspect of the Action.

Petitioners cite only a single unreported case in which they claim petitions were held in abeyance before reconsideration was granted. *See* State & Mun. Pet. Mot. at 13. This citation is not instructive. The twenty-two-year-old order Petitioners cite does not explain the Court's reasoning or the circumstances in which its decision arose. *See Am. Trucking Ass'ns, Inc. v. EPA*, No. 97-1440, 1998 WL 65651, at *1 (D.C. Cir. Jan. 1, 1998).[2] Given the dearth of information from which to draw any parallels to the given case, its singularity is more instructive: Petitioners have identified only a single instance in more than twenty years in which abeyance appears to have been granted before EPA announced its intention to reconsider a challenged action.

B. Petitioners have not identified any basis for reconsideration of the Action that would disrupt judicial review of their petitions.

Even considered on their merits, Petitioners' administrative petitions for reconsideration do not provide a basis for delaying adjudication of their judicial petitions. Petitioners fail to establish that their requests for reconsideration "raise[] substantial questions about the validity of the Agency's analysis." *See Lead Indus.*, 647

[2] Despite Petitioners' assertion, it is unclear whether EPA had, in fact, "not yet agreed to convene reconsideration proceedings." *See* State & Mun. Pet. Mot. at 13. While Petitioners are correct in noting that EPA opposed abeyance, the order states only that abeyance was granted pending "disposition" of the administrative petition. *See Am. Trucking*, 1998 WL 65651, at *1. No further information on the contemporaneous status of reconsideration is given.

F.2d at 1187; *see also NRDC*, 902 F.2d at 974. Petitioners claim only that reconsideration would "clarify" EPA's existing decision and allow for (unspecified) additional public comment on legal bases for that decision that they believe were not elucidated when it was proposed. Petitioners' claims are purely speculative, as reconsideration has not been granted, and, in any case, are insufficient to warrant delay.

Petitioners first claim that abeyance is necessary to allow EPA to provide clarification as to the scope of its determination in the One National Program Action. In particular, Petitioners claim that they cannot parse the meaning of EPA's waiver withdrawal for model years before 2021. But as the Action explains, and as Petitioners' motions ably restate, *see* Interest Group Pet. Mot. at 7-8; State & Mun. Pet. Mot. at 14, EPA reached two independent conclusions regarding the legality of the 2013 waiver, each of which has an independent effect. *See* 84 Fed. Reg. at 51,338, 51,351, & 51,356 ("This action is being undertaken on two separate and independent grounds."). First, EPA determined that NHTSA's Preemption Regulations render the California waiver "invalid, null, and void" with respect to greenhouse gas and Zero Emission Vehicle standards. 84 Fed. Reg. at 51,338. Petitioners quote EPA's plain statement that this determination, and thus the invalidation of the waiver, was "effective November 26, 2019." *See* State & Mun. Pet. Mot. at 14; 84 Fed. Reg. at

51,328 (withdrawing the California waiver as to the preempted provisions "effective on the effective date of this joint action").[3]

Second, EPA independently concluded that the 2013 waiver is invalid under the terms of CAA Section 209(b)(1)(B). 84 Fed. Reg. at 51,339. But EPA made clear that it had reached this second conclusion only with respect to model years 2021-2025. *Id.*; State & Mun. Pet. Mot. at 14. EPA thus explained that it intended its withdrawal of the waiver on the basis of EPCA preemption "to take effect upon the effective date of this joint action," while its "separate and severable" withdrawal of the waiver pursuant to Section 209 applies "beginning in model year 2021." 84 Fed. Reg. at 51,351.

Given these independent conclusions, the Action at times references the invalidity of the waiver as a whole (pursuant to EPA's determination as to the effect of the Preemption Regulations). At other times, it references the invalidity as to model years 2021-2025 (pursuant to EPA's determination under Section 209). But the complexity inherent in reaching two independent conclusions that bear on the 2013 waiver in different ways is not an "abstract disagreement[] over administrative

[3] Of course, this Court may take up any substantive challenge to the effective date of EPA's action, should Petitioners think it so substantial as to continue to assert it.

policies" that must be answered by EPA before it can be adjudicated by the Court. *See* State & Mun. Pet. Mot. at 15 (quoting *API*[4]).

Petitioners next claim abeyance will allow for additional public comment on legal bases for EPA's determinations that it contends were not explained at proposal. *See* State & Mun. Pet. Mot. at 16-17. But the Action finalized (in substantial part) the same legal determinations proposed in the August 24, 2018 proposed action, 83 Fed. Reg. 42,986. *See, e.g.*, 84 Fed. Reg. at 51,328 (explaining the proposed EPA determinations finalized in the Action). In addition, in an effort to fully respond to public comments, EPA provided a more substantial discussion of the statutory and regulatory history and context underlying its determinations. This extended legal and historical discussion, and Petitioners' unspecified complaints about it, fail to cast doubt on the "validity" of EPA's portion of the Action or this Court's ability to adjudicate these legal disputes on the record before it. In any event, Petitioners fail to identify any authority for requiring still-more public comment on these legal questions, as the waiver withdrawal is not a rulemaking under CAA Section 307(d), 42 U.S.C. § 7607(d).

Finally, Petitioners claim reconsideration would allow EPA to clarify its reasons for revoking California's 2013 waiver. *See* State & Mun. Pet. Mot. at 18-19. But this is

[4] Petitioners cite "*Am. Petroleum Inst.*, 101 F.3d at 1431 (stating that courts should avoid 'entangling themselves in abstract disagreements over administrative policies')" but this appears to be a citation error. The case and quote are found at *API*, 683 F.3d at 386, where they refer, in any event, to a court's consideration of prudential ripeness.

not grounds for abeyance. As in any judicial petition for review of agency action, this Court is equipped to weigh whether EPA has acted within its authority and provided a reasoned basis for its determinations. Petitioners' vague assertions that EPA's "true reasons" for withdrawing the waiver are "unclear" and that a new explanation could make EPA's reasoning "more concrete," *id.*, do not "raise[] substantial questions about the validity of the Agency's analysis." *See Lead Indus.*, 647 F.2d at 1187.

These are insufficient bases for delaying judicial review of the Action, especially where the balance of equities supports expediting – not delaying – the Court's consideration. As the Agencies have explained in their motion seeking expedited consideration, ECF No. 1820782, prompt consideration of Petitioners' challenges is essential to forestall impacts on U.S. automakers, states, and the public. *See id.* at 3-7. Petitioners claim that abeyance would cause no harm because the Action is not stayed. Interest Group Pet. Mot. at 16-17. But Petitioners ignore the State of California's own efforts in response to the Action, which have sought to compel automakers to abide by separate California dictates notwithstanding the Action and to punish automakers that choose not to. *See* ECF No. 1820782 at 5-6; *see also* ECF No. 1821514 at 8-9, 11-14 (Respondent-Intervenors' motion to expedite). This is not a mere case of "regulatory uncertainty." *See* Interest Group Pet. Mot. at 17.

In any case, Petitioners are incorrect that hardship here must be "immediate and significant" to overcome a request for abeyance. *See* State & Mun. Pet. Mot. at 21 (quoting *API*, 683 F.3d at 389, and citing *Devia v. NRC*, 492 F.3d 421, 427 (D.C. Cir

2007)). In both *API* and *Devia*, this Court was assessing hardship in the context of prudential ripeness. For example, the Court in *API* was weighing whether judicial review should proceed notwithstanding the fact that the agency had issued a new proposed rule affecting the challenged action. The standard elucidated there, of "significant" hardship, reflected the Court's conclusion that such a showing would be necessary to warrant embroiling itself in the "finality and fitness problems inherent in attempts to review tentative positions." *API*, 683 F.3d at 389 (quoting *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21 (D.C. Cir. 1984)). EPA's position here is not tentative – and Petitioners do not assert their challenges are prudentially unripe – so *API* is inapposite.[5]

And, as explained above, Petitioners' assertion that reconsideration will narrow the scope of this Court's review after the abeyance is lifted is unsupported. There is thus no basis to assume that abeyance will promote judicial economy. This Court can best preserve the parties' resources – and maintain the balance of equities – by adjudicating the entirety of the Action, consistent with its exclusive jurisdiction and on the basis of the Action and the record currently before it.

[5] Likewise, in *Devia* the Court was considering the prudence of reviewing denials of lease and rights-of-way applications. The Court determined that it was "speculative whether the project will ever be able to proceed," so it found that the challenge was unripe and abeyance was warranted. *See Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 422 (D.C. Cir. 2007).

II. THE PENDING DISTRICT COURT CASE DOES NOT WARRANT ABEYANCE.

This Court plainly has exclusive jurisdiction over challenges to EPA's portion of the Action. 42 U.S.C. § 7607(b)(1). No party disputes this. Petitioners give no reason why this Court should not simultaneously consider its jurisdiction over the claims related to NHTSA, as well as the claims related to EPA, now. Petitioners assert that the district court has jurisdiction over the challenges to the Preemption Regulations. *See, e.g.*, Interest Group Pet. Mot. at 12. However, this Court, not the district court, has exclusive jurisdiction to review the Preemption Regulations. And this Court, not the district court, should determine its own jurisdiction. Petitioners also assert that the close inter-relationship between the petitions for review and the district court complaints counsels in favor of abeyance. But judicial economy favors litigating the common questions in this Court.

A. This Court has exclusive jurisdiction to review the Preemption Regulations.

Under 49 U.S.C. § 32909(a)(1), a regulation "prescribed in carrying out any of sections 32901–32904 or 32908" may be reviewed only through a petition in the court of appeals. For this Court to have jurisdiction over the Preemption Regulations, those regulations must be at least "colorably authorized" by one of the statutory provisions specified in Section 32909. *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 723 (D.C. Cir. 2016).

The Preemption Regulations "carry[] out" the EPCA provisions cited in 49 U.S.C. § 32909. NHTSA expressly and repeatedly invoked Sections 32901 through 32903 as the source of NHTSA's authority. It explained that a proper understanding of the scope of preemption is essential to the integrity of the statutory scheme that calls for NHTSA to promulgate *national* CAFE standards. *See, e.g.*, 84 Fed. Reg. at 51,316 ("NHTSA is exercising its authority, under 49 U.S.C. §§ 32901 through 32903, to promulgate regulations to protect the integrity of the national program."); *see also id.* at 51,317; 51,319-20.

The Preemption Regulations are directly and integrally tied to NHTSA's authority to set and implement national, uniform fuel economy standards that are neither too low nor too high. *See, e.g.*, 49 U.S.C. § 32902(a) (requiring NHTSA to prescribe by regulation, each model year, the "maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year" as the applicable average fuel economy standard); *see also* 84 Fed. Reg. at 51,312 ("Uniform national fuel economy standards are essential to accomplishing the goals of EPCA.").

In particular, the Preemption Regulations interpret EPCA to provide that the standards NHTSA sets are, in fact, uniform and nationwide standards as Congress intended, rather than standards that are applicable only piecemeal due to a patchwork of conflicting State or local requirements. *See id.* at 51,311; *id.* at 51,313 ("Congress's intent to provide for uniform national fuel economy standards is frustrated when

State and local actors regulate in this area."). The Preemption Regulations are therefore directed toward "carrying out" the pertinent provisions of EPCA that provide for national fuel economy standards, namely 49 U.S.C. §§ 32901 through 32903.

The language of Section 32909 confirms that the exclusive judicial review mechanism encompasses regulations such as these. If Congress had intended a narrower judicial review provision, limited only to regulations that specifically establish CAFE standards, it easily could have omitted the phrase "carrying out," leaving the statutory text to provide for court of appeals review of any "regulations prescribed in sections 32901-32904 or 32908." Courts do not read a statute in a way that renders any part of it superfluous. *See, e.g., Agnew v. Gov't of the D.C.*, 920 F.3d 49, 57 (D.C. Cir. 2019). The statute's broad reference to "regulations . . . carrying out" NHTSA's responsibility to set national CAFE standards should thus be given effect by recognizing that the Preemption Regulations must be reviewed directly in a court of appeals.

The Preemption Regulations also prescribe that NHTSA's standards under Section 32902(a) are the standards that manufacturers must comply with, not those set by States.[6] The Preemption Regulations are relevant, and indeed critical, to

[6] "Even identical standards interfere with the national program by imposing requirements not applicable to nationwide fleets and impose compliance regimes inconsistent with EPCA." 84 Fed. Reg. at 51,317.

NHTSA's administration of the program Congress created under Sections 32901-04. As NHTSA explained, the exercise of this authority was "necessary to maintain the integrity of the corporate average fuel economy program and compliance regime established by Congress as a nationwide program." 84 Fed. Reg. at 51,311. In particular, the Preemption Regulations are "*necessary to the effectiveness* of NHTSA's existing and forthcoming fuel economy standards [under Section 32902] . . . specifically, one set of *national* standards." *Id.* at 51,316 (emphasis added) (noting that the need for national uniformity is underscored by EPCA's express preemption provision).

When State and local actors enact fuel economy standards that are more stringent than the national standards set by NHTSA, this renders NHTSA's judgment about which fuel economy standards are maximum feasible, as determined and set by the agency considering required statutory factors, inapplicable in those States. State standards thus frustrate NHTSA's careful balancing of the congressionally mandated factors, which balancing is done using the agency's expert judgment and in light of public comments. *See id.* at 51,313; *see also id.* at 51,311-12 (noting that "[u]niform national fuel economy standards are essential" and State and local requirements "render the critical balancing required by EPCA devoid of meaning")

California's tailpipe greenhouse gas emission standards exemplify this problem. NHTSA explained that because of the direct relationship between tailpipe carbon emissions and fuel economy, these State standards are fuel economy standards, just by

another name.[7] As a result, these standards effectively represent a displacement and frustration of NHTSA's standards in California and other jurisdictions that adopt them.

Given the foregoing, NHTSA did not just "colorably" conclude that the Preemption Regulations could be promulgated under its authority in Sections 32901-03 (and particularly its authority under Section 32902)—NHTSA's assertion of that authority was entirely correct. The Preemption Regulations provide clarity that standards established by NHTSA under Section 32902(a), based upon a careful balancing of statutory factors, are the appropriate maximum feasible fuel economy standards that manufacturers can and must meet on a national basis. *See id.* at 51,325 ("*49 U.S.C. 32902* makes clear that NHTSA sets nationally applicable fuel economy standards, and NHTSA is *implementing its authority to do so* through this regulation clarifying the preemptive effect of its standards consistent with the express preemption provision in 49 U.S.C. 32919." (emphasis added)). The Preemption Regulations thus affirm and restore to operation these Section 32902 standards—even

[7] The relationship between the combustion of gasoline and the amount of carbon emitted at the vehicle's tailpipe is well recognized. And so the techniques available to reduce the amount of tailpipe CO_2 emitted per mile from a gasoline engine are the same techniques used to improve fuel economy, *i.e.*, techniques that increase the number of miles that may be driven on a gallon of gasoline. For this reason, a fuel economy standard for an automobile can alternatively be stated as a tailpipe carbon (or CO_2) emission standard (and vice versa). Thus, any Federal or State standard attempting to regulate the emission of CO_2 from a vehicle's tailpipe directly and inextricably relates to—indeed, it is a regulation of—the average fuel economy the vehicle must achieve.

in jurisdictions that have attempted to undermine or displace them with alternative standards purporting to merely regulate greenhouse gases.

Interest Group Petitioners assert that *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), undercuts the Agencies' argument. Interest Group Pet. Mot. at 12. But unlike in *National Association of Manufacturers*, NHTSA clearly and expressly explained why it believed the EPCA preemption determination was, in the parlance used by the Supreme Court, promulgated "pursuant to" and "by reason of the authority of" Sections 32901-903, as described above. And unlike the statutory provision at issue in *National Association of Manufacturers*, Section 32909(a) is not limited to particular, discrete agency actions or regulations. Rather, it expansively provides for jurisdiction over challenges to any regulations "carrying out" any aspect of the broad provisions it cites.

Interest Group Petitioners also argue that to the extent jurisdiction is in doubt, the district court should decide the issue in the first instance. Interest Group Pet. Mot. at 13. In support, they cite *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317 (11th Cir. 2016), where the Eleventh Circuit held an appeal in abeyance while the Sixth Circuit addressed a direct petition for review of the same regulation. But the Sixth Circuit had *already determined* that it had jurisdiction in *Olens*, and had issued a

nationwide stay that might have mooted the order being appealed to the Eleventh Circuit. *Id.; see also id.* at 1321. Neither of those factors are present here.[8]

B. The overlapping district court issues do not justify abeyance.

The State and Municipal Petitioners argue that because the issues in the district court and in this Court are interrelated, this Court should defer to the district court in order to avoid simultaneous proceedings. *See* State & Mun. Pet. Mot. at 19-21. They note that in *Basardh v. Gates*, 545 F.3d 1068 (D.C. Cir. 2008), this Court held a petition for direct circuit court review in abeyance pending the resolution of a district court case involving the same parties and issues. *See* State & Mun. Pet. Mot. at 19. But *Basardh* involved very different considerations. The question in *Basardh* was whether to proceed with a direct review petition brought by a detainee at Guantanamo Bay, Cuba, in light of a pending district court petition for habeas corpus. 545 F.3d at 1068-69. This Court granted abeyance, but noted that the Supreme Court had recently held that a habeas petition "is the preferred course" for a detainee to seek review. *Id.* at 1069. In addition, simultaneous parallel district court and appellate proceedings could have risked national security breaches due to the particular and sensitive nature of the detainee cases. *Id.* And, the court of appeals' jurisdiction was not just disputed, it was cast into "serious doubt" by a recent Supreme Court decision. *Id.* at 1070.

[8] Interest Group Petitioners also cite *Sierra Club v. Jackson*, 813 F. Supp. 2d 149 (D.D.C. 2011) but in that case the motion to hold the circuit court proceedings in abeyance was unopposed. *Id.* at 154 n.2.

Here, in contrast, this Court indisputably *has* jurisdiction to consider the challenges to EPA's portion of the Action. There are no countervailing considerations that weigh in favor of district court review, as in *Basardh*. This Court should therefore hear all of the challenges to the Action, and should do so expeditiously.

CONCLUSION

For the reasons explained above, the Agencies respectfully request that the Court deny the motions to hold these petitions in abeyance.

DATED: January 10, 2020

Respectfully submitted,

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/s/ Chloe H. Kolman
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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, a copy of the foregoing Opposition to Motions to Hold Petitions in Abeyance was served electronically through the Court's CM/ECF system on all counsel of record.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN