ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

COMPETITIVE ENTERPRISE INSTITUTE, et al. Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al., Respondents.	No. 20-1145 and consolidated cases

Respondents' Combined Opposition to Petitioners' Motion to Establish Briefing Schedule and Format, and Motion to Establish Briefing Schedule and Format in the Alternative

Respondents National Highway Traffic Safety Administration ("NHTSA") and James C. Owens, Acting Administrator; U.S. Environmental Protection Agency ("EPA") and Andrew Wheeler, Administrator; and U.S. Department of Transportation and Elaine L. Chao, Secretary (collectively, "Respondents" or "the Agencies") hereby oppose Petitioners' Motion to Establish Briefing Schedule and Format, ECF No. 1860054 ("Motion"), which is premature and prejudicial to the fair resolution of this case. Respondents respectfully move, in the alternative, for entry of the proposed briefing schedule, format, and word limits, as set forth at pages 18-19 below.

Counsel for State and Local Government Petitioners and Respondent-Intervenors, and Public Interest Organization Petitioners and Respondent-Intervenors, state that they oppose Respondents' motion. Counsel for Movant-Intervenor Alliance for Automotive Innovation states that the Alliance supports Respondents' proposal. Counsel for Movant-Intervenor Ingevity Corporation states that Ingevity Corporation does not oppose Respondents' proposed briefing schedule and supports the ability of all Intervenor-Respondents to file individual briefs subject to a combined word limit. Counsel for Movant-Intervenors American Honda Motor Co., Inc., BMW of North America, LLC, Ford Motor Company, Rolls-Royce Motor Cars NA, LLC, and Volkswagen Group of American, Inc. state that Auto Manufacturers oppose the proposed briefing format to the extent it excludes the Auto Manufacturers' participation in briefing. Petitioners Competitive Enterprise Institute, et al.; Petitioner Advanced Energy Economy; Petitioners Calpine Corp, et al.; Petitioner National Coalition for Advanced Transportation; and Petitioners Clean Fuels Development Coalition, et al., did not provide a position before filing.

SUMMARY

Petitioners' Motion to establish a briefing schedule comes at a time when several other motions are still pending and before this Court has issued an order seeking briefing proposals. Their request is premature, as the resolution of other pending motions may affect the appropriate briefing schedule or format in this case.

In addition, the Motion short-circuits the typical period provided by the court for the parties to try to reach agreement on a joint proposal in this kind of complex case.

But should this Court wish to set a briefing schedule at this time, Respondents' proposed schedule and format is superior to Petitioners' and should be entered. Respondents' proposed schedule would afford time to resolve the pending motions and to brief this case without unduly burdening any party or this Court. Respondents' proposed expanded word counts (32,000 words collectively for Petitioners' and for Respondents' opening briefs) adequately accounts for the multiple sets of Petitioners raising different claims, while avoiding inundating this Court with nearly 1000 pages of briefing. And Respondents' schedule would allow this case to proceed at a reasonable pace and be calendared for oral argument next September.

In contrast, Petitioners' proposed schedule and format is wholly unworkable. As further described below, the schedule seeks to rush briefing in this complex case while simultaneously asking the Court to allow an unwarranted 144,000 words between Petitioners' and Respondents' opening briefs. Petitioners present no adequate justification for requesting such an unprecedented volume of briefing. Nor do they present any persuasive case that it is necessary for oral argument to be scheduled May 2021, as opposed to a few months later. Indeed, Petitioners chose not to seek expedition of this case within the period for filing procedural motions. They then waited over seven weeks after the filing of the record to file contested motions

to supplement that record. And in those motions they have taken the position that any supplementation must occur "prior to merits briefing." ECF No. 1858308 at 12.

Accordingly, and for the reasons explained below, Respondents respectfully request that this Court deny Petitioners' motion and defer the establishment of a briefing schedule and format until after all pending motions are decided. In the alternative, Respondents request that the Court grant their proposed briefing schedule and format.

I. BACKGROUND

On April 30, 2020, Respondent Agencies EPA and NHTSA jointly published a rulemaking titled the "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 85 Fed. Reg. 24,174 ("SAFE II Rule" or "Rule"). The Rule establishes two consonant sets of vehicle regulations for passenger cars and light trucks: one, issued by NHTSA, establishes corporate average fuel economy standards; the other, issued by EPA, establishes vehicle greenhouse-gas emission standards. *Id.* NHTSA's action replaces a standard set in 2012 for model year 2021 vehicles. The rule establishes fuel-economy standards for the first time for model years 2022-2026. *Id.* at 24,181-82. EPA's action replaces its existing standards set for model years 2021-2026, which were originally set in 2012. *Id.* Both actions follow EPA's completion of the 2018 Mid-Term Evaluation, established as part of the 2012 rulemaking, which considered whether EPA's 2022-2025 standards should be revised in a separate rulemaking that would follow the

Evaluation. *Id.* at 24,182; 83 Fed. Reg. 16,077 (Apr. 13, 2018) (Revised Mid-Term Evaluation).

In establishing fuel-economy and greenhouse-gas standards in the Rule, each Agency weighed required factors established by each Agency's governing statute (for EPA, the Clean Air Act; for NHTSA, the Energy Policy and Conservation Act). *Id.* at 24,177. This effort required extensive modeling and analysis of variables such as fuel prices, vehicle sales, traffic fatalities, vehicle miles traveled, environmental impacts, and multifaceted elements of automotive design and technology. *See generally id.* at 24,181-212 (summarizing the Rule). The resulting Federal Register notice—totaling 1,105 pages—details the complex and highly technical methodologies used and conclusions reached by each Agency. *Id.* at 24,174-25,278.

Petitioners filed nine petitions for review. One group of Petitioners—Competitive Enterprise Institute, et al. ("CEI")—challenges the Rule as being unduly stringent. A second group—State and Local Government Petitioners, Public Interest Organization Petitioners, and Advanced Energy and Transportation Petitioners (collectively, "Coordinating Petitioners")—challenges the Rule as being insufficiently stringent. A third group—Clean Fuels Development Coalition, et al. ("CFDC")—challenges the Rule's treatment of renewable fuels and flex-fuel vehicles. *See* Mot. at 10-13.

Two of these petitions purport to renew their challenges to the 2018 Mid-Term Evaluation, which was the subject of an earlier case—one that this Court has already

decided. *See California v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019). In denying the *California* petitions, the Court explained that the Mid-Term Evaluation itself is "akin to an agency's grant of a petition for reconsideration of a rule," *id.* at 1351, and is "not judicially reviewable final action," *id.* at 1353.

Here, this Court set a deadline for procedural motions of June 22, 2020. *See* ECF No. 1844068. No such motions were filed. Petitioners declined to file any petition to expedite this case. Respondents filed the administrative record on July 6, 2020. Petitioners then waited over seven weeks before filing two motions to supplement that record. ECF Nos. 1858308, 1858924 (August 25 and 28, 2020). State and Local Government Petitioners and Public Interest Organization Petitioners jointly requested the inclusion of six documents generated during the Rule's drafting that they say are "uniquely probative" of their claims. ECF No. 1858308 at 11. Petitioner CEI requested the addition of EPA's 2019 Integrated Science Assessment for Particulate Matter and two letters written by EPA's Clean Air Science Advisory Committee. ECF No. 1858924 at 1. Respondents' responses to the two motions are due on September 18, 2020, with replies due on September 25, 2020. *See* ECF No. 1861063; Fed. R. App. P. 27(a)(4) (providing seven days for reply briefs).

Also pending before this Court are five motions to intervene on behalf of Alliance for Automotive Innovation; several state and local governments; a group of public interest organizations; Ingevity Corporation; and a group of five automakers (with respect to remedy issues only). ECF Nos. 1844089, 1844912, 1845212, 1848163,

and 1849385 (respectively). Respondents opposed the last of those motions on July 9, 2020. ECF No. 1850961.

II. ARGUMENT

A. Petitioners' request is premature.

Petitioners' request to establish a schedule and format for merits briefing in this matter is premature. First, briefing is currently ongoing in two disputes over the scope of the administrative record and will not be completed before September 25. One of those disputes raises the prospect of amending the record to include thousands of additional pages of material. Doing so could expand the issues in dispute in this litigation.

Indeed, given the nature and scope of the dispute, Petitioners' motion to supplement specifically requests "that this Court order the Agencies to complete and supplement their administrative records *prior to merits briefing*, so that the parties may brief all issues in these complex cases with the record for review properly defined." ECF No. 1858308 at 12. Respondents dispute the factual and legal assertions in those motions but agree that merits briefing should be deferred until after record questions are fully resolved and any supplementation, if necessary, has occurred.

There are also five pending motions to intervene in this litigation. ECF Nos. 1844089, 1844912, 1845212, 1848163, and 1849385. Respondents opposed the last of these, filed by five automakers, on July 9, 2020, ECF No. 1850961, and movants responded on July 16, 2020, ECF No. 1851963. Until the Court acts on these motions

and, in particular, rules on the opposed motion, the number and alignment of intervenors in this case remains uncertain. A briefing proposal that seeks at this time to establish the timing and size and number of intervenor briefs is thus necessarily premature.

Respondents thus ask this Court to defer action on a briefing schedule until after those motions are resolved. At that time, the parties could still reach a compromise on at least some elements of a briefing proposal. So the Court, after resolving the pending motions, should issue an order allowing parties an orderly opportunity to discuss and potentially find agreement on a briefing proposal.

B. Petitioners' proposal is unworkable.

1. The proposed briefing intervals are unworkable.

If this Court nevertheless wishes to establish a briefing schedule now, then it should reject Petitioners' proposal as unworkable. Petitioners' proposed briefing interval for Respondents' opening brief is inadequate given the dates over which it falls and the nature of this case. Petitioners' proposal would give the Agencies 70 days to prepare its brief. But the federal government will only be open 65 of those days given five intervening federal holidays (Veteran's Day, Thanksgiving, Christmas, New Year's Day, and Martin Luther King, Jr. Day). And that 70-day period encompasses at least two weeks—the week of Thanksgiving and the week between Christmas and New Year's—when it is reasonable to expect that very few employees at NHTSA, EPA, or the Department of Justice will be available. Thus, under Petitioners'

proposal, Respondents would have significantly fewer days than the 70 days Petitioners purport to provide Respondents to draft a brief and obtain the necessary management approvals before filing.

That interval is insufficient given the Rule's sheer complexity. Even if this Court rejects Petitioners' unprecedented word counts (and especially if it does not), briefing this case in a compressed period will prejudice Respondents' defense. As Petitioners acknowledge, the Rule is "exceedingly complex" and "highly technical," Mot. at 15-16. This will be an unusually difficult, technical, and complex briefing and that should be reflected in the time afforded to brief the case.

This Court has commonly established longer briefing intervals in similarly complex cases. For example, in a recent challenge to EPA's ozone designations, the Court gave respondents 90 days to draft a 26,000-word brief. ECF No. 1764265. In litigation over EPA's Cross-State Air Pollution Rule Update, the interval was 91 days for a 30,000-word brief, ECF No. 1691655, later extended to 121 days, ECF No. 1704975. Two recent challenges concerning EPA's renewable fuels standards also had briefing intervals of at least 90 days. ECF No. 1802964 (97 days for a 26,000-word brief); ECF No 1740528 (90 days for a 26,000-word brief). None of those cases required coordination between two Agencies in addition to the Department of Justice, as this case does. Meanwhile, in challenges to EPA's greenhouse-gas standards for model years 2012-2016, where EPA and NHTSA were both respondents, the Court

gave the Agencies 90 days to write an opening brief that was only 14,000 words. ECF No. 1299440.[1]

Petitioners' proposed interval for Respondents is all the more insufficient given that in the related "SAFE I" case, *Union of Concerned Scientists v. EPA*, D.C. Cir. No. 19-1230, many of the same petitioners defended the necessity of longer briefing intervals. And that was in a case with a much shorter record (the Federal Register notice was only 54 pages; the 1105-page notice here is more than 20 times larger) and that concerned primarily legal issues. In the joint briefing proposal submitted in the SAFE I case, the petitioners requested a 78-day briefing interval, noting that "[t]his briefing interval is commensurate with other complex, multi-party litigation in this Court and is appropriate given that the Court already has determined that this case should not be expedited." ECF No. 1832077 at 5.

No party sought expedition here so that does not provide a basis to distinguish Petitioners' position between these cases. Meanwhile, the more complex and technical subject matter in this case supports extending the 78-day interval in SAFE I to the 90-

[1] Petitioners here also claim they need a minimum of 34 days to draft 23,000 words in reply "given the need to coordinate a shared word allotment, complete internal review processes of numerous state and local governments, and respond to multiple Intervenor briefs in addition to Respondents' briefs." Mot. at 9. Respondents' brief must similarly account for coordination of a shared word count between more than one agency; comply with independent review processes at EPA, NHTSA, and the Department of Justice; and respond to multiple briefs. And yet, Petitioners' proposal would give Respondents 70 days, or approximately twice that interval, to draft a brief that is more than three times the word length.

day interval Respondents are requesting below in this challenge to the SAFE II Rule. It surely does not countenance giving Respondents what is effectively significantly less than 70 days, especially where Petitioners are seeking far greater word limits.[2]

The specific timing of Petitioners' schedule is also problematic. Given the structure of review processes within the Agencies and the Department of Justice, this would put crucial stages of Agency and management review directly in the path of the Christmas and New Year's holidays. Without a lengthier briefing interval, Respondents will not be in a position to avoid likely scheduling conflicts.

Petitioners also fail to adequately justify the need for their proposed schedule. They claim the schedule is necessary because if argument does not occur in the spring Term, "it is quite likely" this Court will fail to decide the case before January 1, 2022, when model year 2021 ends and another model year commences. Mot. at 7. But an argument in early September, as Respondents propose, may indeed allow a decision in "Fall 2021," which is within Petitioners' preferred time frame. *See id.* (reflecting desire for decision in Summer or Fall 2021). And in any event, there is no inherent harm in allowing a lawfully promulgated rule to remain in place pending judicial review. Indeed, Petitioners had a mechanism available to address any such harm: they could

[2] The parties' joint request in SAFE I would have given those petitioners 78 days to draft 35,000 words, *id.*; the Court ultimately gave the petitioners 78 days to draft only 26,000 words, ECF No. 1843712, and that period was further extended to account for the COVID-19 pandemic.

have moved to stay the Rule or to expedite briefing, or both. They chose to do neither.

Petitioners now admit that their proposed schedule seeks to advance "expeditious resolution" of this case "without the need for an order formally expediting consideration." Mot. at 7. But an order expediting a case (or one staying a rule) is not a mere formality; it ensures that the burdens of doing so are justified according to the specific parameters required by Circuit law. Petitioners did not undertake to make those showings when they had the opportunity to do so, and they should not be allowed now to secure that relief by the backdoor, without the necessary legal showings.

The fact that the briefing interval suggested is comparable to two other cases cited by Petitioners does not prove that it is adequate here. Petitioners cite the briefing orders issued in *American Lung Ass'n v. EPA*, ECF No. 1826621, and *Mozilla Corp. v. FCC*, ECF No. 1743015, which gave EPA and the FCC 60 and 52 days respectively to draft their answering brief. Respondents do not dispute that they have, in previous cases, briefed rulemakings on similar, and indeed shorter, timeframes. But each rule and each case is unique. And as the prior examples show, numerous cases have been briefed on longer timeframes as well.

American Lung and *Mozilla* are also different in important respects. In particular, neither case required coordination between two federal agencies in addition to the Department of Justice. In addition, in *American Lung* Respondents had sought to

expedite the case and, although that motion was denied, the parties' interest in accelerating briefing was well established. The legal issues had also been in play for nearly five years already and no party proposed a schedule longer than the 60 days ordered by this Court. Importantly, in both cases the United States' own briefing proposal indicated that it believed it could suitably brief the issues within the timeframe allotted and so requested intervals equal to or less than those adopted. The United States does not so believe here.

2. Petitioners' proposed word counts are unreasonable.

Petitioners' proposed word counts are also insupportable. Their request for a total of 72,000 words for Petitioners' opening briefs would result in some *1000 pages* of briefing between opening briefs and replies – *not including* intervenor or amicus briefs. DOJ's Environmental Defense Section is not aware of *any* environmental case in the D.C. Circuit where a challenge to agency rulemaking has been granted a comparable word count.

To put that request in perspective, consolidated petitions challenging EPA's Clean Power Plan—a case that went directly to en banc review in this Court—had opening briefs of 42,000 words per side, despite the case's treatment of complex technical and modeling issues alongside significant legal issues. *West Virginia v. EPA*,

D.C. Cir. No. 15-1363, ECF No. 1595922.[3] Similarly, the *Wisconsin* case addressing EPA's Cross-State Air Pollution Rule had petitioners on both sides of the case—some asserting the rule was too stringent, some that it was too lax. That briefing also addressed complex EPA modeling that required significant explanation in the opening briefs. Nonetheless, opening briefs were limited to 30,000 words per side. ECF Nos. 1675267, 1691655, 1704975 (setting and resetting briefing schedule). While this is a complex and highly technical case, Petitioners have failed to demonstrate that they require these unprecedented word counts—amounting to approximately 1000 pages of briefing between Petitioners and Respondents alone—to address the challenged rulemaking.

Respondents recognize that the filed petitions include one petition asserting that the SAFE II Rule is unduly stringent. And, as noted below, Respondents do not dispute Petitioners' request to file separate briefs between the parties who oppose the Rule as too stringent and those that oppose it as insufficiently stringent. Respondents take no position on the number of briefs Petitioners should be allowed to file. But the word counts suggested here are unreasonable.

CEI, which challenges the Rule on the grounds that it is too stringent, and CFDC, which challenges the Rule's treatment of alternative fuels and flex-fuel

[3] Briefing in that case was expedited, so the schedule there does not bear on this case. *See* ECF No. 1594951.

vehicles, both claim a need for a full-length brief. Mot. at 3. Even if these Petitioners' interests are distinct from the other Petitioners, it does not follow that they require two full-length briefs in this case. Petitioners might reasonably coordinate to avoid duplicative recitations of the same statutory and regulatory background—which Coordinating Petitioners have suggested will occupy 6,000 words of their proposed briefing alone. *See* Mot. at 16. At the same time, CFDC fails to justify why the narrow scope of issues it raises warrants a full-length brief. Mot. at 11-12. These narrow issues, *see* 85 Fed. Reg. at 24,385-89, 25,227, can be addressed in less than 13,000 words, and any additional issues CFDC has can be suitably addressed by other Petitioners.

The parties challenging the Rule as insufficiently stringent, Coordinating Petitioners, likewise do not explain why they should be entitled to 46,000 words of briefing between them. That total, which comes out to nearly 250 pages of briefing, is unreasonable. On its face, this request does not comply with any reasonable reading of the Circuit Rules. *Even if* Coordinating Petitioners could establish that they are three distinct subgroups with disparate interests, and so were each entitled to their own full-length brief (which they are not), three full-length 13,000-word briefs would total 39,000 words. Petitioners do not attempt to explain why they need 7,000 words on top that already excessive sum.

But no matter, because Coordinating Petitioners do not in fact demonstrate that they have disparate views on the legality of Respondents' joint rulemaking

sufficient to warrant three distinct full-length (let alone over-length) briefs. Coordinating Petitioners' explanation of their planned arguments, Mot. at 16-22, does not indicate any issue on which these parties have a disagreement or that can be raised by only a single one of these Petitioner groups. The Circuit's practice handbook is clear that Petitioners with "common interests in consolidated . . . appeals"—as are the interests of Coordinating Petitioners—"must join a single brief where feasible." D.C. Cir. Handbook at 37. The handbook further reminds parties that it looks with "extreme disfavor" on duplicate briefs. *Id.*

This Court should reject the unsupported and erroneous assertion that Coordinating Petitioners have disparate or conflicting interests in this case—especially where the words allotted to this subset of aligned Petitioners alone would exceed the total words allowed all Petitioners in other major cases. *E.g.*, ECF No. 1595922 (42,000 word opening briefs in challenge to EPA's Clean Power Plan, which was argued before the en banc court); ECF No. 1675267 (30,000 word opening briefs in multi-party challenge to EPA's Cross-State Air Pollution Rule Update).

Coordinating Petitioners' non-binding proposed word allocations further demonstrate that the proposed word counts are unwarranted. For example, they indicate that they will spend 1,500 words, or approximately 8 pages, on standing. In the related SAFE I briefing, a roughly identical group of petitioners briefed standing in half that amount. *See* ECF Nos. 1849316 at 26-27, 1849201 at 2-4. Petitioners state that they plan to spend 3,000 words, or nearly a quarter of a standard-length brief, just

summarizing their arguments. And they claim the need for "substantial additional words" to challenge EPA's 2018 Mid-Term Evaluation. Mot. at 16, 17 (anticipating 2,500 words dedicated to this argument). But Petitioners already challenged that action and lost. *See California,* 940 F.3d at 1345. This Court concluded that the Mid-Term Evaluation "does not determine rights or obligations or establish legal consequences within the meaning of the *Bennett* test's second prong." *Id.* at 1350. Accordingly, it "is not judicially reviewable final action." *Id.* at 1353. Petitioners do not get to re-litigate that question.[4]

Finally, as noted below, Respondents see no reason to diverge from this Court's rules providing for reply briefs of half the length of a party's opening brief. For that reason, Respondents oppose CEI's and CFDC's requests for an over-length reply brief, Mot. at 3.[5] *See, e.g.*, ECF No. 1826621 (*American Lung* reply brief set at half the length of opening briefs, notwithstanding respondent-intervenor briefs); ECF No. 1743105 (same in *Mozilla*); ECF No. 1299440 (same in *Coalition of Responsible Regulation*); ECF No. 1764265 (same in *Clean Wisconsin*).

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[4] Petitioners misleadingly suggest this Court held that the claims were "unripe." *See* Mot. at 16. The Court never considered ripeness and, to the contrary, concluded that the Mid-Term Evaluation "itself did not alter the standards in place for [model years 2022-2025" (which is the action taken instead by the Rule here) and so was not "judicially reviewable." *Id.* at 1350.

[5] Coordinating Petitioners have requested a reply brief that is half the size of the opening brief. Mot. at 3. Respondents do not object to this proportion, although we object to the proposed size—23,000 words—for the same reasons we object to the size of the opening brief.

C. Respondents' proposal is reasonable and should, in the alternative, be granted.

If this Court is inclined to establish a briefing proposal at this time, Respondents request that it enter the following proposal, providing for 90-day briefing intervals for opening briefs:

Briefs for Petitioners (not to exceed 32,000 words; split at Petitioners' or this Court's discretion)	January 14, 2021
Brief(s) of Amici Curiae for Petitioners or No Party (each brief not to exceed 6,500 words)	January 21, 2021
Brief of Respondents (not to exceed 32,000 words)	April 14, 2021
Brief(s) of Amici Curiae for Respondents (each brief not to exceed 6,500 words)	April 21, 2021
Briefs of Intervenor-Respondents (up to four briefs, not to exceed a combined total of 22,400 words)[6]	April 28, 2021
Reply Briefs for Petitioners (not to exceed 16,000 words; split at Petitioners' or this Court's discretion)	May 31, 2021
Deferred Appendix	June 7, 2021
Final Briefs	June 14, 2021

[6] The proposed 22,400 limit here does not include the five automakers seeking to intervene only as to remedy.

This proposal gives Petitioners and Respondents 90-day intervals to file their opening briefs. Those intervals would commence three weeks after the parties finish briefing the two pending motions to supplement the agencies' administrative records. *See* ECF Nos. 1858308, 1858924. Briefing on the scope of the administrative record is expected to conclude on September 25, 2020. Allowing three weeks thereafter for this Court's consideration of those motions would allow resolution of those issues, which Petitioners acknowledge "will substantially affect the content of Petitioners' merits briefs." Mot. at 8. It will also allow additional time for the Court to rule on the pending motions to intervene, including the opposed motion, which will finalize the sets of parties participating in this lawsuit. The additional three-week period also affords Petitioners any additional time necessary to account for the fact that the proposed briefing interval for Petitioners will fall over the Thanksgiving and winter holidays.

Respondents' schedule also allows 47 days for preparation of reply briefs, which is half the briefing interval set for opening briefs, rounded to the next the workday. This is consistent with typical practice, *see, e.g.*, ECF Nos. 1299440, 1595922, 1843712, and slightly longer than the 34-day timeframe Coordinating Petitioners say is the minimum they require for drafting reply briefs. Mot. at 9.

As established above, 90-day briefing intervals are reasonable in this case given the highly technical and complex record, and the need to coordinate between two Agencies in addition to the Department of Justice. Ninety-day intervals also align with

the briefing intervals ordered in other complex cases in this Circuit where no party sought expedition. And they would allow for argument early in the fall of 2021, which is reasonable in the absence of expedition.

The requested period also takes account – as Petitioners' schedule does not – of the time lost to scheduled leave and federal holidays over Thanksgiving, Christmas and the winter holidays, and New Year's.

Respondents' proposed 32,000 word limit for opening Petitioner and Respondent briefs reflects the fact that there are two groups of aligned Petitioners challenging the rule as unduly stringent (CEI) and insufficiently stringent (Coordinating Petitioners), as well as a third group of Petitioners who raise a narrow and discrete set of issues concerning alternative fuels and flex-fuel vehicles (CFDC). This proposal reflects Respondents' expectation that Petitioners will comply with this Court's guidance that parties with common interests join a single brief and avoid duplicate filings.

Respondents take no position on the number of briefs to be filed within the total word limit provided and leave to Petitioners' or the Court's discretion how to best allocate that total among the three types of issues.

Respondents have provided Intervenors with a collective word limit equivalent to 70 percent of the word limit for opening briefs, consistent with the proportion established by Federal Rule 32(a)(7)(B)(i) and Circuit Rule 32(e)(2)(B)(i). Respondents understand that Movant-Intervenor Alliance for Automotive Innovation will be

separately requesting that it be allocated 9,100 words for its brief because it is the only movant-intervenor proposing to represent full-line vehicle manufacturers on all merits issues in this litigation. The United States supports that allocation.

Respondents' remaining proposals accord with Federal and Circuit Rules. Respondents have provided word limits for amici curiae consistent with Federal Rule 29(a)(5). And Respondents have provided a total word limit for reply briefs that is 50 percent of the limit for opening briefs, consistent with Federal Rule 32(a)(7)(B)(ii).

CONCLUSION

For the reasons provided above, Respondents respectfully request that this Court deny Petitioners' motion and defer the establishment of a briefing schedule and format until after all pending motions are decided. In the alternative, Respondents request that the Court grant Respondents' proposed briefing schedule and format.

DATED: September 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify that the foregoing complies with the type-volume limitation because it contains 4,828 words, according to the count of Microsoft Word.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2020, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system. I also hereby certify that the foregoing was served by U.S. postal mail upon the following attorney of record, who is not registered with the Court's CM/ECF system:

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/s/ Chloe H. Kolman
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