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.	No. 19-1230 (and consolidated cases)

MOTION TO HOLD CASES IN ABEYANCE PENDING IMPLEMENTATION OF EXECUTIVE ORDER AND CONCLUSION OF POTENTIAL RECONSIDERATION

The United States, on behalf of Respondents National Highway Traffic Safety Administration ("NHTSA") and the United States Environmental Protection Agency ("EPA"), et al. (collectively "Federal Agencies"), hereby moves the Court to place these cases in abeyance, pending the Federal Agencies' implementation of an Executive Order signed on January 20, 2021. That Executive Order directs the Federal Agencies to immediately review and potentially rescind or revise the joint agency action at issue in this case (the "One National Program Action" or the "Action"). In light of this Presidential directive, the One National Program Action is under close scrutiny by the Federal Agencies, and the positions taken by the Agencies

in this litigation to date may not reflect their ultimate conclusions. The Federal Agencies should be afforded the opportunity to fully review the Action consistent with the Executive Order and the Agencies' respective statutory authorities.

Accordingly, the United States respectfully requests that this Court hold these cases in abeyance while the Agencies conduct their review. The United States requests that the abeyance remain in place until 30 days after the conclusion of review and any resulting agency action, with motions to govern further proceedings due upon expiration of the abeyance period. As discussed further below, such abeyance will promote judicial economy by avoiding unnecessary adjudication and will support the integrity of the administrative process.

Respondents contacted coordinating counsel for Petitioners and Respondent-Intervenors regarding their positions on this motion. All Petitioners state that they do not oppose this motion. Respondent-Intervenor States state that they will oppose the motion. Respondent-Intervenor American Fuel & Petrochemical Manufacturers states that it takes no position on the motion. Respondent-Intervenors the Coalition for Sustainable Automotive Regulation and the Automotive Regulatory Council state that they consent to the motion.

BACKGROUND

On September 27, 2019, NHTSA and EPA jointly issued the "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program." 84 Fed. Reg. 51,310 (the "One National Program Action" or the "Action"). This

Action addressed the authority of California and other states to regulate greenhouse gas emissions from light-duty motor vehicles. Specifically, NHTSA issued for the first time a set of "preemption" regulations, stating that statutory language in the Energy Policy and Conservation Act barring state laws and regulations "related to fuel economy standards," 49 U.S.C. § 32919(a), preempts state and local tailpipe greenhouse-gas emission standards and zero-emission-vehicle sales mandates for light-duty vehicles. The joint Action also included EPA's determination to withdraw those portions of the 2013 waiver issued pursuant to Clean Air Act Section 209, 42 U.S.C. § 7543(b), that had allowed California to adopt such greenhouse-gas emission standards and zero-emission vehicle sales mandates. EPA's portion of the One National Program Action also put forward an interpretation of Clean Air Act Section 177, 42 U.S.C. § 7507, stating that this provision should be read to allow other states to adopt California's vehicle standards for criteria pollutants, but not its vehicle standards for greenhouse gases. *See generally* 84 Fed. Reg. 51,310.

The joint Action was challenged by numerous states and municipalities, environmental and public interest organizations, and energy and industry groups in ten petitions for review. These petitions were consolidated under the lead case *Union of Concerned Scientists v. NHTSA*, D.C. Cir. No. 19-1230. Merits briefing was completed on October 27, 2020. *See* ECF No. 1843712. Oral argument has not yet been scheduled.

On January 20, 2021, President Joseph R. Biden Jr. signed Executive Order 13990 on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). The Executive Order establishes a policy to:

> listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

Id. (Section 1). To that end, the Executive Order specifically directs "all executive departments and agencies . . . to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id.*

That Executive Order specifically identified the One National Program Action as potentially in conflict with new federal policy. *Id.* (Section 2). Under the Executive Order, the Federal Agencies, "as appropriate and consistent with applicable law, shall consider publishing for notice and comment a proposed rule suspending, revising, or

rescinding" the One National Program Action "by April 2021." *Id.* at 7037-38 (Section 2(a) & 2(a)(ii)).

ARGUMENT

The Executive Order specifically directing review of this Action marks a substantial new development that warrants holding this litigation in abeyance. The Federal Agencies should be afforded the opportunity to respond to the Executive Order by reviewing the One National Program Action in accordance with the new policies and on the timetable set forth in the Order. Abeyance will further the Court's interests in avoiding unnecessary adjudication, support the integrity of the administrative process, and ensure due respect for the prerogative of the executive branch to reconsider the policy decisions of a prior Administration.

It is well-established that agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*"); *see also Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) (addressing informal adjudication). Agencies' interpretations of statutes they administer are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d

1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "'[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations'" (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part))). Courts may defer judicial review of a final action pending completion of reconsideration proceedings. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*").

With these principles in mind, and based on recent developments, abeyance is warranted in this case. The President of the United States has directed the Federal Agencies to "immediately review" the One National Program Action, and to consider action "suspending, revising, or rescinding" it within the next three months. 86 Fed. Reg. at 7037-38 (Section 2(a) & 2(a)(ii)). Given this explicit direction, and the relatively short timeframe on which the Agencies are directed to conduct such a review, "[i]t would hardly be sound stewardship of judicial resources to decide this case now." *API*, 683 F.3d at 388. Abeyance would allow the Federal Agencies to "apply [their] expertise and correct any errors, preserve[] the integrity of the administrative process, and prevent[] piecemeal and unnecessary judicial review," *id.*, while furthering the policy set forth in the Executive Order.

Abeyance is also warranted to avoid the prospect of holding oral argument in the midst of the new Administration's review of the Action at issue in this case.

Merits briefing in this case has concluded but oral argument has not yet been scheduled. Were the Court to deny this motion and schedule this matter for argument, counsel for the United States would likely be unable to represent the current Administration's position on the many substantive questions that are the subject of that nascent review. Nor would it be proper for counsel to speculate as to the likely outcome of the current Administration's review, as any such speculation could call into question the fairness and integrity of the ongoing administrative process.

Notably, granting abeyance here would also be consistent with this Court's past practice. For example, a similar 2008 challenge to EPA's denial of a California Section 209 waiver request was held in abeyance in early 2009, after a change in presidential administrations prompted EPA to reconsider its denial decision. *See California v. EPA*, D.C. Cir. No. 08-1178, ECF No. 1167136 (granting abeyance request). The Court later granted the petitioners' request to have the case voluntarily dismissed after EPA granted the waiver upon reconsideration. ECF No. 1204414; *see also, e.g.*, *Am. Petroleum Inst. v. EPA*, D.C. Cir. No. 13-1108, ECF No. 1675813 (challenges to Clean Air Act regulation of oil and gas sources placed in abeyance after presidential transition); *North Dakota v. EPA*, D.C. Cir. No. 15-1381, ECF Nos. 1673072 & 1688176 (challenges to Clean Air Act regulation of new power plants placed in abeyance after presidential transition); *Texas v. EPA*, D.C. Cir. No. 17-1021,

ECF No. 1715548 (challenges to Clean Air Act regional haze regulations placed in abeyance after presidential transition).

Abeyance also will not prejudice any party. None of the Petitioners challenging the One National Program Action opposes the requested abeyance of judicial proceedings. Respondent-Intervenor States do oppose abeyance, but Respondent-Intervenors face no harm arising from the postponement of judicial review of the Action, which remains in effect.

WHEREFORE, the United States requests that this Court hold these cases in abeyance while the Federal Agencies conduct their review of the Action, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting agency action, with motions to govern further proceedings due upon expiration of the abeyance period.[1]

Respectfully submitted,

JEAN E. WILLIAMS
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DATED: February 1, 2021

/s/ Chloe H. Kolman
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[1] The United States is willing to provide status reports at regular intervals during the abeyance period (Respondents suggest every 120 days) if the Court would find that useful.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion to Hold Cases in Abeyance complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond font, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 1,714 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 1st day of February, 2021.

/s/ Chloe H. Kolman
CHLOE H. KOLMAN