ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK TRAILER MANUFACTURERS ASSOCIATION, INC., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents, and CALIFORNIA AIR RESOURCES BOARD, *et al.*, Intervenors.	No. 16-1430 (consolidated with No. 16-1447)

Reply in Support of Motion to Lift Abeyance and Set Briefing Schedule

Last March, EPA and NHTSA met with petitioner Truck Trailer Manufacturers Association (TTMA) and urged TTMA to delay filing this motion. TTMA advised the agencies that it intended to move to lift the abeyance in summer 2019 to facilitate a decision by 2020, in advance of the regulatory compliance date of January 2021. But, at the meeting, the agencies asked TTMA to wait on the ground that the forthcoming May 2019 Unified Agenda and

Regulatory Plan would provide a firm timetable for reconsideration and issuance of a Notice of Proposed Rulemaking concerning the trailer aspects of the Final Rule. After reviewing the May 2019 regulatory agenda—which stated that the notice of proposed rulemaking would issue in October 2019—TTMA agreed to wait. When the agencies submitted their November 5, 2019 status report to this Court and issued the November 18, 2019 regulatory agenda making clear that they would not issue an NPRM as planned, TTMA sought to reach EPA and NHTSA by telephone and email. TTMA sought to address the agencies' progress and TTMA's need for regulatory certainty in advance of the 2021 NHTSA compliance date. The agencies did not respond and TTMA promptly filed this motion.

The government's response—which chastises TTMA for "wait[ing]" to file this motion, without disclosing that TTMA did so at the government's behest—is troubling. U.S. Opp. 4. TTMA waited as long as it did in an effort to avoid unnecessary litigation and in light of the government's repeated statements that it was in the process of reconsidering the rule. Federal agencies should not string regulated parties—and this Court—along for years with illusory commitments and then blame the regulated industry for not discerning earlier that the agencies were in fact *not* going to act.

TTMA's motion does not seek expedition—as the government and intervenors puzzlingly claim—but simply seeks to set a briefing schedule as

provided in the Federal Rules of Appellate Procedure. TTMA respectfully requests that the Court enter the briefing schedule set forth below, which will permit the Court to hear argument in May 2020 and to decide the case in advance of the January 2021 compliance deadline.

PROPOSED SCHEDULE

In light of the government's conflict in March (see U.S. Opp. 3 n.2) and the intervenors' request to file their brief after the government's brief, TTMA now proposes the following schedule:

- TTMA's Opening Brief: Wednesday, January 15
- Agencies' Answering Brief: Friday, February 14
- Intervenors' Briefs: Friday, February 21
- TTMA's Reply: Friday, March 6
- Deferred Joint Appendix: Friday, March 13
- Final Briefs: Friday, March 20

This schedule would allow the Court to hear argument in May 2020. *See* D.C. Cir. Handbook of Practice & Internal Procedures at 48 (stating that the Court typically allows 45 days between the close of briefing and oral argument). And this schedule shortens no party's time other than TTMA's own, including 14 days for reply instead of 21. It is not "truncated." Private Intervenor Opp. 7. Although the government and the intervenors all contend that TTMA is seeking to "expedite" the case and must show "irreparable injury" to obtain the proposed schedule, U.S. Opp. 4; *see* State Intervenor Opp. 7, that is incorrect. TTMA's motion asks the Court to lift the abeyance and set a briefing schedule that would

permit decision—at the earliest—*three and a half years* after the appeal was filed. It is not a disguised "motion for expedition" under the D.C. Circuit handbook. D.C. Cir. Handbook of Practice & Internal Procedures at 33-34. It is a request for a standard briefing schedule for the government and the intervenors.

The government says that EPA "typical[ly]" receives 60 days to respond to a petition for review, but Federal Rule of Appellate Procedure 31 provides for 30 days. To be sure, the government often receives an *extension* of time, but it should not under the circumstances here, where its own conduct has led to the time crunch. As noted, TTMA would have filed this motion this summer and so informed the government. TTMA held off only because the government advised TTMA in March 2019 that its spring unified regulatory agenda would contain a firm schedule for reconsideration, and because that schedule in fact specified an October 2019 date for the proposed rule. When the government induces a litigant *not* to seek to lift an abeyance based on commitments about a schedule for government reconsideration that turns out to be wrong and provides no notice or explanation of that change, the Court should not extend the briefing schedule to accommodate the government.

And extending the briefing schedule would cause significant prejudice to TTMA's members, for reasons no party seriously disputes: the NHTSA rule takes effect in January 2021, and TTMA's members will need substantial advance lead

time to bring their trailers into compliance. The government contends that the prejudice will not occur until later this year and that TTMA could seek a stay of the NHTSA portion of the rule at that time. U.S. Opp. 5. But stays are the exception, not the rule; and they are unnecessary when the Court could set a briefing schedule that both provides all parties the time to which they are entitled under the federal rules and would allow the Court to decide the case without any need for TTMA to seek a stay.

Neither the government nor the intervenors cite any authority for the notion that a party's possible ability to satisfy the stay factors in the future justifies a delayed briefing schedule that could prevent a decision on the merits in time for the party to obtain relief in the normal course. Moreover, obtaining a stay is more difficult than winning an appeal because TTMA must not only show likelihood of success on the merits, but irreparable injury. Although TTMA's members will face irreparable injury in the absence of relief before January 2021, TTMA's right to review does not and should not depend on its ability to satisfy the requirements for a stay.

The government also notes that, under its proposed schedule—which gives the government 70 days to draft its brief—"briefing would be completed by early July" and the Court could issue a decision before January 2021. U.S. Opp. 5. But if briefing pushes into the summer, the Court could hear argument in September

2020 at the earliest, and decisions of this Court often taken substantially longer than three months to issue. A May 2020 argument date would allow the Court to reach a decision before 2021 if it so chooses without an unnecessarily jammed time for decision. In light of the fact that this case has been in abeyance for three years at the request of the government and in service of an illusory commitment to rulemaking that the government claimed could obviate the need for litigation, any compression should be in the briefing schedule, not the Court's time for decision.

The government also contends that more time is necessary because this case is "not typical" and involves a "major rule jointly promulgated" by two agencies. U.S. Opp. 3. But TTMA challenges an exceptionally narrow aspect of the rule, namely, whether a "trailer" is a "motor vehicle" within the meaning of the Clean Air Act (under which EPA claims authority to regulate) and a "vehicle" within the meaning of the Energy Independence and Security Act (under which NHTSA claims authority to regulate). These are straightforward questions of statutory interpretation of the sort this Court considers every day. The agencies presumably have been working together for the past three years to assess their position and whether they continue to believe that they have legal authority to regulate trailers under these provisions. And the parties already have briefed the Clean Air Act question, after which this Court stayed the EPA portion of the rule.

Finally, the Court should not grant the intervenors' requests for (1) thirty days rather than the usual seven to respond to the government's briefs and for (2) double the allotted word count for their response briefs. Seven days between the respondent and intervenor briefs is the gap provided for in this Court's rules. *See* D.C. Cir. Rule 28(d)(3); *see* D.C. Cir. Handbook of Practice & Internal Procedures at 37 ("[T]he Clerk's Office will stagger the briefing so that intervenors and *amici curiae* file their briefs seven days after the brief of the party they support."). And it is the norm in this Court, including in challenges to major rules. *Windsor Redding Care Center, LLC v. NLRB*, No. 18-1299 (Feb. 21, 2019); *California v. EPA*, No. 18-1114 (Jan. 11, 2019); *Flat Wireless, LLC v. FCC*, No. 18-1271 (Dec. 3, 2018); *City of Oberlin v. FERC*, No. 18-1248 (Nov. 5, 2018); *INEOS USA LLC v. FERC*, No. 18-1081 (Sept. 11, 2018); *Mozilla Corp. v. FCC*, No. 18-1051 (July 30, 2018); *Oglala Sioux Tribe v. NRC*, No. 17-1059 (May 18, 2017); *Sustainable Energy & Econ. Dev. Coal. v. NRC*, No. 16-1108 (Oct. 7, 2016).

The intervenors come up with only a handful of exceptions over the last twenty years. The *Wisconsin v. EPA* case that the intervenors cite was nothing like this case; it involved seventeen consolidated petitions and dozens of parties, and the parties all *agreed* to an exception to the seven-day rule. TTMA would ordinarily be happy to accommodate the intervenors' request for an exception, but

since that request would make it impossible for the Court to hear the case this term, TTMA asks the Court to apply the ordinary rule.

The intervenors argue that the government may decide not to defend the rule, but the only position the government has articulated thus far is that it will take no position in the litigation pending completion of its rulemaking. When TTMA sought a stay of the EPA portion of the rules, the government filed a three-page response stating that "EPA is unable to represent its ultimate conclusions on these issues at this time" because of the pending rulemaking. Response to Stay Motion at 3 (Oct. 12, 2017). The rulemaking will still be pending at the time this case is briefed, meaning that the government may well say nothing of substance in its briefs. If the government does decide to affirmatively argue that the rule is unlawful, and if the government's arguments are substantially different than TTMA's such that intervenors cannot respond in seven days, they can approach the Court for an extension at that time. But given the likelihood that the government's brief will not require a response at all, the intervenors certainly have not shown the requisite "extraordinarily compelling reason[]" to quadruple the ordinary time for filing their response. D.C. Cir. Rule 28(e)(1).

Nor should the Court double the word limits and give both sets of intervenors 9,100 words for their response briefs, for a total of 18,200. This Court grants motions to extend a brief's word limits only for "extraordinarily compelling

reasons." D.C. Cir. Rule 28(e)(1). In cases vastly more complex than this one, the Court has ordered state and environmental intervenors who are on the same side to share 12,600 words between their two briefs. *See* Briefing Order, *Wisconsin v. EPA*, No. 16-1407 (May 15, 2017) (involving challenge to EPA rule requiring upwind states to reduce pollution affecting downwind states). The Court should order the intervenors to share the ordinary 9,100 words. There is certainly no justification for granting the intervenors 18,200 words—5,200 more words than the *petitioner* will receive.[1]

CONCLUSION

The Court should adopt TTMA's proposed briefing schedule, and TTMA respectfully requests that the Court set argument in May.

[1] Petitioners in No. 16-1447, the Racing Enthusiasts and Suppliers Coalition, have filed a response asking the Court to continue the abeyance of their petition. TTMA does not seek to lift the abeyance in No. 16-1447, which raises issues that are entirely distinct from the issues raised in TTMA's petition. TTMA asks the Court to set a briefing schedule for TTMA's petition, No. 16-1430.

Dated: December 16, 2019

Respectfully submitted,

/s/ Elisabeth S. Theodore

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,985 words, excluding the parts of the filing exempted by Fed. R. App. P. 32(f). The filing complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because it was prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: December 16, 2019

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019 the foregoing was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

Dated: December 16, 2019

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