ORAL ARGUMENT NOT 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

JOINT PROPOSED BRIEFING FORMAT AND SCHEDULE

Pursuant to the Court's February 4, 2020 order, all Petitioners, Respondents, and Respondent-Intervenors (collectively, "Parties") in the above-captioned consolidated petitions for review respectfully submit this joint proposal for a briefing format and schedule. A brief background for this joint proposal is set forth in Part I, below. The Parties' proposal and the Parties' detailed justifications in support of that proposal are set forth in Part II, below.

I. BACKGROUND

Petitioners challenge a set of related final actions published jointly under the heading: "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One

National Program," 84 Fed. Reg. 51,310 (September 27, 2019). The National Highway Traffic Safety Administration ("NHTSA") finalized regulations stating that the Energy Policy and Conservation Act preempts state regulation of tailpipe greenhouse-gas emissions and zero-emission vehicles. The Environmental Protection Agency ("EPA") finalized a withdrawal of aspects of a 2013 Clean Air Act preemption waiver that it had previously granted to the State of California under Clean Air Act Section 209(b), 42 U.S.C. § 7543(b), and also finalized a determination that states other than California cannot use Clean Air Act Section 177, 42 U.S.C. § 7507, to adopt California's greenhouse-gas emission standards for vehicles.

This Court has consolidated the eight petitions for review that challenge various components of the NHTSA and EPA actions described above. Petitioners are 23 states, three cities, and the District of Columbia; eleven public-interest organizations; three California air quality management districts; several power companies; Advanced Energy Economy; and the National Coalition for Advanced Transportation.

Respondents are NHTSA and Acting Administrator James Owens; the Department of Transportation and Secretary Elaine L. Chao; and EPA and Administrator Andrew Wheeler (together, "Respondents" or the "Agencies").

Three groups of Intervenors have also joined the case in support of Respondents: a group of thirteen states; a coalition representing automakers (the

Automotive Regulatory Council, Inc., and the Coalition for Sustainable Automotive Regulation); and the American Fuel & Petrochemical Manufacturers.

In December 2019, Respondents and Respondent-Intervenor Automakers moved for expedited consideration of these petitions, *see* ECF Nos. 1820782 & 1821514, and State and Environmental Petitioners moved for the petitions to be held in abeyance, *see* ECF Nos. 1821653 & 1821672. By order dated February 4, 2020, the Court denied both sets of motions and ordered the parties to submit within 30 days a proposed format for the briefing of all issues in these consolidated cases. *See* ECF No. 1826992.

II. JOINT BRIEFING SCHEDULE AND FORMAT

A. Summary of the Parties' Joint Proposal for Briefing Schedule and Format

The Parties' proposed briefing schedule and word allocations are as follows:

Brief or Filing	**Date Due**	**Words**
Petitioners	Friday, May 22	35,000 total, shared between up to 4 briefs
Amici curiae supporting petitioners and amici curiae supporting neither party, if any	Friday, May 29	
Respondents	Wednesday, Aug. 5	35,000 total
Amici curiae supporting respondents, if any	Wednesday, Aug. 12	
Intervenors supporting Respondents	Monday, Aug. 17	24,500 total, shared between 2 briefs
Petitioners (reply)	Tuesday, Sept. 8	17,500 total, shared between up to 4 briefs
Deferred Appendix	Tuesday, Sept. 15	
Final briefs	Monday, Sept. 21	

This Court "strongly urged" the Parties to agree to a proposed briefing format and schedule, ECF 1826992, at 2. Despite significant divergence between the Parties as to the appropriate word limits and schedule, the Parties negotiated extensively and have reached the global compromise above that they respectfully request that this Court adopt.

In further support of this compromise, each side presents below its own justification (prepared by the party or parties noted[1]) for requesting briefing intervals

[1] Although the Parties agree on the briefing schedule and format proposed here, the positions presented in the descriptions below are provided by the respective parties

lengthier than provided by Circuit rules, requesting separate briefs, and for requesting word allotments from this Court beyond the standard allotment under Circuit rules.

B. Petitioners' Rationale for Proposed Briefing Format

1. Rationale for Briefing Intervals

Petitioners request a deadline for principal briefs of May 22, 2020, or 78 days after submission of this joint proposal. This 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. As discussed further below, Petitioners include numerous parties with diverse sets of interests, including nearly half the Nation's states. Petitioners need an extensive coordination period to avoid duplicative briefs and present the numerous and momentous issues in this case as efficiently and effectively as possible under the word limits on which the Parties have compromised.

Petitioners propose that their reply briefs be due 34 days after Respondents' brief and 22 days after Intervenors' briefs. This modest enlargement of the period provided by Circuit rules is necessary to ensure that Petitioners can coordinate their reply briefs during the month of August 2020 and have time to adequately respond to briefs of Respondents, Intervenors, and any amici curiae.

2. Rationale for Separate Briefs

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and are not accepted or endorsed by opposing parties. The Parties reserve their right to oppose any legal arguments presented in these statements in their merits briefs.

There are four distinct Petitioner groups (described below), each with markedly different legal statuses and litigation perspectives. Each group will work diligently to avoid unnecessary duplication of argument and to join in parts of others' briefs where possible, but each group intends to raise distinct arguments and to rely upon distinct record submissions. Petitioners also may be able to join in a separate, single brief to present a limited set of issues where their interests and arguments are fully aligned, but Petitioners have not been able to determine at this early stage whether that will be feasible. To accommodate the different possible briefing permutations and allow Petitioners to brief the case as efficiently as possible within the above-mentioned constraints, Petitioners request leave to submit up to four separate principal briefs and up to four separate reply briefs.

State and Municipal Petitioners are 23 States, the District of Columbia, and the cities of Los Angeles and New York, and the City and County of San Francisco. NHTSA's and EPA's actions restrict these petitioners' authority to adopt and enforce their own pollution-control laws. The California Air Resources Board, in particular, has been a co-regulator in this field for decades and is the agency that sought and received the federal-preemption waiver that EPA has revoked. Only State and Municipal Petitioners can adequately defend their interests in preserving their own sovereign authority, and their decades of experience administering pollution-control laws give them a unique perspective on why the actions under review are unlawful. This Court ordinarily does not compel governmental petitioners to join in a single

brief with other petitioners, *see* D.C. Cir. R. 28(d)(4) and 29(d), and there is no reason to depart from that sound practice here.

Air Quality Management District Petitioners are the South Coast, Bay Area, and Sacramento Metropolitan Air Quality Management Districts. These districts "are the mechanism through which the State [of California] meets and maintains state and federal air quality standards under the federal Clean Air Act and California law." *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 782 (9th Cir. 2005). South Coast Air Quality Management District is responsible for an area with some of the worst air-quality problems in the country, which gives it a special perspective on the issues in this case. South Coast also raised many unique arguments in comments on NHTSA's and EPA's proposal. *See* 84 Fed. Reg. at 51,311, 51,315, 51,317–19, 51,321–22, 51,324, 51,326–28, 51,354 (responding to those unique arguments).

Public-Interest Organization Petitioners are eleven regional and national nonprofit organizations committed to protecting public health and the environment by reducing air pollution from new motor vehicles. Collectively, these organizations count millions of members throughout the country affected by NHTSA's and EPA's actions. These organizations have broad expertise in the legal, administrative, technical, environmental, and public-health aspects of controlling automobile emissions. In addition to submitting extensive comments on the agencies' joint proposal, many of these organizations participated in earlier administrative and judicial proceedings to support the state emission-control laws that the agencies have

now declared invalid. Public-Interest Organization Petitioners raised unique arguments in their comments to the agencies and will do the same in this Court. Given their unique interests and arguments, it is not feasible for Public-Interest Organization Petitioners to join in a single brief with any other group of petitioners.

Industry Petitioners are Advanced Energy Economy, National Coalition for Advanced Transportation, Power Companies Climate Coalition, New York Power Authority, Calpine Corporation, National Grid USA, and Consolidated Edison, Inc. Collectively, these petitioners represent the interests of (1) electric vehicle manufacturers, which are directly regulated by the agency actions under review, (2) other business interests invested in the development and adoption of advanced transportation technologies, and (3) electric utilities and generators adversely affected by the challenged actions because they would prevent states from requiring automakers to deploy electric vehicles in the numbers and on the schedule needed to realize the full benefits of the investments these utilities and generators are making to support integration of vehicles to the electricity grid. These petitioners have financial stakes in preserving state authority to limit automobile emissions and can demonstrate how the factual predicates for NHTSA's and EPA's actions are invalid. Given their unique interests and perspectives, it is infeasible for Industry Petitioners to join in a single brief with any other petitioner group.

3. Rationale for Word Allocations

In these unusually complex cases, Petitioners challenge three unprecedented actions taken by two federal agencies, NHTSA and EPA. The agencies published all three actions in a single Federal Register notice, but Petitioners believe that each action is distinct and raises novel and complex constitutional and statutory issues, concerning both the agencies' power to act and the bases for the actions, as well as a number of complicated record-based arguments about decades of past agency actions and legal interpretations; and the environmental and economic impacts of the automobile industry. The statutes at issue here have lengthy, relevant statutory histories, and all of the actions here are novel and consequential, especially to the States whose long-standing regulatory authority the agencies have declared to be invalid. Petitioners require a substantial increase in the usual word allotments to adequately present these issues to the Court. Petitioners believe that far more words than requested here are appropriate to brief all the important legal issues fully and fairly. But in the interest of compromise and certainty, Petitioners have agreed to the word allocations above. A detailed justification for this request follows.

a. **Standing (2,000 words)**[2]
b. **Background and other required sections of briefs (7,750 words total)**
    1. Statements of the case (4,750 words)
    2. Summaries of argument (2,500 words)
    3. Statements of jurisdiction, statements of issues, standards of review, conclusions (500 words)

[2] Word allocations in parentheses reflect estimated aggregate words across all principal briefs to be filed by Petitioners. Petitioners reserve the right to add or subtract issues and vary word allocations in their final briefs.

c. Argument: NHTSA's regulations (12,250 words total)

1. Statutory subject-matter jurisdiction (3,750 words)
2. Exceedance of statutory authority (1,500 words)
3. Impermissible statutory construction (4,500 words)
4. Arbitrary and capricious findings and conclusions (1,500 words)
5. Violation of National Environmental Policy Act (1,000 words)

d. Argument: EPA's Waiver Revocation (11,000 words total)

1. Exceedance of statutory authority (2,500 words)
2. EPCA rationale – arbitrary, capricious, contrary to law (1,000 words)
3. Clean Air Act rationale (7,500 words total)
    i. Impermissible statutory constructions (5,000 words)
    ii. Arbitrary and capricious findings (2,500 words)

e. Argument: EPA's Section 177 Determination (2,000 words total)

1. Exceedance of statutory authority (500 words)
2. Impermissible statutory construction (1,500 words)

Standing – Each petitioner will submit arguments to establish its standing to challenge each of the three distinct final actions challenged in this case, which inflict several types of Article III injuries-in-fact.

Background – Petitioners' statements of the case will provide the background needed for this Court to review all three actions, including background on the Clean Air Act and EPCA, and how each statute has been amended, implemented, and interpreted. California's long history of regulating vehicular emissions, and EPA's long history of waiving preemption for the State's emission standards, also provide critical background to this case, as does the adoption of California's standards by other states. Petitioners will also describe the unusual procedural evolution of these three actions, which the agencies proposed as part of a larger raft of actions but finalized separately.

NHTSA's regulations – Petitioners will argue that the Court lacks jurisdiction to review NHTSA's regulations directly and that the district court must review them in the first instance. In its order denying motions of some Petitioners for abeyance, this Court ordered the Parties to brief jurisdiction along with the merits. In the district court, NHTSA used 4,514 and 5,879 words, respectively, in the argument sections of its motion to dismiss or transfer and reply in support. State and municipal plaintiffs and public-interest organization plaintiffs used 5,304 and 7,373 words in the argument sections of their respective oppositions to NHTSA's motion to dismiss.

On the merits, Petitioners will contend that NHTSA exceeded its statutory authority because EPCA's express preemption provision is self-executing and does not authorize implementing regulations, nor does any other provision of EPCA or any other statute authorize NHTSA to issue rules on express or implied preemption. Petitioners will argue that, in any event, NHTSA's view of EPCA's preemptive effect is not entitled to any deference.

Petitioners will contend that NHTSA's interpretation of EPCA as preempting state greenhouse gas emission and zero-emission vehicle standards is impermissible. Here, Petitioners will raise numerous, distinct arguments, with some arguments that address NHTSA's action in its entirety, other arguments that are specific to NHTSA's separate express and conflict preemption positions, and still other arguments specific to one of the two types of standards. These arguments call for analyzing multiple provisions of EPCA, the Clean Air Act, and the Energy Independence and Security

Act, as well as the relationships between the statutory histories and specific provisions of all three of those statutes. Petitioners will also address a series of court decisions that contradict NHTSA's reading and Congress's embrace of those decisions, as well as NHTSA's mistaken reliance on the unsettled constitutional doctrine of "equal sovereignty," which Intervenor States have indicated an intent to vigorously defend.

Petitioners will argue that NHTSA's interpretation is unreasonably overbroad, inconsistent with EPCA's objectives, inadequately explained, and an unacknowledged, unjustified departure from NHTSA's past practice. Petitioners will contend that the agency misapprehends the relationship between greenhouse-gas emissions and fuel economy as inevitably "inherent." Petitioners further will argue that NHTSA failed to respond to significant public comments on these and other fundamental issues.

Petitioners will maintain that NHTSA erred as a matter of law in concluding that EPCA preemption applies even to state regulation of vehicles of model years for which NHTSA has not prescribed an average fuel-economy standard. Petitioners will also contend that NHTSA erred in declaring that EPCA preemption can apply to state and local regulation of used vehicles. Petitioner's argument will rest on additional structural arguments about EPCA and its relationship to Clean Air Act provisions protecting so-called "in-use" regulations. Petitioners will also contend that NHTSA acted unlawfully and arbitrarily in declaring unenforceable EPA-approved plans to implement national ambient air quality standards insofar as those plans incorporate state vehicular greenhouse-gas emission or zero-emission-vehicle standards.

Petitioners will argue that NHTSA violated the National Environmental Policy Act (NEPA), regulations implementing that statute, and the agency's own regulations by asserting that NEPA does not apply to its action, by not preparing environmental documents for its action, and by failing to analyze significant environmental impacts. Petitioners will respond to NHTSA's assertion that NEPA analysis was not required because NHTSA believes that its action is non-discretionary.

EPA Waiver Revocation – Petitioners will first argue that EPA lacks authority to revoke a previously issued Clean Air Act Section 209(b) preemption waiver on any ground and, in any event, on the two grounds at issue here. This issue is a novel one because EPA has never before revoked any of the hundreds of preemption waivers granted to California since 1967. It is also a momentous question because California will continue to seek and (presumably) receive preemption waivers for air pollutants other than greenhouse gases. The stability of the standards subject to those waivers is of crucial importance to California, the other States that adopt California's standards, the Nation's air quality, and the many industries affected by those standards.

Petitioners will contend that the Act's text, purpose, and history preclude EPA from revoking California's waiver. Addressing this issue requires careful consideration of the relevant case law, the complex statutory history, past waiver decisions by EPA, and the factual record. Petitioners will further argue that EPA failed to respond to significant comments respecting its power to revoke a preemption waiver, that EPA

did not adequately consider serious reliance interests or justify its decision to revoke, and that EPA committed prejudicial procedural errors.

Petitioners then will argue that EPA erred by revoking California's preemption waiver based on NHTSA's regulations. Here, too, there are several novel questions because EPA has never previously based a waiver decision on factors outside those established in Section 209(b)(1) of the Clean Air Act. Petitioners will argue that, even assuming the validity of NHTSA's action, EPA may not rely on an action by another agency under a different statute to revoke a previously granted waiver. Petitioners will also explain that EPA did not provide adequate notice to the public that it proposed to revoke a waiver for vehicles of model years before 2021 and failed to justify that action or consider how it would adversely impact serious reliance interests.

Petitioners will argue that EPA's revocation of California's preemption waiver for vehicular greenhouse-gas emission standards and zero-emission-vehicle standards on the ground that the State "does not need such State standards to meet compelling and extraordinary conditions" 42 U.S.C. § 7543(b)(1)(B), is unlawful for several reasons. Petitioners will rely on the relevant statutory provisions (including their evolution through lengthy statutory histories), decades of past waiver decisions, and evidence in the voluminous record to contend that: (1) EPA's new interpretations of statutory terms including "need," "such State standards," and "compelling and extraordinary conditions," are unlawful based on the text and history of the Act and are unjustified departures from decades of agency practice upon which at least some

Petitioners have relied; (2) EPA's refusal to grant deference to California's findings and EPA's attempt to impose a heavy burden of proof on California contravenes the statute and binding precedent; (3) EPA's reliance on unsettled "equal sovereignty" principles to limit application of Clean Air Act Section 209(b) is unsupported and unlawful; (4) even under EPA's crabbed view of that statutory provision, California needs the standards at issue to meet compelling and extraordinary conditions because, as established by extensive record evidence, climate change creates compelling and extraordinary conditions in the State and the standards also address pollutants, such as smog precursors, regarding which California's conditions are also compelling and extraordinary (as is undisputed by EPA); and (5) EPA unlawfully disregarded most of the record evidence before it and committed procedural errors including failing to respond to significant comments and failing to address the general-conformity implications of its action.

EPA's Section 177 Determination – Petitioners will argue that EPA's Section 177 Determination is a distinct action subject to judicial review separate from EPA's Waiver Revocation, and that EPA's interpretation of Section 177 is due no deference. Petitioners will contend that the Section 177 Determination is impermissible and not adequately explained because it (1) rests on an impermissible reading of Clear Air Act Section 177 as restricting the types of California emission standards that other States may adopt and enforce at their discretion; (2) conflicts with Section 177's express ban on creating "a 'third vehicle'" subject to a suite of emission standards not applicable at

the federal level or in California, (3) rests upon false distinctions between greenhouse gases and other pollutants that are unsupported by the record; (4) is accompanied by a deficient explanation that failed to respond to significant comments; and (5) issued in violation of NEPA.

C. Respondents' Rationale for Proposed Briefing Format

Under the Parties' Joint Proposed Briefing Format and Schedule, Respondents' brief will be filed on or before August 5, 2020. The agreed-upon 75-day briefing interval reflects the size of the briefs to be filed here, with the attendant time necessary for multiple levels of review within and between NHTSA, EPA, and the Department of Justice. It also accommodates significant scheduling conflicts, including the absence of one or both of DOJ counsel for the period of June 18-July 5 and absence of important client personnel in the last two weeks of July. The 75-day briefing interval is also roughly commensurate with the time afforded Petitioners for brief preparation between the submission of this proposal and the due date for Petitioners' opening briefs on May 22, 2020 (totaling 78 days). At the same time, the proposed schedule accommodates the United States' interest in ensuring a timely resolution of this litigation. Completing briefing by September 21, 2020, will allow the case to be docketed for argument as soon as the Court's schedule allows in the fall of 2020.

Respondents request one brief totaling no more than 35,000 words to ensure parity with the total words requested by Petitioners in this matter. Were the Court to

modify the word limits proposed here, Respondents requests a word allocation that is equal to Petitioners'.

D. Respondent-Intervenors' Rationale for Proposed Briefing Format

As justification for the above-proposed briefing format for their proposed two briefs, Respondent-Intervenors state as follows:

For their part, the thirteen intervening States propose that they file a brief separate from the other Intervenors. As detailed in the States' motion to intervene, these Intervenors plan to make arguments unique to the States. This Circuit's Rule 28(d)(4) also contemplates a separate intervenor brief for the States.

As for the two other intervening groups, Respondent-Intervenors representing the automotive industry (the Automotive Regulatory Council, Inc., and the Coalition for Sustainable Automotive Regulation) and Respondent-Intervenors representing fuel and petrochemical manufacturers (the American Fuel & Petrochemical Manufacturers) (collectively, "Industry Intervenors") propose that they file a single, joint brief, consistent with the preferences set forth in this Court's rules and the Court's February 4, 2020 Order. *See* D.C. Cir. R. 28(d)(4).

As for a word count, the States and the Industry Intervenors concur with the proposal to give all Intervenors on the Respondents' side 70% of the words allotted to the Petitioners and Respondents, consistent with the ratio set forth in this Court's rules and the need to respond to over-length Petitioners' briefs. *Compare* Fed. R. App. P. 32(a)(7)(B)(i) with D.C. Cir. R. 32(e)(2)(b) (70% ratio).

III. CONCLUSION

The Parties respectfully request that the Court adopt the briefing schedule and format set forth in Part II.A above.

DATED: March 5, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2020, copies of the foregoing Joint Proposed Briefing Format and Schedule were served through the Court's CM/ECF system on all registered counsel.

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