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, Respondent.	No. 19-1230 and consolidated cases

PETITIONERS' SECOND SUPPLEMENTAL RESPONSE TO REQUEST FOR BRIEFING PROPOSALS

INTRODUCTION AND BRIEFING PROPOSAL

On February 4, 2020, this Court ordered the parties to submit briefing proposals by March 5, 2020. The parties submitted a joint proposed briefing format and schedule on that date. Doc. No. 1832077. On April 3, 2020, Petitioners filed a supplemental response to the Court's request for briefing proposals, requesting an amendment to the schedule presented in the previously

submitted joint proposal. ECF No. 1836717. No party opposed that request. *See id.* at 2. The Court has not entered a briefing order to date.

In light of the lengthy and extraordinary effects of the COVID-19 pandemic on Petitioners and their counsel, and other circumstances described herein, Petitioners respectfully ask the Court to enter the proposed briefing schedule set forth below in lieu of the schedule set forth in Petitioners' prior supplemental response. Specifically, Petitioners propose a deadline for their opening briefs that is 60 days later than the parties proposed in their joint submission on March 5 and 39 days later than Petitioners proposed in their April 3 supplemental submission. The proposed numbers of briefs and words are unchanged from prior submissions.

Brief or Filing	**Date Due**	**Words**
Petitioners	Tuesday, July 21	35,000 total, shared between up to 4 briefs
Amici curiae supporting Petitioners and amici curiae supporting neither party, if any	Tuesday, July 28	
Respondents	Monday, October 5	35,000 total
Amici curiae supporting Respondents, if any	Tuesday, October 13 (due to holiday)	
Intervenors supporting Respondents	Monday, October 19	24,500 total, shared between up to 3 briefs
Petitioners (reply)	Monday, November 9	17,500 total, shared between up to 4 briefs
Deferred Appendix	Monday, November 16	
Final briefs	Monday, November 23	

BACKGROUND

As noted above, on March 5, 2020, all parties jointly submitted a proposed briefing format and schedule, pursuant to which Petitioners' opening briefs would have been due May 22, 2020. Doc. No. 1832077. Shortly thereafter, however, it became clear to Petitioners that the proposed May 22, 2020 deadline for their opening briefs would be unworkable, in light of the substantial and adverse effects on Petitioners and their counsel from the COVID-19 pandemic. Notably, the San Francisco Bay Area counties, where several of Petitioners' counsel reside, issued shelter-in-place orders on March 16, 2020, and the State of California issued a statewide stay-at-home order on March 19, 2020. Meckenstock Decl., ¶ 15. These orders shuttered day-care centers, schools, and other businesses and organizations upon which Petitioners' counsel and their families depended. *Id.*

Counsel for State and Public Interest Petitioners reached out to counsel for Respondents on March 24, 2020 and proposed moving the deadline for Petitioners' opening briefs out by 60 days to July 21, 2020.[1] *Id.* at ¶ 16. Respondents took the position that it was premature to assess how much additional time was warranted

[1] State Petitioners' counsel observed that the United States Court of Appeals for the Ninth Circuit had issued an order providing automatic 60-day extensions of time, upon request, due to the pandemic's impacts in the States within that circuit. *See* U.S. Court of Appeals for the Ninth Circuit, "COVID-19 Notice", *available at* http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/COVID-19%20Notice.pdf (last visited May 2, 2020).

but ultimately agreed not to oppose an immediate request for a 21-day extension without prejudice to Petitioners' (or any party's) ability to seek additional time in the future. *Id.* at ¶ 17. Accordingly, on April 3, 2020, Petitioners filed a supplemental response to the request for briefing proposals, asking that the Court add 21 days to the schedule provided in the parties' joint proposal, such that Petitioners' opening briefs would be due June 12, 2020. Doc. No. 1836717.

Since that April 3, 2020 filing, the constraints on State Petitioners' counsel due to the pandemic have not subsided.[2] Shelter-in-place and stay-at-home orders have been extended and remain in effect, either with no end date or with an end date of June 30, 2020. Meckenstock Decl., ¶ 19. Those extensions, combined with related announcements from businesses and organizations, have confirmed that the constraints on Petitioners' counsel will continue for some time, likely through the full period for preparation of Petitioners' opening briefs. *Id.* Similar orders and closures are affecting many members of State Petitioners' coalition outside of California as well, and, of course, the pandemic's dramatic impacts on health and

[2] Petitioners' initial supplemental response—in which they sought a 21-day extension—correctly indicated that Petitioners' counsel have been impacted by illnesses, as well as by school and business closures and other pandemic impacts. Because these counsel have recovered, Petitioners are not reiterating that basis for extension here but note, nonetheless, that illnesses did significantly slow expected progress on briefs in this case during March and April.

well-being, daily activities, physical work spaces, and family care demands (including support for elderly parents) continue.

In addition, since the filing of the first supplemental response on April 3, 2020, conflicting deadlines for complex and substantive filings have arisen in another matter being handled by the lead attorney for State Petitioners here. *Id.* at ¶ 20. Specifically, the United States, plaintiff in the other matter, filed a second summary judgment motion on April 20, 2020 and will not agree to extend the deadline for defendant California's opposition past May 18, 2020. *Id.*

In light of these circumstances, Petitioners approached Respondents on April 23, 2020 for their positions on additional time for Petitioners' their opening brief. Respondents have asked that their position be represented as follows:

> The United States recognizes the unprecedented nature of the current public health crisis and did not oppose Petitioners' request for a 21-day extension of the deadline for their merits brief. Petitioners' current request would extend the deadline for their merits brief to nearly five months after the date of the parties' jointly submitted briefing schedule. The United States believes that the current unopposed deadline of June 12 is sufficient in light of the amount of time Petitioners have already had to draft their merits briefs, the time they have remaining, and the issues the United States anticipates Petitioners will address.

On April 30, 2020, Petitioners reached out to Respondent-Intervenors for their position. Respondent-Intervenor States indicated they do not consent to the additional time proposed herein; Respondent-Intervenors Coalition for Sustainable Automotive Regulation and Automotive Regulatory Council oppose the additional

time; and Respondent-Intervenor American Fuel and Petrochemical Association takes no position.

BASES FOR THE REQUESTED EXTENSION OF TIME

The bases for State Petitioners' request for additional time to prepare opening briefs are two-fold: substantial impacts from the COVID-19 pandemic on State Petitioners' counsel and new, conflicting deadlines for substantive and consequential filings in another matter.

The lawyers handling this case for California have all been affected by the dramatic effects the pandemic has had on the personal and professional lives of so many Americans. Meckenstock Decl., ¶¶ 11, 12. Some of these impacts have been particularly substantial on the two attorneys leading California's team—Jonathan Wiener (lead counsel for the Energy Policy and Conservation Act portions of the case) and Elaine Meckenstock (lead counsel for the Clean Air Act portions of the case as well as overall lead counsel for State Petitioners).

Both Mr. Wiener and Ms. Meckenstock have developed deep and substantial understandings of the legal and factual issues in this complex case over extended periods (including development of comments on the proposed actions in late 2018) and have significant experience litigating similar matters. *Id.* at ¶ 4. This expertise is not readily replaceable. *Id.* Both of these attorneys, however, have had their capacity to work on this case severely constrained. *Id.* at ¶ 5.

Due to a daycare center closure and the San Francisco shelter-in-place order, Mr. Wiener is working from home while simultaneously caring for an infant and a three-year old. *Id.* at ¶ 6. His capacity to work has been substantially reduced to half-time or less. *Id.* The daycare center has indicated it will remain closed through at least the end of June, so these constraints will continue to slow the preparation of Petitioners' opening brief for the foreseeable future. *Id.* at ¶ 19. While Mr. Wiener is doing what he can to delegate work (in this matter and other matters) to other attorneys, no one has his background and depth of knowledge on the Energy Policy and Conservation Act issues that are the crux of Petitioner's challenge to the National Highway and Traffic Safety Administration's regulation. *Id.* at ¶¶ 4, 6. Moreover, many attorneys in the California Attorney General's Office are also managing family responsibilities (including home childcare and/or schooling) or are covering for co-assigned colleagues who are, limiting the office's ability to shift work to other attorneys. *Id.* at ¶ 6. Thus, the constraints on Mr. Wiener's ability to work at the levels anticipated when the original joint scheduling proposal was submitted are consequential for the ongoing preparation of the State Petitioners' brief.

Similarly, Ms. Meckenstock cannot simply delegate the drafting of the Clean Air Act sections of State Petitioners' brief, or the coordination of the overall briefing effort, to other attorneys, due to her extensive background and depth of

knowledge of this case and these issues and the other constraints described above. *Id.* at ¶ 4. But she, too, has had her capacity to work diminished by the pandemic due to disruptions in services upon which she and her disabled partner previously relied. *Id.* at ¶ 7. As a result of these disruptions, Ms. Meckenstock's working time is constrained because she must undertake or assist with tasks and activities that were previously handled by her partner (with the assistance of others) or by businesses that are not currently operating. *Id.* Ms. Meckenstock's capacity to work on this case has been further reduced by the need to cover for co-counsel who are constrained due to the demands of home childcare and/or home schooling. *Id.* at ¶ 8.

In addition, Ms. Meckenstock now has conflicting deadlines for substantive filings in another complex matter in which she is also lead counsel. In *United States v. California* (2:19-cv-02142, E.D. Ca.), the plaintiff United States filed a second summary judgment motion on April 20, 2020, following resolution of a prior round of summary judgment motions on March 12, 2020. Meckenstock Decl., ¶¶ 9, 10. The United States has been unwilling to agree to an extension of time for defendant California's opposition in that case beyond May 18, 2020, and insists that California should have no more than two weeks, in early to mid-June, for its reply brief should the State file a cross-motion for summary judgment. *Id.* at ¶ 10. The briefing in that case is complex and consequential. *See id.* at ¶ 9, 10. As

a result of all these events, Ms. Meckenstock must now juggle her work as lead counsel in this case with her work as lead counsel in *United States v. California* (and work in other matters), alongside her significantly increased family and household responsibilities.

For the foregoing reasons, State Petitioners respectfully request that the Court issue an order establishing the briefing schedule outlined above (on page 2), with the deadline for all Petitioners' opening briefs in this case set as July 21, 2020. This is 60 days beyond the original, jointly proposed date of May 22, 2020 and 39 days beyond the unopposed June 12, 2020 date proposed in Petitioners' first supplemental response.

Dated: May 4, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing response to an order complies with the typeface and volume requirements of the rules of this Court and Federal Rules of Appellate Procedure. The document is set in Times New Roman font, 14-point, and contains 1,873 words according to the word-count feature of Microsoft Word.

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CERTIFICATE OF SERVICE

I filed the foregoing document, and accompanying declaration, with the U.S. Court of Appeals for the District of Columbia Circuit on May 4, 2020, using the CM/ECF system. All parties are represented by counsel that are registered CM/ECF users and will be served by the CM/ECF system.

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IN THE UNITED STATES COURT OF APPEALS
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UNION OF CONCERNED SCIENTISTS, *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Respondent.	No. 19-1230 and consolidated cases

DECLARATION OF M. ELAINE MECKENSTOCK IN SUPPORT OF PETITIONERS' SECOND SUPPLEMENTAL RESPONSE TO REQUEST FOR BRIEFING PROPOSALS

I, M. Elaine Meckenstock, hereby declare:

1. All of the statements contained herein are based on my own personal knowledge and if called to testify I could and would competently testify thereto.

2. I am a Deputy Attorney General for the California Department of Justice and an active member of the State Bar of California. I am admitted to practice in this Court.

3. I lead the team of attorneys for the State of California Petitioners in these consolidated cases, and we, in turn, lead the coalition of 22 other States, the District of Columbia, and 3 cities who are Petitioners in cases 19-1239 and 19-1246.

4. I am the overall lead counsel for State of California Petitioners in this matter. I am also the lead attorney for the Clean Air Act portions of this case. Jonathan Wiener, another Deputy Attorney General with the California Department of Justice, is our lead attorney for the Energy Policy and Conservation Act portions. Mr. Wiener and I drafted or reviewed the respective portions of our comments on the proposals issued by the Agencies in August 2018, and we have been substantively engaging as leads on these issues since those comments were submitted. As a result of the depth and duration of this work, we have developed especially deep understandings of the factual and legal issues in this case. While other team members are playing important roles in the preparation of our brief, our lead attorneys—Mr. Wiener and myself—are playing and must play essential and substantial roles in the development, drafting, and review of our brief in this case.

Bases for the Requested Additional Time

5. Both Mr. Wiener and I have experienced substantial disruptions in our capacities to work as a result of the COVID-19 pandemic and the response to it.

6. Mr. Wiener has an infant and a three-year-old child and, with the closures of his daycare center, is juggling working from home with childcare responsibilities for his two young children. As a result, Mr. Wiener's working hours have been substantially reduced to half-time or less. Mr. Wiener has attempted to delegate work on his other matters to other attorneys, so that he can maximize the time he can spend on this matter. But many attorneys in the California Attorney General's Office are also now juggling family responsibilities with work or are covering for co-assigned colleagues experiencing those impacts

of the pandemic, limiting the ability to shift work to other attorneys. And, when delegation is possible, it takes time to effectuate and rarely, if ever, results in Mr. Wiener being able to fully or immediately extricate himself because most of his other matters have complex histories with which new attorneys are not familiar.

7. My overall capacity to work has also been reduced by family obligations. My partner is legally blind, and the pandemic-related closures have upended the adaptive strategies that he, and we, had come to rely upon, many of which involved local businesses that are now closed or personal assistance that is no longer available from businesses that remain open. As a consequence, substantially more of my time is now spent assisting him with tasks and activities for which he previously relied on others or performing tasks and chores that previously did not require my attention. These demands are further magnified by the needs of his elderly parents, who live in another State. These needs are both greater and harder to fulfill as a result of the pandemic, and my partner's ability to shop online or otherwise arrange necessary deliveries or services for his parents is quite limited.

8. My capacity to work on this case has also been reduced, as a result of the pandemic, by the need to cover some duties for co-counsel who are even more heavily impacted than I am, including several who have small children at home due to school and daycare closures. Thus, there are now more demands for my time because other assigned attorneys are less available. It is possible, in most (but not all) situations, to add attorneys to these teams, and we have done so and are continuing to do so. However, there is a limit to how much, and how quickly, adding new team members alleviates these constraints for the reasons discussed above. I am, in fact, spending a not insignificant amount of time on-boarding attorneys in other cases in order to ensure those matters are covered and to allow me to focus more on this and other cases in which my role is more crucial.

9. My capacity to work on this case, in this crucial period, has been further reduced by the United States' decision to file a second summary judgment motion, asserting Foreign Affairs preemption, in another case in which I am lead counsel. In *United States v. California*, Case No. 2:19-cv-02142-WBS-EFB, Eastern District of California, the United States is challenging California's decision to "link" its cap-and-trade program to a similar program in Quebec. I was assigned to be lead counsel in this case because I have substantial knowledge of California's cap-and-trade program, having defended it in a previous lawsuit, as well as significant experience defending California regulatory programs against constitutional challenges.

10. The first round of summary judgment motions was just resolved on March 12, 2020. But the United States chose to file its second summary judgment motion (on its remaining claim) on April 20, 2020. Despite the pandemic and overlapping work demands on Defendants' counsel (including, but not limited to, me) and Defendants themselves, the United States has been unwilling to agree to extend the deadline for California's responsive brief which is currently due May 18, 2020. Assuming Defendants cross-move for summary judgment, as is likely, we would have only two weeks, under the United States' proposed schedule, to prepare our reply brief—the weeks from June 8 to June 22. Both of those briefs, then, will take substantial amounts of my time away from the State Petitioners' brief in this case, as the timeframes overlap entirely or substantially. And, while my office has taken steps to expand our team in the *United States v. California* matter, significant amounts of my time are still necessary both because the regulatory program and legal issues are complex and because of the pace of the case—which has involved substantial motion practice since the filing of the amended complaint in November of 2019—which has prevented other attorneys from having substantial time to acquire the necessary depth of knowledge.

11. While the constraints described above are specific to Mr. Wiener and myself, the work of our entire team has been disrupted by the pandemic and its consequences. Others on the team have children at home who would otherwise be in school, and everyone on the team has loved ones, such as elderly parents, to whom they are dedicating more time. For example, many of us are arranging for deliveries to our parents to limit the need for trips outside—a task that can be quite time-consuming in this time of supply chain disruptions and overwhelmed delivery services.

12. In addition, the transition to remote working for the thousands of employees in the California Department of Justice was a complex process, resulting in shifting administrative and technological procedures and policies, temporary and/or longer-term losses of access to files (electronic and otherwise) and to certain kinds of equipment and services, software glitches and network issues, and a variety of other disruptions. While many of these disruptions have been reduced over time, they were substantial during the last two weeks of March and into the beginning of April 2020, severely constraining our team's ability to make progress on the brief in this case during that crucial period. In addition to these technological and administrative disruptions, our team has also, of course, been affected by the anxiety and distress caused by the public health and economic crisis facing the Nation and the world. Many tasks are simply taking longer than they used to due to all of these effects.

13. Further complicating our work on this case, the United States has recently finalized major administrative proceedings or initiated major new ones, including Part 2 of the very same proposal in which the agencies proposed the actions at issue in this case (the part concerning the federal greenhouse gas emissions and fuel economy standards). These developments are occupying attorneys who might otherwise have been available to work on this matter and have

also taken up time from attorneys assigned to this matter who have been long assigned to those other matters.

The Development of Petitioners' Request for Additional Time

14. Pursuant to the Court's order, the parties submitted a joint proposed briefing format and schedule on March 5, 2020. Doc. No. 1832077. Under that joint proposal, Petitioners' Opening Briefs would have been due May 22, 2020. *Id.* at 4.

15. Shelter-in-place orders were issued for all San Francisco Bay Area counties, including the two counties in which Mr. Wiener and I live, on March 16, 2020, and a California-wide stay-at-home order issued on March 19, 2020. We began to experience the disruptive consequences of these orders immediately, including the closures of schools and daycares and the discontinuation of previously relied upon services. The California Department of Justice was also implementing its transition to have most of its approximately 5,000 employees work remotely during this period. Similar stay-at-home orders have since been put into effect in most, if not all, of the jurisdictions represented in our coalition.

16. On March 24, 2020, in concert with counsel for Petitioners in Cases No. 19-1230 and 19-1243, I reached out to counsel for Respondents to set up a time to discuss the pandemic's impacts on our teams and the related need for an extension to the schedule we had jointly submitted to the Court on March 5, 2020. When we spoke with counsel for Respondents, we indicated that our groups of Petitioners were experiencing severe disruptions from the pandemic and that we sought a 60-day extension to the proposed schedule we had jointly submitted to the Court.

17. Respondents took the position that it was premature to assess how much more time was warranted but ultimately agreed not to oppose an immediate request for a 21-day extension to the schedule jointly proposed by all parties on March 5,

2020, without prejudice to Petitioners' (or any party's) ability to seek additional time in the future.

18. In light of Respondents' position and in light of the fact that the joint briefing proposal was still pending before the Court, on April 3, 2020, we submitted a supplemental response to the Court's request for briefing proposals, that reflected a 21-day extension to the deadline for Petitioners' opening briefs and reserved Petitioners' rights to seek additional extensions. Doc. No. 1836717.

19. Since the submission of that supplemental response on April 3, 2020, the extent and the duration of the impacts from the pandemic have only become more clear. Mr. Wiener's day care remains closed and has indicated that it will remain so until at least the end of June 2020. The businesses and organizations on which my partner and I previously relied for various services likewise remain closed, and there is no indication that they will reopen anytime soon. Indeed, the stay-at-home order for the State of California remains in effect, and both the timing and manner for its end are unclear at this time. And the Bay Area counties, in which Mr. Wiener and I reside, just extended their shelter-in-place orders through May 30, 2020. I, thus, anticipate that Mr. Wiener and I will continue experience the above-described constraints on our capacity to work throughout the period in which we are completing work on the State Petitioners' brief, including ongoing research and drafting, internal and client reviews and resulting changes, coordination with other Petitioners, and reviews by our coalition members.

20. Also since the submission of our supplemental response on April 3, 2020, the United States has filed its second summary judgment motion in the *United States v. California* case, and it has become clear that the United States will not agree to a schedule which would ameliorate the overlap between this case and that one or account for the pandemic's effects.

21. As a result of all of this, we still need the 60 days of additional time about which we approached the United States in late March. Because 21 of those 60 days were included in the first supplemental response filed on April 3, 2020, we are now requesting 39 additional days, such that Petitioners' opening briefs would be due **July 21, 2020**.

I declare that the foregoing statements are true and correct under penalty of perjury. Executed on this day, May 2, 2020, in Berkeley, California.

/s/ M. Elaine Meckenstock
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Deputy Attorney General