

1 XAVIER BECERRA
 Attorney General of California
 2 SARAH E. MORRISON
 ERIC KATZ
 3 Supervising Deputy Attorneys General
 CATHERINE M. WIEMAN, SBN 222384
 4 TATIANA K. GAUR, SBN 246227
 ROXANNE J. CARTER, SBN 259441
 5 JESSICA BARCLAY-STROBEL, SBN 280361
 BRYANT B. CANNON, SBN 284496
 6 Deputy Attorneys General
 300 South Spring Street, Suite 1702
 7 Los Angeles, CA 90013
 Telephone: (213) 269-6329
 8 Fax: (916) 731-2128
 E-mail: Tatiana.Gaur@doj.ca.gov
 9 *Attorneys for Plaintiff State of California, by and
 through Attorney General Xavier Becerra and
 10 California State Water Resources Control Board*

LETITIA JAMES
 Attorney General of the State of New
 York
 PHILIP BEIN (*admitted pro hac vice*)
 Senior Counsel
 TIMOTHY HOFFMAN (*admitted pro hac vice*)
 Senior Counsel
 Office of the Attorney General
 Environmental Protection Bureau
 28 Liberty Street
 New York, NY 10005
 Telephone: (716) 853-8465
 Fax: (716) 853-8579
 Email: Timothy.Hoffman@ag.ny.gov
Attorneys for Plaintiff State of New York

11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 **STATE OF CALIFORNIA BY AND THROUGH**
 14 **ATTORNEY GENERAL XAVIER BECERRA AND**
 15 **CALIFORNIA STATE WATER RESOURCES**
 16 **CONTROL BOARD, STATE OF NEW YORK,**
 17 **STATE OF CONNECTICUT, STATE OF ILLINOIS,**
 18 **STATE OF MAINE, STATE OF MARYLAND,**
 19 **STATE OF MICHIGAN, STATE OF NEW JERSEY,**
 20 **STATE OF NEW MEXICO, STATE OF NORTH**
 21 **CAROLINA EX REL. ATTORNEY GENERAL**
 22 **JOSHUA H. STEIN, STATE OF OREGON, STATE**
 23 **OF RHODE ISLAND, STATE OF VERMONT,**
 24 **STATE OF WASHINGTON, STATE OF**
 25 **WISCONSIN, COMMONWEALTHS OF**
 26 **MASSACHUSETTS AND VIRGINIA, THE NORTH**
 27 **CAROLINA DEPARTMENT OF**
 28 **ENVIRONMENTAL QUALITY, THE DISTRICT OF**
COLUMBIA, AND THE CITY OF NEW YORK,

 Plaintiffs,

 v.

ANDREW R. WHEELER, AS ADMINISTRATOR
OF THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY; R.
D. JAMES, AS ASSISTANT SECRETARY OF THE
ARMY FOR CIVIL WORKS; AND UNITED
STATES ARMY CORPS OF ENGINEERS,

 Defendants.

Case No. 3:20-cv-03005-RS

PLAINTIFFS' BRIEF RESPONDING
TO THE COURT'S ORDER FOR
ADDITIONAL BRIEFING

 Date: June 18, 2020
 Time: 1:30 pm
 Dept: San Francisco Courthouse,
 Courtroom 3 – 17th Floor
 Judge: Honorable Richard Seeborg
 Action Filed: 5/1/2020

1 **INTRODUCTION**

2 The States and Cities respond here to the Court’s request that the parties address the
 3 following question: “Does the existence of a specific statutory provision authorizing a court to
 4 stay the effective date of an agency rule have any effect on the considerations otherwise
 5 applicable when evaluating the propriety of a so-called ‘nationwide injunction?’” ECF No. 163.
 6 The stay that the States and Cities seek here under 5 U.S.C. § 705 would postpone the effective
 7 date of the 2020 Rule and apply nationwide. If this Court issues a stay under § 705 of the 2020
 8 Rule’s effective date pending judicial review, the Court need not reach the States’ and Cities’
 9 alternative request for a nationwide preliminary injunction.

10 **A STAY UNDER 5 U.S.C. § 705 APPLIES NATIONWIDE**

11 5 U.S.C. § 705¹ is an interim statutory remedy authorized by the Administrative
 12 Procedure Act (APA) that, by its plain terms, allows a court to delay the effective date of a rule
 13 pending resolution of judicial review. A stay under § 705 preserves the status quo prior to
 14 judicial determination that a rule must be vacated under § 706—the kind of vacatur that the States
 15 and Cities seek here. *See* ECF No. 1 (Complaint) (seeking order “declaring the 2020 Rule
 16 unlawful, setting it aside, and vacating it”).

17 Although courts have looked to similar factors to issue preliminary injunctions and stays
 18 under § 705, they are “different forms of relief.” *Washington v. United States Dep’t of Homeland*
 19 *Sec.*, 408 F. Supp. 3d 1191, 1212 (E.D. Wash. 2019) (granting nationwide stay under § 705 and
 20 preliminary injunction). Because a stay under § 705 “operates upon the judicial proceeding
 21 itself,” it differs from a preliminary injunction that “direct[s] the conduct of a particular actor.”
 22 *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)).

23 A stay of the 2020 Rule under § 705 would apply nationwide. That is because the scope of
 24 interim relief authorized by § 705 parallels the remedy of vacatur that this Court is authorized to
 25 issue under § 706—a remedy that would apply to the nationwide 2020 Rule, not solely to the

26 ¹ Section 705 provides that “[o]n such conditions as may be required and to the extent
 27 necessary to prevent irreparable injury,” a court “may issue all necessary and appropriate process
 28 to postpone the effective date of an agency action or to preserve status or rights pending
 conclusion of the review proceedings.” 5 U.S.C. § 705. Unless otherwise specified, all citations
 to statutory sections are to Title 5 of the United States Code.

1 States and Cities challenging the Rule. *See* 5 U.S.C. § 706(2); *National Mining Ass’n v. U.S.*
 2 *Army Corps of Eng’rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) (when “agency regulations are
 3 unlawful, the ordinary result is that the rules are vacated—not that their application to the
 4 individual [plaintiffs] is proscribed”). Accordingly, “§ 705 must be read to authorize relief from
 5 agency action for any person otherwise subject to the action, not just as to plaintiffs.” *D.C. v.*
 6 *U.S. Dep’t of Agric.*, — F. Supp. 3d —, No. 20-119 BAH, 2020 WL 1236657, at *34 (D.D.C.
 7 Mar. 13, 2020) (ordering nationwide relief after conducting comprehensive analysis of judicial
 8 authority to issue a stay under § 705).

9 To the extent the Agencies argue in their supplemental briefing that any § 705 stay should
 10 be “narrowly tailored,” their failure to present evidence showing how the court could “craft a
 11 limited stay” warrants “stay[ing] the Final Rule in its entirety.” *Texas v. EPA*, 829 F.3d 405, 435
 12 (5th Cir. 2016) (granting § 705 stay and rejecting EPA’s argument for more narrow remedy).
 13 Indeed, courts have rejected similar arguments recently raised by federal agencies that a rule
 14 should be “set aside only as to the plaintiffs,” reasoning that:

15 [T]he Court would be at a loss to understand what it would mean to vacate a
 16 regulation, but only as applied to the parties before the Court. As a practical
 17 matter, for example, how could this Court vacate the Rule with respect to the
 18 organizational plaintiffs in this case without vacating the Rule writ large? What
 19 would it mean to ‘vacate’ a rule as to some but not other members of the public?
 20 What would appear in the Code of Federal Regulations?

21 *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019); *see also New Mexico Health*
 22 *Connections v. HHS*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) (“The Court does not know how
 23 a court vacates a rule only as to one state, one district, or one party. The [federal government’s]
 24 lawyer advised that he was not sure if the department had ever asked for relief to be limited to one
 25 state before doing so in this case and did not know of anyone else in the United States asking for
 26 such relief.”). Likewise, here, a § 705 stay that is geographically limited would result in a
 27 regulatory patchwork that fails to afford the States and Cities complete interim relief against the
 28 harms that will befall them if the 2020 Rule takes effect. ECF No. 30 (Plaintiffs’ Motion for
 Preliminary Injunction or Stay) at 39-40; ECF No. 148 (Plaintiffs’ Reply to Agencies in Support
 of Motion) at 24-25; ECF No. 165 (Plaintiffs’ Reply to State Intervenors in Support of Motion) at

1 11-20. Moreover, allowing a federal rule to take effect with respect to all but the States and
 2 Cities risks entrenching unlawful policies that will become more difficult or costly to replace and
 3 unwind later if those plaintiffs ultimately prevail on the merits and the challenged rule is vacated.
 4 *See D.C.*, 2020 WL 1236657, at *35 (rejecting geographic limitations urged by federal agencies
 5 that would allow rule to be implemented in “two dozen states” because once the “‘egg has been
 6 scrambled,’ ‘restor[ing] the status quo ante’ will be considerably more disruptive”).

7 Nor can the Agencies argue that this Court lacks authority under § 705 to issue nationwide
 8 relief. Where Congress wished to cabin courts’ authority to issue a stay under § 705, it said so
 9 expressly. *See, e.g.*, 16 U.S.C. § 1855(f)(1)(A) (§ 705 “not applicable” to judicial review of
 10 fishery-management regulations); 15 U.S.C. § 3416(b) (same for natural gas regulations). The
 11 absence of any such limitation as to geography indicates this Court can rely on § 705 to do
 12 exactly what Congress authorized—postpone the effective date of the 2020 Rule nationwide
 13 “pending conclusion of the review proceedings.” 5 U.S.C. § 705. Indeed, any objection by the
 14 Agencies to the issuance of a nationwide stay here “should be seen for what it is: a bold and bald-
 15 faced effort to restrict the exercise of Article III judicial power to aggrandize that of the executive
 16 branch.” *D.C.*, 2020 WL 1236657, at *39 (citing Mila Sohoni, *The Lost History of The*
 17 *“Universal” Injunction*, 133 HARV. L. REV. 920, 996 (2020)).²

18 Moreover, both the Agencies and State Intervenors have invoked § 705 to stay regulations
 19 nationwide. In 2016, several State Intervenors obtained a § 705 stay of an EPA rule “in its
 20 entirety” over EPA’s objections. *Texas*, 829 F.3d at 435. They also obtained a § 705 stay of the
 21 Clean Power Plan. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).³ EPA has also repeatedly
 22 invoked § 705 to postpone the effective dates of its own rules on a nationwide basis. *See, e.g.*,

23 _____
 24 ² *See also* Brief for Professor Mila Sohoni as *Amica Curiae* Supporting Respondents,
Trump v. Pennsylvania, 140 S. Ct. 918 (No. 19-454), 2020 WL 1877916.

25 ³ In contrast, when the State Intervenors challenged the 2015 Rule, they requested only
 26 injunctive relief and not stays under § 705. *See* Memorandum in Support of Motion for a
 27 Preliminary Injunction, *Georgia v. McCarthy*, Case No. 2:15-cv-79 (S.D. Ga. July 25, 2015)
 28 (ECF No. 32); States’ Memorandum in Support of Motion for Preliminary Injunction, *North*
Dakota v. U.S. Env’tl. Prot. Agency, Case No. 3:15-cv-59 (N.D. Aug. 10, 2015) (ECF No. 33);
 States’ Memorandum in Support Motion for Preliminary Injunction *Texas v. EPA*, Case No. 3:15-
 cv-162 (S.D. Tex. Feb. 12, 2016) (ECF No. 40).

1 *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 21-22 (D.D.C. 2012).⁴

2 Finally, courts that have considered interim relief in recent challenges to agency rules have
 3 granted *both* § 705 stays and preliminary injunctions “without geographic limitation”; these
 4 courts reason that a preliminary injunction against enforcement of the rule is a proper alternative
 5 remedy should a court of appeal “determine[] that a section 705 stay is not appropriate.”
 6 *Washington*, 408 F. Supp. 3d at 1223; *D.C.*, 2020 WL 1236657, at *32. While the States and
 7 Cities here seek a stay or, in the alternative, preliminary injunctive relief, these cases confirm that
 8 the remedy provided by a § 705 stay may be issued prior to or in conjunction with a nationwide
 9 preliminary injunction.

10 Thus, the stay that the States and Cities seek here of the 2020 Rule’s effective date under
 11 § 705 would be nationwide. As shown in the States’ and Cities’ motion and reply briefs, either a
 12 stay or a nationwide preliminary injunction is necessary to prevent the irreparable harm that the
 13 State and Cities will suffer if the 2020 Rule goes into effect.

14
 15
 16
 17
 18
 19
 20
 21
 22 ⁴ The following is a partial list of § 705 postponements that have stayed the entirety of a
 23 rule (or provided stays to specific regulatory provisions in a rule) on a nationwide basis: 79 Fed.
 24 Reg. 26,297 (May 7, 2014) (SEC); 76 Fed. Reg. 59,896 (Sept. 28, 2011) (Dep’t of Labor); 73
 25 Fed. Reg. 67,107 (Nov. 13, 2008) (EPA); 69 Fed. Reg. 19,937-39 (Apr. 15, 2004) (EPA); 66 Fed.
 26 Reg. 27,863-64 (May 21, 2001) (Dep’t of Labor); 66 Fed. Reg. 20,191 (Apr. 20, 2001) (Dep’t of
 27 Energy); 60 Fed. Reg. 54,949 (Oct. 27, 1995) (EPA); 60 Fed. Reg. 50,426-28 (Sept. 29, 1995)
 28 (EPA); 60 Fed. Reg. 26,828 (May 19, 1995) (EPA); 60 Fed. Reg. 22,228 (May 4, 1995) (EPA);
 55 Fed. Reg. 10,455-56 (Mar. 21, 1990) (EPA); 57 Fed. Reg. 22,178 (May 27, 1992) (EPA); 57
 Fed. Reg. 5,859-61 (Feb. 18, 1992) (EPA); 56 Fed. Reg. 43,874-77 (Sept. 5, 1991) (EPA); 56
 Fed. Reg. 27,332-36 (June 13, 1991) (EPA); 56 Fed. Reg. 19,951-52 (May 1, 1991) (EPA); 56
 Fed. Reg. 1,556-57 (Jan. 15, 1991) (EPA); 55 Fed. Reg. 38,057-58 (Sept. 17, 1990) (EPA); 55
 Fed. Reg. 29,205-06 (Mar. 15, 1990) (EPA); 54 Fed. Reg. 4,021-22 (Jan. 27, 1989) (EPA); 48
 Fed. Reg. 45,537-38 (Oct. 6, 1983) (Fed. Trade Comm’n); 46 Fed. Reg. 2,975-76 (Jan. 13, 1981)
 (FERC).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: June 16, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
SARAH E. MORRISON
ERIC KATZ
Supervising Deputy Attorneys General
CATHERINE M. WIEMAN
ROXANNE J. CARTER
JESSICA BARCLAY- STROBEL
BRYANT B. CANNON
Deputy Attorneys General

/s/ Tatiana K. Gaur

TATIANA K. GAUR
Deputy Attorney General
*Attorneys for Plaintiff State of California, by
and through Attorney General Xavier
Becerra and California State Water
Resources Control Board*

For the STATE OF NEW YORK
LETITIA JAMES
Attorney General of the State of New York
Philip Bein (*admitted pro hac vice*)
Senior Counsel

For the State of Connecticut
WILLIAM TONG
Attorney General

/s/ Timothy Hoffman

Timothy Hoffman (*admitted pro hac vice*)
Senior Counsel
Office of the Attorney General
Environmental Protection Bureau
28 Liberty Street
New York, NY 10005
Telephone: (716) 853-8465
Fax: (716) 853-8579
Email: Timothy.Hoffman@ag.ny.gov

/s/ Matthew I. Levine

Matthew I. Levine
David H. Wrinn*
Assistant Attorneys General
Office of the Attorney General
165 Capitol Avenue
P.O. Box 120
Hartford, CT 06141-0120
Telephone: (860) 808-5250
Email: Matthew.Levine@ct.gov
Email: David.Wrinn@ct.gov

1 For the State of Illinois
2 KWAME RAOUL
3 Attorney General

4 /s/ Jason E. James

5

Jason E. James (*admitted pro hac vice*)
6 Assistant Attorney General
7 Matthew J. Dunn
8 Chief, Environmental Enforcement/Asbestos
9 Litigation Division
10 Office of the Attorney General
11 Environmental Bureau
12 69 West Washington, 18th Floor
13 Chicago, IL 60602
14 Telephone: (312) 814-0660
15 Email: jjames@atg.state.il.us

For the State of Maine
AARON M. FREY
Maine Attorney General

/s/ Jillian R. O'Brien

Jillian R. O'Brien, Cal. SBN 251311
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
Telephone: (207) 626-8800
Email: Jill.OBrien@maine.gov

12 For the STATE OF MARYLAND
13 Brian E. Frosh
14 Attorney General of Maryland

15 /s/ Joshua M. Segal

16

Joshua M. Segal*
17 Special Assistant Attorney General
18 Office of the Attorney General
19 200 St. Paul Place
20 Baltimore, MD 21202
21 Telephone: (410) 576-6446
22 Email: jsegal@oag.state.md.us

For the State of Michigan
DANA NESSEL
Attorney General of Michigan

/s/ Daniel P. Bock

Daniel P. Bock (*admitted pro hac vice*)
Assistant Attorney General
Michigan Department of Attorney General
Environment, Natural Resources and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 335-7664
Email: bockd@michigan.gov

1 For the State of New Jersey
GURBIR S. GREWAL
2 Attorney General

For the State of New Mexico
HECTOR BALDERAS
Attorney General of New Mexico

3 /s/ Lisa Morelli
Lisa Morelli, Cal. SBN 137092
4 Deputy Attorney General
Environmental Practice Group
5 Division of Law
R.J. Hughes Justice Complex
6 25 Market Street, P.O. Box 093
Trenton, New Jersey 08625
7 Telephone: (609)376-2745
Email: Lisa.Morrelli@law.njoag.gov
8

/s/ William Grantham
William Grantham (*admitted pro hac vice*)
Assistant Attorney General
201 Third Street NW, Suite 300
Albuquerque, New Mexico 87102
Telephone: (505) 717-3520
Email: wgrantham@nmag.gov

9
10
11 For the State of North Carolina ex rel. Attorney
General Joshua H. Stein and for the North
12 Carolina Department of Environmental Quality
JOSHUA H. STEIN
13 Attorney General
Daniel S. Hirschman
14 Senior Deputy Attorney General

For the State of Oregon
Ellen F. Rosenblum
Attorney General of the State of Oregon

15 /s/ Amy L. Bircher
Amy L. Bircher*
16 Special Deputy Attorney General
Marc Bernstein
17 Special Deputy Attorney General
North Carolina Department of Justice
18 P.O. Box 629
Raleigh, NC 27602
19 Telephone: (919) 716-6400
20 Email: abircher@ncdoj.gov

/s/ Paul Garrahan
Paul Garrahan (*admitted pro hac vice*)
Attorney-in-Charge, Natural Resources
Section
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 947-4593
Fax: (503) 378-3784
Email: paul.garrahan@doj.state.or.us

1 For the State of Rhode Island
2 PETER F. NERONHA
3 Attorney General

3 /s/ Alison B. Hoffman
4 Alison B. Hoffman (*admitted pro hac vice*)
5 Special Assistant Attorney General
6 Office of the Attorney General
7 150 South Main Street
8 Providence, RI 02903
9 Telephone: (401) 274-4400
10 Email: AHoffman@riag.ri.gov

For the State of Vermont
THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Laura B. Murphy
Laura B. Murphy (*admitted pro hac vice*)
Assistant Attorney General
109 State Street
Montpelier, VT 05609
Telephone: (802) 828-3186
Email: laura.murphy@vermont.gov

10 For the State of Washington
11 ROBERT W. FERGUSON
12 Attorney General

12 /s/ Ronald L. Lavigne
13 Ronald L. Lavigne (*admitted pro hac vice*)
14 Senior Counsel
15 Office of the Attorney General
16 2425 Bristol Court SW, 2nd Fl.
17 Olympia, WA 98504
18 Telephone: (305) 586-6751
19 Email: ronald.lavigne@atg.wa.gov

For the State of Wisconsin
JOSHUA L. KAUL
Wisconsin Attorney General

/s/ Gabe Johnson-Karp
Gabe Johnson-Karp (*admitted pro hac vice*)
Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707
Telephone: (608) 267-8904
Email: johnsonkarp@doj.state.wi.us

1 For the Commonwealth of Massachusetts
2 MAURA HEALEY
3 Attorney General

4 /s/ Seth Schofield
5

Seth Schofield (*admitted pro hac vice*)
6 Senior Appellate Counsel
7 David S. Frankel (*admitted pro hac vice*)
8 Special Assistant Attorney General
9 Energy and Environment Bureau
10 Office of the Attorney General
11 One Ashburton Place, 18th Flr.
12 Boston, MA 02108
13 Telephone: (617) 963-2436 / 2294
14 Email: seth.schofield@mass.gov
15 Email: david.frankel@mass.gov

For the Commonwealth of Virginia
MARK R. HERRING
Attorney General
Donald D. Anderson
Deputy Attorney General
Paul Kugelman, Jr.
Senior Assistant Attorney General
Chief, Environmental Section

16 /s/ David C. Grandis
17

David C. Grandis*
18 Senior Assistant Attorney General
19 Office of the Attorney General
20 202 North Ninth Street
21 Richmond, VA 23219
22 Telephone: (804) 225-2741
23 Email: dgrandis@oag.state.va.us

24 For the DISTRICT OF COLUMBIA
25 KARL A. RACINE
26 Attorney General

27 /s/ Brian Caldwell
28

Brian Caldwell*
Assistant Attorney General
Social Justice Section
Office of the Attorney General
for the District of Columbia
441 Fourth Street N.W., Ste # 600-S
Washington, D.C. 20001
Telephone: (202) 727-6211
Telephone: (202) 445-1952 (m)
Email: brian.caldwell@dc.gov

For the CITY OF NEW YORK
JAMES E. JOHNSON
Corporation Counsel of the City of New York

1 /s/ Nathan Taylor
2

Nathan Taylor*
3 New York City Law Department
4 100 Church Street, Rm 6-144
5 New York, NY 10007
6 Telephone: (646) 940-0736 (m)
7 Telephone: (212) 356-2315
8 Email: NTaylor@law.nyc.gov

21 *Application for admission *pro hac vice*
22 *forthcoming.*

CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Andrew R. Wheeler, et al.**

Case No.: **3:20-cv-03005-RS**

I hereby certify that on June 16, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFFS’ BRIEF RESPONDING TO THE COURT’S ORDER FOR ADDITIONAL BRIEFING

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 16, 2020, at Los Angeles, California.

Ernestina Provencio
Declarant

/s/ Ernestina Provencio
Signature