

ORAL ARGUMENT NOT YET SCHEDULED
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Western States Trucking Association,
Inc., and Construction Industry Air
Quality Coalition, Inc.,

Petitioners,

v.

U.S. Environmental Protection Agency,
and Michael S. Regan, in his official
capacity as Administrator,

Respondents.

No. 23-1143 and consolidated
cases

EPA's Reply in Support of Motion for Abeyance

The Court should suspend the briefing schedule and put this case in abeyance pending decision in two related cases: *Ohio v. EPA*, Case No. 22-1081 (D.C. Cir.) and *Texas v. EPA*, Case No. 22-1031 (D.C. Cir.). Most of the issues presented here are already before the Court in *Ohio* and *Texas*. Decisions in those cases—argued three months ago—should arrive soon. Because the two decisions will very likely substantially narrow, or even resolve, this dispute, efficiency counsels a pause in the briefing. Though Petitioners object to EPA's sensible

request, their opposition prioritizes their own preferences without grappling with broader judicial-efficiency concerns.

Petitioners do not dispute that this case largely rehashes issues already briefed and argued in *Ohio* and *Texas* (where some Petitioners are also parties). *See, e.g.*, Private Opp. 4-5, 7. Indeed, over 80 percent of Petitioners' substantive briefing overlaps with issues in *Ohio* and *Texas*. EPA Mot. 6-7. Here is a page-by-page comparison of the overlaps:

Substantive issues Petitioners briefed here	Briefed in <i>Ohio</i> or <i>Texas</i>?
Constitutionality of Section 209(b) of the Clean Air Act and in particular, equal sovereignty. State Br. 17-28.	Yes, see <i>Ohio</i> State Br. 16-33.
Interpretation of Section 209(b)(1)(B)'s waiver criterion. Private Br. 42-58.	Yes, see <i>Ohio</i> Fuel Br. 27-52.
Applicability of the major-questions doctrine, federalism canon, and constitutional-avoidance canon to interpretation of Section 209(b)(1)(B). Private Br. 19-28, 39-42, 58-59.	Yes, see <i>Ohio</i> Fuel Br. 19-26, 52-54.
EPA's authority under Section 202(a) as to electric vehicles. Private Br. 28-37.	Yes, see <i>Texas</i> Fuel Br. 21-61.

On top of these overlapping substantive issues, many threshold issues pending in *Ohio* and *Texas* also apply here. For example, State Petitioners offer standing allegations similar to those that EPA disputed in *Ohio*. *Ohio* EPA Br. 23-29; *compare Ohio* State Br. 13-15 *with* State Br. 14-16. This case also implicates

similar zone-of-interest concerns as in *Ohio* and exhaustion concerns as in *Texas*.

See Ohio EPA Br. 29-31; *Texas* EPA Br. 38-39.¹

A decision on the overlapping issues would likely control resolution of the same issues here, while also potentially mooting other issues. For example, were the *Ohio* panel to hold that Section 209(b) is unconstitutional, then this Court would not need to decide the interpretative disputes over Section 209(b)(1)(B). Or, as another example, if EPA prevails on an overlapping threshold issue like state petitioners' standing in *Ohio*, that decision could control the standing analysis here. That, in turn, would moot the need to reach State Petitioners' constitutional and lead-time claims. *See* State Opp. 4-5, 7; Private Opp. 7.

The overlapping issues, moreover, should be decided soon. Oral argument in *Ohio* and *Texas* happened three months ago. So those decisions could arrive in a matter of weeks or months, and almost certainly before any decision is issued here. *See* Private Opp. 2 (exaggerating that abeyance would delay resolution here by months "or years").

Efficiency thus counsels pausing briefing now. Doing so would not unduly prejudice Petitioners. *See* Private Opp. 2. First, a pause does not preclude the

¹ Though Petitioners declare there is "no question" of exhaustion here, EPA is not aware of any comments contending that the Clean Air Act bars the disputed waiver because the agency lacks authority to do what California sought to do here. *See* Private Opp. 7 (citing no comments); Private Br. 4 (raising this issue in litigation).

possibility of expedited briefing or other ways to fast-track this case once *Ohio* and *Texas* are decided.

Second, a pause does not preclude the possibility of allowing Petitioners to revise or supplement their briefs to address the *Ohio* and *Texas* decisions.² (Of course, the parties will be in a better position to determine exactly what modified procedures are equitable and efficient once they see the decisions.)

Third, a pause would not affect the timing of the *Ohio* and *Texas* decisions. Again, most issues Petitioners raised here have been argued and briefed (by some of the same Petitioners) in those cases. And the panels there are working on their decisions. Petitioners are not harmed by a short pause in a related case that revisits the same issues.

The Court should also reject Petitioners' attempt to blame EPA for failing to foresee the extent of overlap between the cases and not seeking abeyance earlier. *See* Private Opp. 1, 4-6; State Opp. 1-2, 5-7. Though EPA had agreed to proceed with briefing, it did so with the understanding—based on discussions with Petitioners—that any overlap with *Ohio* would be outweighed by the presentation of discrete new issues. And as Petitioners concede, EPA had not known about any

² In fact, given that those forthcoming decisions would likely control (or at least substantially affect) resolution here, the merits panel in this case could—even absent abeyance—very well choose to wait for those decisions and then request supplemental briefing. So there is little reason to think that abeyance pending those decisions would materially delay a resolution here.

potential overlap with *Texas*. Private Opp. 5. Only when EPA read the opening briefs did the sheer extent of that overlap become clear. Had EPA known that at the outset, it would have sought abeyance earlier.

In any case, the timing of EPA's abeyance motion did not prejudice Petitioners (none of whom is actually regulated by the California rules at issue). Regardless of when EPA sought abeyance, Petitioners knew full well that many of their issues were already before the Court and would almost certainly be decided before this case concluded. Given that reality, they could have briefed the non-overlapping issues more thoroughly. Yet they chose to use the bulk of their briefs to regurgitate arguments from *Ohio* and *Texas*. Their choice cannot, as Petitioners urge, count as prejudice to them. Private Opp. 5-6.

In sum, Petitioners' opening briefs largely raise the same issues that are currently before the Court in *Ohio* and *Texas*. Those cases will be decided soon. In the interest of judicial economy, the Court should follow its common practice of abating briefing pending decisions in related cases that will likely narrow the case and affect its resolution. *See* EPA Mot. 9-10 (collecting cases).

Submitted on December 11, 2023.

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Certificates of Compliance and Service

I certify that this filing complies with Fed. R. App. P. 27(d)(1)(E) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this motion complies with Fed. R. App. P. 27(d)(2)(A) and D.C. Cir. R. 27(c), because by Microsoft Word's count, it has 1012 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Finally, I certify that on December 11, 2023, I filed the foregoing with the Court's CMS/ECF system, which will notify each party.

/s/ Sue Chen