

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE )  
UNITED STATES OF AMERICA and )  
NATIONAL AUTOMOBILE )  
DEALERS ASSOCIATION, )

Petitioners )

Case No. 09-1237

v. )

U.S. ENVIRONMENTAL )  
PROTECTION AGENCY and )  
LISA P. JACKSON, Administrator, )  
U.S. Environmental Protection Agency, )

Respondents )

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**PETITIONERS' CONDITIONAL MOTION FOR LEAVE  
TO FILE A SURREPLY IN OPPOSITION TO RESPONDENTS'  
MOTION TO DISMISS FOR LACK OF STANDING**

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In their Reply in Support of Motion to Dismiss for Lack of Standing, (“Reply”), Respondents (collectively “EPA”) sought entirely new relief by requesting for the first time that the Court hold this case in abeyance pending the outcome of an ongoing rulemaking that, according to EPA, *could* subject the case to dismissal for mootness. *See* Reply at 5, 10. Petitioners Chamber of Commerce of the United States of America and National Automobile Dealers Association (collectively “Petitioners”) oppose EPA’s newly asserted abeyance request and

respectfully submit that it be disregarded by the Court (1) because the request is untimely; (2) because the request was not made in a properly-filed motion, but instead was made for the first time in a reply; and (3) because EPA has not established that abeyance is warranted. If the Court is nonetheless inclined to consider EPA's abeyance request, Petitioners ask for an opportunity to respond to the request in a surreply or other additional briefing.

On September 10, 2009, the Court issued a scheduling order, setting an October 13, 2009 deadline for all procedural motions and an October 26, 2009 deadline for all dispositive motions. *See* Clerk's Order Directing Parties to File Initial Submissions (Sept. 10, 2009). On October 13, 2009, EPA filed a single procedural motion, requesting an extended briefing schedule. *See* Respondent's Mot. for Extended Briefing Schedule (filed Oct. 13, 2009). On October 26, 2009, EPA filed a single dispositive motion asking the Court to dismiss the Petition for lack of standing. *See* Respondent's Mot. to Dismiss for Lack of Standing (filed Oct. 26, 2009). Nowhere in either motion did EPA request, or even suggest, that the case should be held in abeyance. Rather, as noted above, EPA first asked the Court to hold the case in abeyance in its November 20th Reply filed in support of its standing motion.

EPA's request for abeyance should be disregarded. First, EPA made the request more than five weeks after the Court's deadline for all procedural motions.

*See* D.C. Cir. Handbook of Practice and Internal Procedures at 28 (June 8, 2009) (listing a motion for abeyance as a “procedural motion”). EPA does not (and cannot) offer any reasonable explanation for the delay. Indeed, the rulemaking proposal cited by EPA as the justification for abeyance was published in the Federal Register *before* the deadline for procedural motions in this case. *See* 74 Fed. Reg. 49,454 (Sept. 29, 2009).

Second, EPA compounded the error by making its untimely request *not* in its own Motion, but in a Reply filed in support of a Motion seeking entirely different relief. *See* FED. R. APP. P. 27(a)(4) (“Repl[ies] must not present matters that do not relate to the response”); *see also* *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments made for the first time in a reply are generally waived); *Envtl. Def. v. EPA*, 467 F.3d 1329, 1339 n.5 (D.C. Cir. 2006) (argument waived where parties merely “pointed to evidence in support of their argument in the fact section of their initial brief,” because “the argument itself must be introduced in an opening brief”).

Finally, EPA has failed to support its request with any legal authority or to meaningfully address any of the factors that would govern this Court’s assessment of whether abeyance is warranted. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (noting that when considering abeyance, the Court “may also take

account of the traditional factors in granting a stay,” citing *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).<sup>1</sup>

Petitioners do not wish to inconvenience the Court with unnecessary briefing, and for that reason do not at this time submit a substantive filing explaining why there is no need and no justification for holding this case in abeyance.<sup>2</sup> Rather, for the reasons given above, Petitioners submit that the Court should simply disregard EPA’s improper and untimely request. If, however, the Court is inclined to consider the abeyance request, Petitioners ask that the Court grant them leave to respond to that request in a surreply or other additional briefing.

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<sup>1</sup> The factors relevant in considering a stay request are (1) the likelihood the petitioner will ultimately prevail; (2) the likelihood of irreparable injury to petitioner if a stay is granted; (3) the harm to other interested parties by granting the stay; and (4) general public interest factors, including whether granting the stay would ultimately expedite resolution of the issues. See *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>2</sup> Petitioners do note, as explained in prior briefing, that the EPA decision challenged by this Petition subjects Petitioners to current and ongoing harms because, *inter alia*, California is now enforcing its greenhouse gas emissions standards for current-year motor vehicles. See Petitioners’ Resp. to Respondents’ Mot. for Extended Briefing Schedule (filed Oct. 26, 2009). The fact that the California standards are now in effect is among the various reasons that abeyance is unwarranted and the Petition should be considered expeditiously.

Dated: December 2, 2009

Respectfully submitted,

/S/

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petitioners' Conditional Motion for Leave to File a Surreply in Opposition to Respondents' Motion to Dismiss for Lack of Standing has been filed with the Clerk of the Court this 2nd day of December, 2009 by using the CM/ECF System.

In addition, I hereby certify that the foregoing Petitioners' Conditional Motion for Leave to File a Surreply in Opposition to Respondents' Motion to Dismiss for Lack of Standing has been served by United States first-class mail this 2nd day of December, 2009 upon each of the following participants or proposed intervenors in the case who are not registered CM/ECF users:

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