ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF CALIFORNIA, et al., Petitioners, v. ANDREW R. WHEELER, et al., Respondents.	Case No. 19-1239 & Consolidated Cases

MOTION OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS FOR LEAVE TO INTERVENE

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, American Fuel & Petrochemical Manufacturers ("AFPM") respectfully moves for leave to intervene in support of respondents Andrew R. Wheeler and United States Environmental Protection Agency ("EPA"); Elaine L. Chao and United States Department of Transportation ("DOT"); and James C. Owens and National Highway Traffic Safety Administration ("NHTSA"). The petitions in these consolidated cases challenge a joint action of NHTSA and EPA entitled *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51,310 (Sept. 27, 2019).

AFPM and its members have a substantial interest in this case. NHTSA and EPA promulgated the rule to explain that federal law preempts California programs purporting to set standards for CO_2 emissions by certain vehicles. The rule also withdraws a

waiver previously granted to California, which negated the Clean Air Act's preemptive effect on the state. If the rule were vacated, California and other states could continue imposing fuel economy standards and mandates for electric vehicle sales. These state laws and regulations harm AFPM's members by decreasing demand for their products.

AFPM is a national trade association that represents American refining and petrochemical companies. It has 31 refining company members that own/operate 95% of the nation's domestic petroleum refining capacity. These companies directly and indirectly provide jobs, contribute to economic and national security, and enable the production of products used by families and businesses throughout the United States. For example, in California, the refining industry supports 136,000 jobs and contributes more than $33 billion to the state's economy, accounting for 1.2% of the state's GDP. The refining industry in California alone generates $2.9 billion in state and local tax revenues and $3.2 billion in federal tax revenue. All told, the refining industry contributes more than $400 billion to the United States economy.

AFPM's members provide affordable and reliable fuels and petrochemicals that make modern life possible while impacting the environment as little as possible. In fact, U.S. refineries spent $69 billion over the last decade on the prevention, control, abatement, and elimination of environmental pollution. As a result of research and investments by the fuel and automotive sectors, the internal combustion engine is nearly 100% more efficient than it was in 1975. And, since model year 2004, CO_2 emissions

have decreased by 22% and fuel economy has increased by 28%. In addition to improving the efficiency of its operations and products, AFPM has advocated for policies that would further increase the efficiency of gasoline-powered vehicles. AFPM proposed an octane specification for gasoline that when paired with a new automobile optimized for this fuel can deliver a 3–4% efficiency gain cost-effectively.

AFPM meets the standards for intervention because (1) its request is timely; (2) it has material interests in the rule under review; (3) vacatur of the rule would impair those interests; and (4) AFPM's interests are not otherwise adequately represented. For similar reasons, AFPM has associational standing. The rule restores a level playing field allowing the free market to determine demand for transportation fuel. If the rule is vacated, California and other states will continue to impose fuel economy mandates and mandates to purchase vehicles that run on electricity as opposed to liquid fuels—mandates that will injure AFPM's members financially by artificially reducing the demand for their products. Accordingly, AFPM's motion for leave to intervene should be granted.

BACKGROUND

Fuel Economy Standards Preemption. Under the Energy Policy and Conservation Act ("EPCA"), as amended by the Energy Independence and Security Act,

NHTSA, in consultation with the Department of Energy and EPA, must prescribe "average fuel economy standards" for specified types of vehicles. 49 U.S.C. § 32902.[1] The fuel economy standard is to be set at "the maximum feasible average fuel economy level" that NHTSA decides automobile "manufacturers can achieve" in a given model year. *Id.* § 32902(a). Once NHTSA promulgates a standard, states "may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles" covered by the federal standard. *Id.* § 32919(a).

Clean Air Act Preemption. Section 209 of the Clean Air Act ("CAA") preempts states from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a). EPA may grant waivers from this preemption allowing California to promulgate its own emission standards under certain conditions. *Id.* § 7543(b). But EPA may not grant a waiver if it makes one of three specified findings, including, as relevant here, that California "does not need such State standards to meet compelling and extraordinary conditions." *Id.* § 7543(b)(1). If EPA grants California a waiver, then under CAA Section 177, "any State which has plan provisions approved under [Part D] may adopt and enforce" standards identical to California's. *Id.* § 7507(1).

[1] NHTSA exercises this authority pursuant to a delegation from the Department of Transportation. 49 C.F.R. § 1.95(a).

In January 2013, EPA granted California a waiver of CAA preemption to enforce its "Advanced Clean Car" program. 84 Fed. Reg. at 51,328–29. The Advanced Clean Car program "comprises regulations for [zero-emission vehicles], tailpipe [greenhouse gas] emissions standards, and low-emission vehicles … regulations for new passenger cars, light-duty trucks, medium-duty passenger vehicles, and certain heavy-duty vehicles, for [model years] 2015 through 2025." *Id.* at 51,329. To date, ten states, representing more than 30% of U.S. automotive sales, have adopted California's zero-emission vehicle mandate, claiming to fall within Section 177's exception from preemption.

The Proposed Rule. In August 2018, EPA and NHTSA jointly published a notice of proposed rulemaking. 83 Fed. Reg. 42,986 (Aug. 24, 2018). The notice explained that the agencies intended to (1) issue rules providing that EPCA preempts state regulations of tailpipe CO_2 emissions, (2) withdraw the waiver granted to California under CAA Section 209(b) for its Advanced Clean Car program, and (3) determine that CAA Section 177 permits other states to adopt only California standards that are designed to control traditional "criteria pollutants" to address nonattainment of air-quality standards, and thus does not apply to California standards designed to control greenhouse gas emissions.[2] AFPM submitted comments supporting all three proposals.[3]

[2] The notice also addressed planned revisions to the corporate average fuel economy standards for model year 2021–2026 vehicles. The agencies have not yet finalized this aspect of the proposal, and it is not at issue in this action. 84 Fed. Reg. at 51,310.

[3] *See* Comments of the American Fuel & Petrochemical Manufacturers on the U.S. Environmental Protection Agency's Request for Comment on The Safer Affordable Fuel-

The Final Rule. The rule finalized these actions. *First*, NHTSA concluded that EPCA both expressly and impliedly preempts state efforts to regulate tailpipe CO_2 emissions, including state regulations that require a certain percentage of a manufacturer's fleet to be zero-emission vehicles. 84 Fed. Reg. at 51,311–28. As to express preemption, NHTSA concluded that such regulations are "related to" fuel economy standards under § 32919(a) because of the direct and substantial relationship between tailpipe CO_2 emissions and fuel economy. *Id.* at 51,313. As to implied preemption, NHTSA concluded that state limitations or prohibitions on tailpipe CO_2 emissions directly conflict with the objectives of EPCA by undermining the balancing of statutory factors embodied in the fuel economy standards established by NHTSA under § 32902. *Id.* at 51,314.

Second, EPA withdrew the 2013 CAA waiver for California's Advanced Clean Car program. *Id.* at 51,328–52. After concluding that it has authority to reconsider previously granted waivers, *id.* at 51,331–37, EPA explained that its decision to withdraw the waiver rested on two independently sufficient grounds: (1) California's standards are void and unenforceable under NHTSA's EPCA preemption rules, *id.* at 51,337–38; and (2) in any event, California "does not need" its own greenhouse gas and zero-emission vehicles programs "to meet compelling and extraordinary conditions," and thus is ineligible for a waiver under CAA Section 209(b)(1)(B), *id.* at 51,339–50.

Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, Docket ID No. EPA-HQ-OAR-2018-0283-5698, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0283-5698.

Third, EPA determined that CAA Section 177 does not permit other states to adopt California standards that are designed to control greenhouse gas emissions. *Id.* at 51,350–51. EPA explained that the text, structure, and history of Section 177 all confirm that it was intended to help states address nonattainment of air-quality standards for traditional "criteria pollutants," not to address global climate change. *Id.*

ARGUMENT

I. AFPM Satisfies the Standards for Intervention as of Right.

To intervene as of right under Federal Rule of Civil Procedure 24(a)(2),[4] the movant must (1) file a timely application; (2) claim an interest relating to the subject of the action; (3) show that disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) demonstrate that existing parties may not adequately represent the movant's interest. *See, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). AFPM satisfies each element here.

A. The Motion to Intervene Is Timely.

This motion is timely because it was filed within 30 days after the petition in No. 19-1239 was filed on November 15, 2019. *See* Fed. R. App. P. 15(d). AFPM is seeking to join this case at the earliest possible stage, before the Court has established a schedule and format for briefing, and no party will be prejudiced by the timing of this motion.

[4] The standard for intervention under Federal Rule of Civil Procedure 24 informs the "grounds for intervention" under Federal Rule of Appellate Procedure 15(d). *See Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985).

B. AFPM Has an Interest Relating to the Subject of This Proceeding That May Be Impaired by the Outcome.

AFPM has a direct and substantial interest in this case that will be impaired if petitioners prevail. If the rule is vacated, California and other states will be permitted to continue limiting tailpipe CO_2 emissions and mandating zero-emission vehicles. These state regulations will artificially reduce sales of gasoline and diesel fuel produced by AFPM's members, causing them significant financial harm. Grissom Decl. ¶¶ 4–6.

As noted, AFPM's members include the vast majority of the nation's petroleum refining and petrochemical companies. *Id.* ¶ 2. These companies' bottom lines are directly affected by states' efforts to force consumers to switch from the internal-combustion engine to so-called zero-emission vehicles, *id.* ¶ 5, which consume electricity rather than the gasoline and diesel fuel that AFPM members manufacture, *see* 84 Fed. Reg. at 51,320 (explaining that the "only feasible way" of eliminating tailpipe CO_2 emissions "is to eliminate the use of fossil fuel" in vehicle engines altogether). Similarly, state-imposed tailpipe CO_2 emission standards reduce consumption of transportation fuels produced by AFPM's members. *See id.* at 51,313 (explaining the direct "physical and mathematically measurable relationship between carbon dioxide emissions and fuel economy"). In fact, the zero-emission vehicle mandates in California, Colorado, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Vermont are estimated to result in the loss of 400 to 600 million gallons of gasoline and diesel demand between 2020 and 2025. Grissom Decl. ¶ 6.

By necessity, then, such state regulations decrease the demand for and sale of transportation fuel—the principal product of AFPM's members. *Id.* ¶¶ 4–6. By preventing states from enacting such measures, the rule under review allows market forces to determine the demand for transportation fuel, subject to federal regulation, and thereby protects AFPM's members from artificially reduced demand for their products. *Id.* ¶ 7. If the rule were set aside, states would once again be free to impose such market-distorting regulations, to the direct financial detriment of AFPM's members. *Id.* ¶ 8.

AFPM therefore has a concrete and substantial interest in the rule that would be impaired if petitioners prevailed.

C. Existing Parties Cannot Adequately Represent AFPM's Interests.

AFPM's interests will not be adequately represented by the existing parties. This requirement is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). "The applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Here, the existing parties do not adequately represent the AFPM's interests. Although AFPM supports NHTSA and EPA, mere agreement between a private party and a government agency does not establish adequate representation. *See Fund for Animals*, 322 F.3d at 736. As government agencies, NHTSA and EPA must focus on a broad "representation of the general public interest," not the "narrower interest" of private parties. *Dimond*, 792 F.2d at 192–93. AFPM

and its members have substantial commercial interests in this proceeding that are distinct from NHTSA's and EPA's interests. This Court has found an "inadequacy of governmental representation" when the government has no financial stake in the suit, but a private party does. *See e.g.*, *id.* at 192; *Fund for Animals*, 322 F.3d at 736–37; *NRDC v. Costle*, 561 F.2d 904, 912 & n.41 (D.C. Cir. 1977).

But even if AFPM's and the agencies' interests were more closely aligned, "that [would] not necessarily mean that adequacy of representation is ensured." *Costle*, 561 F.2d at 912. Precisely because AFPM's interests are "more narrow and focussed [*sic*] than EPA's [and NHTSA's]," its participation is "likely to serve as a vigorous and helpful supplement to [the agencies'] defense" of the rule. *Id.* at 912–13.

D. AFPM Has Standing to Intervene.

Because AFPM is seeking to intervene in support of respondents, and not affirmatively invoking the Court's jurisdiction, it need not show that it has standing to sue. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019).[5] Nevertheless, for avoidance of doubt, AFPM has Article III standing.

An association has standing when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the

[5] This Court has previously required intervenor-respondents to demonstrate standing, *see, e.g.*, *NRDC v. EPA*, 896 F.3d 459, 462–63 (D.C. Cir.), *judgment entered per curiam*, 735 F. App'x 737 (D.C. Cir. 2018), but that was before the Supreme Court clarified in *Bethune-Hill* that intervenor-respondents must establish standing only when they are affirmatively invoking a court's jurisdiction.

organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). AFPM satisfies each element.

First, AFPM's members "would have standing to sue in their own right." *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996). The member companies would have standing for the same reasons they fulfill the grounds for intervention. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("[A]ny person who satisfies Rule 24(a) will also meet Article III's standing requirement."). As discussed above, vacatur of the rule would harm AFPM's members financially by artificially decreasing the demand for their products. *See supra*, Part I.B. A decision upholding the rule would redress that injury by preventing California and other states from enacting such demand-depressing regulations. As a result, AFPM's members have a concrete and particularized interest in the outcome of this case. *See, e.g.*, *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5–9 (D.C. Cir. 2017); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316–19 (D.C. Cir. 2015); *Fund for Animals*, 322 F.3d at 733; *Military Toxins Project v. EPA*, 146 F.3d 948, 953–54 (D.C. Cir. 1998).

Second, the interests AFPM seeks to protect are germane to its organizational purpose. As an association of petroleum refiners and petrochemical manufacturers, AFPM promotes its members' and the industry's well-being. For this reason, one of AFPM's primary organizational purposes is to represent the interests of its members in federal and state regulatory proceedings and litigation impacting those interests.

Third, the participation of individual member companies is unnecessary. The validity of the rule is a purely legal question, and AFPM can represent its members' interests in supporting the rule without their individual participation.

II. Alternatively, AFPM Should Be Granted Permissive Intervention.

AFPM also qualifies for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) authorizes permissive intervention when, on a timely motion, the movant shows that its claim or defense has a question of law or a question of fact in common with the main action. *E.g.*, *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Permissive intervention requires neither a showing of the inadequacy of representation nor a direct interest in the subject matter of the action. Here, AFPM's motion is timely, and if permitted to intervene, AFPM will address the issues of law that petitioners present. Because AFPM and petitioners maintain opposing positions on these common questions, and because permissive intervention would contribute to the just and equitable adjudication of the questions presented, it should be permitted.

CONCLUSION

For the foregoing reasons, AFPM respectfully requests that the Court grant its motion to intervene in support of respondents.

Dated: December 13, 2019

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association that represents American refining and petrochemical companies. AFPM has no parent corporation, and no publicly held corporation has a 10% or greater ownership in AFPM.

Dated: December 13, 2019

Respectfully submitted,

/s/ *Eric D. McArthur*
Eric D. McArthur
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STATE OF CALIFORNIA, et al., Petitioners, v. ANDREW R. WHEELER, et al., Respondents.	Case No. 19-1239 Consolidated Cases

CERTIFICATE AS TO PARTIES

The parties to these consolidated cases are:

No. 19-1230. Petitioners are the Union of Concerned Scientists, the Center for Biological Diversity, the Conservation Law Foundation, Environment America, the Environmental Defense Fund, the Environmental Law & Policy Center, the Natural Resources Defense Council, Inc., Public Citizen, Inc., and Sierra Club. Respondent is the National Highway Traffic Safety Administration. The Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc. have intervened in support of respondent. The States of Ohio, Alabama, Alaska, Arkansas, Georgia, Indiana, Louisiana, Missouri, Nebraska, South Carolina, Texas, Utah, and West Virginia have moved to intervene in support of respondent.

No. 19-1239. Petitioners are the State of California, the California Air Resources Board, the State of Colorado, the State of Connecticut, the State of Delaware, the State of Hawaii, the State of Illinois, the State of Maine, the State of Maryland, the Commonwealth of Massachusetts, the People of the State of Michigan, the State of Minnesota, the State of Nevada, the State of New Jersey, the State of New Mexico, the State of New York, the State of North Carolina, the State of Oregon, the Commonwealth of Pennsylvania, the State of Rhode Island, the State of Vermont, the Commonwealth of Virginia, the State of Washington, the State of Wisconsin, the District of Columbia, the City of Los Angeles, and the City of New York. Respondents are Andrew R. Wheeler, the United States Environmental Protection Agency, Elaine L. Chao, the United States Department of Transportation, James C. Owens, and the National Highway Traffic Safety Administration.

No. 19-1241. Petitioners are the South Coast Air Quality Management District, the Bay Area Air Quality Management District, and the Sacramento Metropolitan Air Quality Management District. Respondents are the United States Environmental Protection Agency, Andrew R. Wheeler, the National Highway Traffic Safety Administration, and James C. Owens.

No. 19-1242. Petitioner is the National Coalition for Advanced Transportation. Respondents are the United States Environmental Protection Agency, Andrew R. Wheeler, the United States Department of Transportation, Elaine L. Chao, the National Highway Traffic Safety Administration, and James C. Owens.

No. 19-1243. Petitioners are Sierra Club, the Center for Biological Diversity, the Chesapeake Bay Foundation, Inc., Communities for a Better Environment, the Conservation Law Foundation, Environment America, the Environmental Defense Fund, the Environmental Law and Policy Center, Natural Resources Defense Council, Inc., Public Citizen, Inc., and the Union of Concerned Scientists. Respondents are the United States Environmental Protection Agency and Andrew R. Wheeler.

No. 19-1245. Petitioners are Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition. Respondents are the United States Environmental Protection Agency, the United States Department of Transportation, and the National Highway Traffic Safety Administration.

No. 19-1246. Petitioners are the City and County of San Francisco. Respondents are the United States Environmental Protection Agency, Andrew R. Wheeler, the United States Department of Transportation, Elaine L. Chao, the National Highway Traffic Safety Administration, and James C. Owens.

No. 19-1249. Petitioner is Advanced Energy Economy. Respondents are the United States Environmental Protection Agency and Andrew R. Wheeler.

Dated: December 13, 2019

Respectfully submitted,

/s/ Eric D. McArthur
Eric D. McArthur
Counsel for American Fuel & Petrochemical Manufacturers

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2) and 32(g), and D.C. Circuit Rules 27(a)(2) and 32(a), the undersigned certifies that the foregoing Motion for Leave to Intervene is double-spaced (except for headings and footnotes) in 14-point, Garamond typeface. The undersigned further certifies that the document is proportionally spaced and contains 2,859 words exclusive of the accompanying documents excepted from the word count by Rule 27(a)(2)(B), (d)(2).

/s/ Eric D. McArthur
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene was served on December 13, 2019, through the Court's CM/ECF system on all registered counsel.

/s/ Eric D. McArthur
Eric D. McArthur
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