

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

---

AMERICANS FOR CLEAN ENERGY, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 16-1005 (and
	)	consolidated cases)
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, et al.,	)	
	)	
Respondents.	)	

---

**OPPOSITION OF AMERICAN PETROLEUM INSTITUTE TO  
MOTIONS OF CVR ENERGY, INC., SMALL RETAILERS COALITION,  
AND AMERICAN SOYBEAN ASSOCIATION ET AL. FOR  
LEAVE TO FILE BRIEFS AS *AMICI CURIAE***

Petitioner-Intervenor American Petroleum Institute (“API”) opposes the motions of CVR Energy, Inc. (“CVR”), the Small Retailers Coalition (“Coalition”), and the American Soybean Association et al. (“Biodiesel Associations”) for leave to file briefs as *amici curiae* in these consolidated cases.<sup>1</sup> Movants seek leave to file three *amicus* briefs long after this Court issued a

---

<sup>1</sup> See Mot. of CVR Energy, Inc. for Leave to File Brief as Amicus Curiae Supporting Petitioners, Document No. 1636055 (D.C. Cir. filed Sept. 15, 2016); Mot. of The Small Retailers Coalition to Participate as Amicus Curiae In Support of Obligated Party Petitioners, Document No. 1636057 (D.C. Cir. filed Sept. 15, 2016); Mot. of American Soybean Ass’n et al. for Leave to Participate as Amici Curiae in Support of Petitioners, Document No. 1636047 (D.C. Cir. filed Sept. 15, 2016).

detailed briefing order for these consolidated cases,<sup>2</sup> and after petitioners filed opening briefs subject to word limits established by the Court’s briefing order. Movants have not established that their filings are desirable or that the matters asserted in the briefs are relevant to resolution of this appeal. Accordingly, the motions should be denied. *See* D.C. Cir. Rule 29(a); D.C. Cir. Handbook of Practice 38.

## DISCUSSION

1. Movants Failed To Provide Adequate Notice. The Court “encourages those who wish to participate as *amici* . . . to notify the Court as soon as practicable after a case is docketed in this Court.” D.C. Cir. Handbook of Practice 38; *see also* D.C. Cir. Rule 29(b) (encouraging prospective *amici* to “file a motion for leave to participate . . . as promptly and practicable after the case is docketed in this court”). Such notification “enable[s] the Court to accommodate *amici* briefs in setting the briefing format and schedule.” D.C. Cir. Handbook of Practice 38. None of the movants notified the Court that it wished to participate as *amicus* prior to the Court’s issuance of a briefing order. Rather, movants waited nearly *three months* after a briefing order had issued, and after petitioners had filed opening briefs on the merits, to seek leave to participate in this appeal.

---

<sup>2</sup> *See* Order, Document No. 1621554 (D.C. Cir. June 24, 2016) (setting briefing format and schedule); Order, Document No. 1611965 (D.C. Cir. May 5, 2016) (directing parties to submit proposed briefing format).

The movants' delay prejudiced API. If API had known that CVR and the Coalition were preparing *amicus* briefs in support of the point-of-obligation challenge to EPA's Final Rule—a challenge that API opposes—that knowledge would have informed API's discussions with other petitioners about how the limited number of words for petitioners' opening merits briefs should be allocated.<sup>3</sup> Neither CVR nor the Coalition offers any reason why they could not have sought leave to participate as *amicus curiae* prior to the issuance of a briefing order, or informed petitioners of their intent prior to the filing of petitioners' opening briefs on the merits.

2. Movants Have Not Adequately Explained Why Separate *Amicus* Briefs Are Necessary. Under this Court's Rules, “[a]mici curiae on the same side must join in a single brief to the extent practicable. . . . Any separate brief for an *amicus curiae* must contain a certificate of counsel plainly stating why the separate brief is necessary.” D.C. Cir. Rule 29(d). The motions should be denied because movants have not complied with those requirements.

---

<sup>3</sup> See Opening Brief for Obligated Party Petitioners on Cellulosic Biofuel and Biomass-Based Diesel, Document No. 1634754 (D.C. Cir. filed Sept. 8, 2016); Obligated Party Petitioners' Opening Brief Regarding EPA's Refusal to Consider the Appropriate Placement of the Compliance Obligation in the Final Rule, Document No. 1634780 (D.C. Cir. filed Sept. 8, 2016); see also Unopposed Mot. of Obligated Party Petitioners for Leave to File Separate Petitioner Briefs, Document No. 1631260 (D.C. Cir. filed Aug. 19, 2016).

CVR's brief does not contain the required certificate. In its motion, CVR states that it "has attempted to coordinate with other potential amici, but so far as CVR is aware, no other amicus has interests similar to its own." CVR Mot. at 4. But CVR's and the Coalition's proposed briefs both argue in support of moving the RFS Program's point of obligation. There is no indication that those arguments could not have been presented as a single brief.

Counsel for the Coalition states that it is "aware that a group of businesses and trade associations are seeking to file a joint amici curiae brief," but that a separate brief is "necessary" because the "focus" of the Coalition's brief is "not likely to be duplicated" by any other amicus. Coalition Br. vi. Again, however, the Coalition has not explained why its arguments could not have been presented jointly with other amici in a single brief, as Circuit Rule 29 generally requires.

The Biodiesel Associations similarly assert (Proposed Brief at 34) that a separate brief is necessary because "it is essential that *amici curiae* explain the [Final Rule's] consequences to industry." Yet the Biodiesel Associations do not explain why those consequences could not be set forth jointly with the other movants.

Altogether, movants propose to file three separate petitioner-side *amicus* briefs, totaling over 12,000 words. *See* Fed. R. App. P. 29(d) (limiting length of *amicus* briefs to 7,000 words "[e]xcept by the court's permission").

3. CVR's Motion Fails In Several Other Respects. CVR's motion should be denied for three additional reasons.

*First*, the issue raised by CVR is not properly before the Court. CVR's proposed brief addresses whether participation in the RIN market should be limited to obligated parties. That issue has not been raised by any petitioner and was not decided in the rulemaking under review. Accordingly, it is not at issue here. *See Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (Court ordinarily does "not entertain an amicus' argument if not presented by a party"); *see also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004) (per curiam) ("It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review.").

*Second*, CVR acknowledges that its brief was drafted "in substantial part" by counsel for a group of petitioners that are arguing that EPA should have reconsidered its determination that only refiners and importers are obligated parties under the RFS program. *See* CVR Br. 3–4. In addition, CVR is a member of petitioner American Fuel and Petrochemical Manufacturers ("AFPM"),<sup>4</sup> which has joined the argument that EPA should have reconsidered the "point of obligation"

---

<sup>4</sup> *See, e.g.*, AFPM Annual Report 2016, at 21–22 (2016), *available at* <http://annualreportafpm.org/2016/wp-content/uploads/2016/03/afpm-annual-report-2016.pdf>.

under the RFS program. In these circumstances, granting CVR's motion could encourage efforts to evade word limits in this Court's briefing orders by filing additional arguments in the form of an *amicus* brief.

*Third*, CVR asserts that it is not represented by AFPM because AFPM "did not present [CVR's preferred arguments] to the Court." CVR Motion 3. But trade associations regularly engage in internal deliberations to determine which arguments they will present to the Court. The fact that a trade association decides not to present a member's preferred arguments does not mean that member is not represented competently by the association. *See, e.g., Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (leave to participate as *amicus curiae* should be granted when, among other things, the party's interests are "not represented competently or [are] not represented at all" by other parties (citation and quotation marks omitted)). CVR also asserts that it is not a typical member of AFPM because it operates fertilizer plants as well as refineries, and its fertilizer business allegedly will be harmed by EPA's exercise of its authority to waive certain RFS requirements. *See* CVR Motion 3–4. But CVR does not explain why this is relevant to its point-of-obligation argument. Nor has CVR distinguished itself from Petitioner Valero, which operates refineries and is also a large ethanol producer. *See* CVR Br. 3.

4. The Coalition's Motion Fails In Several Other Respects. The Court should deny the Coalition's motion for two additional reasons.

*First*, the Coalition's proposed brief repeatedly cites trade press articles and other materials that are not in the administrative record and did not even exist when EPA issued its rule. *See, e.g.*, Coalition Br. 2 n.3, 3, 6 nn. 9–12, 7 n.14–15, 9 n.19 (relying on materials published or filed in 2016, after the Final Rule was published in December 2015). Although courts may take judicial notice of such materials in limited circumstances, the Coalition has not shown that the articles and other materials it cites are properly before the Court. *See, e.g., Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003); *True the Vote, Inc. v. IRS*, No. 14-5316, 2016 WL 4151231, at \*8 (D.C. Cir. Aug. 5, 2016).

*Second*, the Coalition has not identified its members, so it is unclear whether they are members of petitioners or intervenors that have already filed briefs in this case. *See Jin*, 557 F. Supp. 2d at 137; D.C. Cir. Handbook of Practice 37 (“The Court . . . looks with extreme disfavor on the filing of duplicative briefs in consolidated cases.”).

5. The Biodiesel Associations' Motion Should Be Denied For Several Additional Reasons. There are also additional reasons for denying the Biodiesel Associations' motion.

*First*, the Biodiesel Associations do not explain why they are not adequately represented by the National Biodiesel Board (NBB), “the national trade association for the biodiesel and renewable diesel industry” whose “mission is to advance the interests of its members by creating sustainable biodiesel and renewable diesel industry growth.” Initial Opening Brief of Petitioner National Biodiesel Board, Document No. 1634783, at C4–C5 (D.C. Cir. filed Sept. 8, 2016). Representatives from soybean and other biofuels groups sit on NBB’s governing board,<sup>5</sup> so it is unclear what “unique perspective” (Biodiesel Associations Br. 3) the *amicus* brief proposed by the Biodiesel Associations will add.

*Second*, the Biodiesel Associations’ proposed brief violates Circuit Rule 29(a) by repeating arguments already made in NBB’s opening brief. *See* D.C. Cir. Rule 29(a) (*amicus* briefs “must avoid repetition of facts or legal arguments made in the principal . . . brief”). The Biodiesel Associations’ proposed brief repeats verbatim or nearly verbatim points in NBB’s brief. *Compare* Biodiesel Associations Br. 8 (criticizing EPA’s purported choice “to prioritize competition amongst advanced biofuels”), *with* NBB Br. 14 (criticizing EPA’s focus on “competition among biofuels”); *compare also* Biofuels Associations Br. 12–17 (arguing that EPA adopted inaccurate estimates of biomass-based diesel production

---

<sup>5</sup> *See* National Biodiesel Board, Meet Our Board, <http://nbb.org/about-us/meet-our-board>.

capacity), *with* NBB Br. 16–18, 20–26 (making the same argument, often in the same terms).

*Third*, the Biodiesel Associations rely throughout on extra-record trade press articles and other materials that postdate the Final Rule’s issuance in December 2015. *See, e.g.*, Biodiesel Associations Br. 11 nn.29–30, 12 n.31, 14 n.44, 19 n.59, 22 n.65, 27 n.79, 29 n.83. Like the Coalition, the Biodiesel Associations have not shown that these materials are properly before the Court.

### CONCLUSION

For the foregoing reasons, the motions for leave to file briefs as *amici curiae* should be denied.

Respectfully submitted,

/s/ Robert A. Long Jr. \_\_\_\_\_  
Robert A. Long, Jr.  
Kevin King  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
rlong@cov.com  
kking@cov.com

*Counsel for Petitioner-Intervenor  
American Petroleum Institute*

September 28, 2016

## **CERTIFICATE OF SERVICE**

I certify that on September 28, 2016, I caused the foregoing document to be filed with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system, and that such filing constitutes service on all parties to these consolidated cases.

/s/ Robert A. Long Jr.  
Robert A. Long, Jr.