

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-2395

Caption [use short title]

Motion for: Intervention in Support of Respondents

State of New York v. National Highway Traffic Safety Administration

Set forth below precise, complete statement of relief sought:

The Association of Global Automakers moves to intervene in support of respondents pursuant to Fed. R. App. P. 15(d).

MOVING PARTY: Association of Global Automakers

OPPOSING PARTY: see attached

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Ashley C. Parrish

OPPOSING ATTORNEY: see attached

[name of attorney, with firm, address, phone number and e-mail]

King & Spalding LLP

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Court- Judge/ Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/ Ashley C. Parrish

Date: 8/30/2019

Service by: CM/ECF Other [Attach proof of service]

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19-2395

United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, STATE OF CALIFORNIA,
STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF
COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND,
COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW
JERSEY, STATE OF OREGON, STATE OF RHODE ISLAND, STATE
OF VERMONT, and STATE OF WASHINGTON,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION;
HEIDI KING in her capacity as Deputy Administrator of the National
Highway Traffic Safety Administration; and ELAINE L. CHAO, in her
capacity as Secretary of the United States Department of
Transportation,

Respondents.

On Petition for Review of a Final Rule
Of the National Highway Traffic Safety Administration

MOTION OF THE ASSOCIATION OF GLOBAL AUTOMAKERS TO INTERVENE IN SUPPORT OF RESPONDENTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Association of Global Automakers (“Global Automakers”) states that it is a nonprofit trade association based in Washington, D.C., charged with promoting the interests of its members in the United States. Global Automakers is not a publicly held corporation, has no parent companies, and no companies have a ten percent or greater ownership interest in Global Automakers.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
BACKGROUND..... 1
ARGUMENT 5
CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Brennan v. N.Y.C. Bd. of Educ.</i> , 260 F.3d 123 (2d Cir. 2001)	7, 9
<i>Floyd v. City of New York</i> , 770 F.3d 1051 (2d Cir. 2014)	6
<i>Fund for Animals, Inc. v. Norton</i> , 322 F.3d 728 (D.C. Cir. 2003)	9
<i>In re Holocaust Victim Assets Litig.</i> , 225 F.3d 191 (2d Cir. 2000)	6
<i>Kleissler v. U.S. Forest Serv.</i> , 157 F.3d 964 (3d Cir. 1998)	9
<i>MasterCard Int’l Inc. v. Visa Int’l Serv. Ass’n, Inc.</i> , 471 F.3d 377 (2d Cir. 2006)	6
<i>McDonald v. E. J. Lavino Co.</i> , 430 F.2d 1065 (5th Cir. 1970)	11
<i>N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.</i> , 516 F.2d 350 (2d Cir. 1975)	7
<i>Natural Res. Def. Council v. Nat’l Highway Traffic Safety Admin.</i> , No. 17-2780 (2d. Cir. 2017)	6
<i>Pub. Citizen, Inc. v. Mineta</i> , 340 F.3d 39 (2d Cir. 2003)	6
<i>Sierra Club, Inc. v. EPA</i> , 358 F.3d 516 (7th Cir. 2004)	5, 10
<i>Sierra Club v. Espy</i> , 18 F.3d 1202 (5th Cir. 1994)	10

Trbovich v. United Mine Workers of America,
404 U.S. 528 (1972) 9

Statutes

49 U.S.C. § 32902(a) 1

49 U.S.C. § 32912..... 4

Federal Civil Penalties Inflation Adjustment Act
Improvements Act of 2015..... 1, 2, 3, 4, 5

Other Authorities

81 Fed. Reg. at 43,526 2

81 Fed. Reg. 95,489 (Dec. 28, 2016) 3

82 Fed. Reg. 32,139 (July 12, 2017) 3

82 Fed. Reg. 32,140 (July 12, 2017) 4

83 Fed. Reg. 13,904..... 4

84 Fed. Reg. 36,007 (July 26, 2019)..... 1

84 Fed. Reg. at 36,008 5

Federal Rule of Appellate Procedure 15(d) 5, 7

Federal Rule of Appellate Procedure 27 1

Federal Rule of Civil Procedure 24..... 5, 11

Local Rule 27.1 1

NHTSA, CAFE Public Information Center, https://one.nhtsa.gov/cape_pic/CAFE_PIC_home.htm (last visited Aug. 7, 2019)..... 2, 8

Pursuant to Rules 15(d) and 27 of the Federal Rules of Appellate Procedure and Local Rule 27.1, the Association of Global Automakers (“Global Automakers”) moves to intervene in the above-captioned proceeding in support of Respondents.

BACKGROUND

On August 2, 2019, a group of states led by the State of New York filed a petition seeking review of a final rule by the National Highway Traffic Safety Administration (“NHTSA”), which was published in the Federal Register at 84 Fed. Reg. 36,007 (July 26, 2019). The rule finalizes the Agency’s determination that (1) the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“Improvements Act”) does not apply to the civil penalty for violations of the Corporate Average Fuel Economy (CAFE) standards, (2) increasing the penalty rate to \$14 per tenth of a mile per gallon would have a negative environmental impact, and (3) the penalty rate should continue to be \$5.50 per tenth of a mile per gallon.

NHTSA establishes CAFE standards for automobiles in each model year. 49 U.S.C. § 32902(a). Automobile manufacturers that produce vehicles for sale in the United States and do not meet these standards

are subject to a civil penalty, calculated by multiplying the applicable penalty rate by the number of tenths of a mile per gallon that their vehicle fleet falls short of the applicable CAFE standard, and then by the number of vehicles in the fleet. *See id.* § 32912(b). Compliance with CAFE standards often depends not only on conditions within each manufacturer's control but also on a variety of externalities, such as the broader economy, the price of fuel that can drive sales towards trucks or cars, and the global price of precious metals necessary for more advanced technologies. Recognizing the uncertainty inherent in the CAFE program, the civil penalty for falling short of a standard, unlike other penalties, is *not* designed to be punitive. Instead, the penalty is one option that automobile manufacturers may choose to pay as a way to provide "compliance flexibility." NHTSA, CAFE Public Information Center, https://one.nhtsa.gov/cafe_pic/CAFE_PIC_home.htm (last visited Aug. 7, 2019).

Following the enactment of the Improvements Act in 2015, NHTSA issued an interim final rule on July 5, 2016 increasing the penalty rate for violation of the CAFE standards from \$5.50 per tenth of a mile per gallon to \$14 per tenth of a mile per gallon. 81 Fed. Reg. at 43,526. That

increase was part of a more comprehensive rule covering all of NHTSA's programs. Global Automakers, along with the Alliance of Automobile Manufacturers (the "Alliance"), petitioned NHTSA for partial reconsideration of that portion of the interim final rule focused on the CAFE civil penalty. The petition challenged the methodology and retroactive application of the revised penalty, and it also urged NHTSA to seek comment on whether to adopt a lower civil penalty amount because of "negative economic impact," as permitted by the Improvements Act. 28 U.S.C. § 2461 note, § 4(c)(1)(A).

NHTSA published a final rule in December 2016 delaying the civil penalty adjustment until the 2019 vehicle model year, responding to concerns about retroactivity. *See* Final Rule, Response to Petition for Reconsideration, 81 Fed. Reg. 95,489 (Dec. 28, 2016). Before the final rule took effect, the new administration took office and reviewed NHTSA's final rule, prompting NHTSA to issue a notice on July 12, 2017 acknowledging that the rule "did not give adequate consideration to all of the relevant issues, including the potential economic consequences of increasing CAFE penalties by potentially \$1 billion per year." Civil Penalties, 82 Fed. Reg. 32,139 (July 12, 2017). In a separate notice issued

concurrently, NHTSA also sought comment on “whether and how to amend the civil penalty rate for violations of [CAFE] standards.” 82 Fed. Reg. 32,140 (July 12, 2017). NHTSA identified a number of issues “concerning the costs and benefits of increased penalties” on which it sought public comment. *Id.* at 32,142–43. Global Automakers and the Alliance jointly submitted comments requesting that NHTSA exercise its authority under the Improvements Act to reduce the initial adjustment of the CAFE penalty in light of the significant “negative economic impact” the penalties increase would cause.

On April 2, 2018, NHTSA issued a proposed rule announcing that, upon reconsideration, the Improvements Act should not be applied to the CAFE civil penalty formula provision found in 49 U.S.C. § 32912 — because the CAFE penalty rate is not designed to be a “civil monetary penalty” under that Act — and therefore the civil penalty rate should remain at \$5.50 per tenth of a mile per gallon. 83 Fed. Reg. 13,904. Again, Global Automakers and the Alliance submitted joint comments supporting NHTSA’s proposed action.

On July 26, 2019, after reviewing comments on its proposed rule, NHTSA issued its final rule confirming that “the CAFE civil penalty rate

is not covered by the [Improvements Act].” 84 Fed. Reg. at 36,008. NHTSA explained that the CAFE civil penalty is “part of a complicated market-based enforcement mechanism,” and that “Congress did not intend for the [Improvements Act] to apply to this specialized civil penalty rate, which has longstanding, strict procedures previously enacted by Congress that limit NHTSA’s ability to increase the rate.” *Id.* NHTSA further concluded that even if the Improvements Act applied to the CAFE civil penalty rate, increasing the civil penalty rate would have “negative economic impact.” *Id.* at 36,009. In light of these conclusions, NHTSA finalized its current civil penalty rate of \$5.50 per tenth of a mile per gallon. *Id.* at 36,009.

ARGUMENT

Global Automakers seeks to intervene in this appeal to protect its members’ interest in fuel economy standards and civil penalty amounts that adequately balance environmental protection with economic growth and stability. Federal Rule of Appellate Procedure 15(d) provides for intervention in such circumstances, whether as of right or by permission. *See Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–18 (7th Cir. 2004) (applying standard articulated in Federal Rule of Civil Procedure 24 to

assess intervention in appellate cases)). Intervention is appropriate as of right if four conditions are met: (1) the motion is timely; (2) the movant has an interest in the action; (3) the movant's interest may be impaired by the outcome of the proceeding; and (4) the movant's interest is not adequately protected by the parties to the proceeding. *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014); *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006). When intervention is unavailable as of right, a court "may grant a motion for permissive intervention if the application is timely and if the 'applicant's claim or defense and the main action have a question of law or fact in common.'" *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 202 (2d Cir. 2000) (quoting Fed. R. Civ. P. 24(b)(2)). This Court has previously allowed Global Automakers (and similar organizations) to intervene on review of a final agency action implicating the interests of its members. *See, e.g., Natural Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, No. 17-2780 (2d Cir. 2017); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39 (2d Cir. 2003).

Intervention as of right. All four factors support granting Global Automakers' motion to intervene as of right.

First, this motion is timely. A Rule 15(d) motion for intervention is timely if it is filed within thirty days of the filing of the petition for review. *See* Fed. R. App. P. 15(d). The petition for review was filed only 28 days ago. There is no risk that allowing Global Automakers to intervene will delay these proceedings or prejudice the rights of Petitioners or Respondents.

Second, Global Automakers has a “direct, substantial, and legally protectable” interest in this action. *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001). This Court has found that an “economic interest,” including an interest in “sustaining [a] regulation” is sufficient. *Id.* at 130; *see also N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (interest is sufficient where trade association’s members benefit from a regulation that is being challenged). Global Automakers is a nonprofit trade association dedicated to ensuring a responsible, open, and competitive automotive marketplace in the United States. It advocates for public policies that improve vehicle safety, encourage technological innovation, and promote responsible environmental stewardship. As Global Automakers argued in its petition for reconsideration and response to

NHTSA's proposed rule, an increase in the CAFE civil penalty rate could have a significant impact on automobile manufacturers — some \$1 billion in increased compliance costs. In light of this direct and substantial interest, this Court granted Global Automakers' motion to intervene during its review of the July 12, 2017 rulemaking. The court should do the same here.

Third, Global Automakers' interests may be substantially impaired by the outcome of these proceedings. The CAFE program is unique among federal regulations. Civil penalties are not designed to be punitive, but rather have been described by NHTSA as providing "compliance flexibility." NHTSA, CAFE Public Information Center, https://one.nhtsa.gov/cafe_pic/CAFE_PIC_home.htm (last visited Aug. 7, 2019). An automaker has a choice between (a) manufacturing vehicles that achieve the prescribed standards in a given model year, (b) relying on its own credits it can carry forward, carry backward, or transfer from one fleet to another, (c) purchasing credits from another manufacturer, or (d) paying the civil penalty. NHTSA's final rule acknowledges that CAFE penalty rates are "part of a complicated market-based enforcement mechanism." *Id.* If this petition is successful and the final rule is

vacated, this carefully balanced approach would be upset, and compliance costs with the CAFE program would increase dramatically.

Fourth, no other party adequately represents Global Automakers' interests in this case. The burden of establishing inadequacy of representation is "minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). An applicant need not demonstrate to a certainty that the existing parties will inadequately represent its interests, but only that such representation "may be" inadequate. *Id.* This Court has held that intervention should be permitted unless the interests of existing parties are "so similar to those of [the movant] that adequacy of representation [is] assured." *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 132–33 (2d Cir. 2001). Other courts have long and uniformly held that private economic interests such as those of Global Automakers and its members cannot be adequately represented by an agency, like NHTSA, that is charged to consider broader interests. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) ("[W]e have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors[.]"); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973–74 (3d

Cir. 1998) (federal government agency and private businesses seeking to intervene had “interests inextricably intertwined with, but distinct from” each other and thus the government’s representation of private interests would be inadequate); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (intervention by private industry group in suit against government appropriate because “[t]he government must represent the broad public interest, not just the [concerns of the industry group]”).

Here, no other party represents the specific interests of the international automakers who make up a large share of all vehicles sold in the United States. NHTSA’s and Global Automakers’ interests are not similar enough to ensure that the adequacy of Global Automakers’ representation is “assured.” And Global Automakers has no assurance that NHTSA would “carry[] the battle forward” if the decision of this Court is unfavorable. *Sierra Club v. EPA*, 358 F.3d at 518. It is therefore critical that Global Automakers be permitted to make its own arguments, as may be necessary, and not be left to hope that Respondents might advance the arguments that it would have made if it were a party to the appeal. Moreover, and as explained above, Global Automakers

participated extensively in the administrative events leading to the promulgation of the rulemaking that is the subject of this challenge.

Permissive intervention. If the Court disagrees that Global Automakers is entitled to intervene as of right, the Court should grant discretionary leave to intervene under Federal Rule of Civil Procedure 24(b), which allows intervention where a party “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). For the reasons articulated above, Global Automakers has easily satisfied this minimal standard. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970) (permissive intervention should be granted “where no one would be hurt and greater justice would be attained”).

Global Automakers has notified counsel of this motion. Both Petitioners and Respondents take no position on the motion.

WHEREFORE, Global Automakers respectfully requests that this Court grant its motion to intervene in the above-captioned case.

Respectfully submitted,

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Dated: August 30, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies that this motion:

- (i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 2,146 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and
- (ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Respectfully submitted,

/s/ Ashley C. Parrish
Ashley C. Parrish

Dated: August 30, 2019

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 30th day of August, 2019, served a copy of the foregoing document on all parties through the Court's CM/ECF system.

/s/ Ashley C. Parrish

Ashley C. Parrish