ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

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

UNION OF CONCERNED SCIENTISTS; CENTER FOR BIOLOGICAL DIVERSITY; CONSERVATION LAW FOUNDATION; ENVIRONMENT AMERICA; ENVIRONMENTAL DEFENSE FUND; ENVIRONMENTAL LAW & POLICY CENTER; NATURAL RESOURCES DEFENSE COUNCIL, INC.; PUBLIC CITIZEN, INC.; and SIERRA CLUB,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION and ASSOCIATION OF GLOBAL AUTOMAKERS, INC.,

Movant Intervenors-Respondents,

PETITIONERS' RESPONSE IN OPPOSITION TO INTERVENTION BY THE COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION

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INTRODUCTION

One of the two movants, the Coalition for Sustainable Automotive Regulation (CSAR), should be denied leave to intervene unless and until it complies with this Court's rules governing disclosure statements, which demand transparency as to parties' identities and affiliations and help judges identify situations in which recusal is necessary.

An unincorporated association like CSAR must file along with its motion to intervene a separate statement disclosing the names of all association members that have issued shares or debt securities to the public. D.C. Cir. R. 15(c)(6) & 26.1(b). CSAR's motion reveals that it has such members. Indeed, CSAR relies on publicly-held companies that manufacture automobiles as the source of its "interest" in this litigation, Fed. R. App. P. 15(d), as well as its standing to intervene as of right. *See* Mot. for Leave to Intervene (Mot.) 16–21. Yet CSAR's disclosure statement lists no corporate members, in violation of this Court's rules and in derogation of the transparency they foster. Because those rules have the force of law, *see Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010), CSAR should be denied leave to intervene unless and until this violation is cured.[1]

[1] Petitioners filed this petition as a protective measure in the event that jurisdiction is deemed proper in this Court to review the challenged action of the National Highway Traffic Safety Administration. Petitioners believe that this Court lacks original jurisdiction to review that agency action, and that their challenge instead must proceed in district court. *See Envtl. Def. Fund v. Chao*, No. 1:19-cv-02907-KBJ (D.D.C. compl. filed Sept. 27, 2019). But this Court may rule on the instant motion to intervene without resolving that jurisdictional issue. *See Nat'l Ass'n of Clean Water Agencies v. Envtl. Prot. Agency*, 734 F.3d 1115, 1160–61 (D.C. Cir. 2013) (denying motion to intervene on procedural grounds without addressing subject-matter jurisdiction, because "jurisdiction is vital only if the court proposes to issue a judgment on the merits" (citation omitted)).

ARGUMENT

I. CSAR's disclosure statement under Circuit Rule 26.1 is deficient.

This Court's rules provide that "[a]ny disclosure statement required by Circuit Rule 26.1 must accompany a motion to intervene." D.C. Cir. R. 15(c)(6). The statement accompanying CSAR's motion to intervene describes CSAR as "an unincorporated nonprofit association." ECF Doc. No. 1813676, at 30 (filed Oct. 31, 2019). This Court's rules further mandate that if a movant intervenor "is an unincorporated entity whose members have no ownership interests, the statement *must include* the names of any members of the entity that have issued shares or debt securities to the public." D.C. Cir. R. 26.1(b) (emphasis added). CSAR's disclosure statement is deficient in this regard.

CSAR's motion represents that the entity has five "automobile manufacturer[]" members: "FCA US LLC …, General Motors LLC …, Mazda Motor of America d/b/a Mazda North American Operations …, Mitsubishi Motors North America …, [and] Toyota Motor North America, Inc." Mot. 4. The motion then relies on those entities—each of which is publicly held or has a publicly-held parent company—to support CSAR's claim to Article III standing and its asserted interest in this litigation. *See id.* at 16–21. However, CSAR does not list any member companies in its disclosure statement.

CSAR is not a trade association exempt from the member-disclosure requirement. Circuit Rule 26.1(b) defines a "trade association" as "a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership." CSAR

apparently has only a handful of members, and it is an ad hoc group rather than a continuing association that promotes the general interests of its members. Public reporting indicates that CSAR was formed very recently for the specific purpose of intervening in this case (and parallel proceedings in the district court, *see supra*, note 1) to support the federal government's position. Coral Davenport & Hiroko Tabuchi, *White House Pressed Car Makers to Join Its Fight Over California Emissions Rules*, N.Y. Times, Oct. 30, 2019, page B1 (Ex. A). The automobile industry is divided with respect to participation in this case, *see* Mot. 4 n.1 (noting that "this motion is … not brought on … behalf" of "American Honda Motor Co., Inc."), and the automakers that have decided to intervene in defense of the federal government apparently wish to be parties here without naming themselves as such, *see* Press Release, Toyota Newsroom, "Toyota's Statement Regarding Uniform National Fuel Economy and Greenhouse Gas Emissions Standards" (Oct. 29, 2019) (Ex. B) ("Toyota entered into [related litigation] not as a plaintiff or a defendant ….").

This Court's rules do not forbid those automakers from participating in this case under the aegis of an ad hoc, unincorporated entity, but the rules do demand that their new association comply with applicable disclosure requirements. It has not done so.

II. CSAR's violation of Circuit Rule 26.1 warrants denial of intervention unless and until the violation is cured.

"The rule of the court is the law of the court, as it is of the parties," *District of Columbia v. Humphries*, 11 App. D.C. 68, 78 (1897), and relief may be denied based on a violation of local rules. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101

F.3d 145, 150–54 (D.C. Cir. 1996). Unless and until CSAR cures its deficient disclosure statement, and also commits to update this Court whenever it "gains or loses" members, its motion to intervene should be denied. 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3972.10 (4th ed. 2008); *see* D.C. Cir. R. 26.1(a) ("A revised corporate disclosure statement must be filed any time there is a change in corporate ownership interests that would affect the disclosures required by this rule."). CSAR's noncompliance with Circuit Rule 26.1 threatens the integrity of these proceedings in multiple respects.

CSAR's violation of this local rule significantly undermines the rule's purpose. Circuit Rule 26.1 "supplement[s] the relevant Federal Rules" requiring "parties and/or attorneys [to] provide information needed for conflict screening" by judges. D.C. Cir. Judicial Council Mandatory Conflict Screening Plan § 3(c). Federal judges must recuse themselves from a proceeding if and when they "know[]" that they have "a financial interest … in a party," 28 U.S.C. § 455(b)(4), and the disclosure rules "assist judges in making [that] determination," Fed. R. App. P. 26.1, 1989 adv. comm. n. The rules thus require incorporated entities to disclose "any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity," D.C. Cir. R. 26.1(a); *accord* Fed. R. App. P. 26.1(a), so that judges may assess whether "a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock," Fed. R. App. P. 26.1(a), 1998 adv. comm. n. There is no principled reason to apply a lighter disclosure requirement to an unincorporated association consisting of only a few corporations, one of which (General Motors) is

among the largest companies in the United States. Compliance with Circuit Rule 26.1 is essential to ensure that ad hoc entities like CSAR are not used to evade the disclosure requirements applicable when corporations participate in litigation before this Court.

It is not sufficient for an unincorporated association to name some or all its current members somewhere in the body of a motion to intervene, as CSAR seems to have done here. *See* Mot. 4. "[J]udges are not like pigs, hunting for truffles buried in briefs." *Jones v. Kirchner*, 835 F.3d 74, 83 (D.C. Cir. 2016) (citation omitted). By not placing this information in the separate disclosure statement that must be updated if and when its membership changes, CSAR has unnecessarily heightened the risk that this Court's conflict-screening procedure will not capture the relevant information and that a judge will be made aware of a conflict only after being assigned to consider the case—if even then.

A failure to disclose and update membership also makes it harder for this Court to determine whether CSAR continues to satisfy the requirements for intervention and Article III standing. CSAR's asserted "interest" in this case, Fed. R. App. P. 15(d), stems from its claim to represent "automobile manufacturers and industry groups who collectively produce and sell a substantial percentage of passenger vehicles and light-duty trucks sold in the United States." Mot. 4; *see also id.* at 16, 20. But, absent compliance with Circuit Rule 26.1, automakers may "withdraw their legal support at any point" and exit CSAR without public notice, Ex. A, leaving the association as nothing but a shell purporting to represent a sizable portion of the industry. CSAR needs to be transparent regarding changes in membership in order to ensure the integrity of these proceedings.

CONCLUSION

CSAR should be denied intervention for failure to comply with Circuit Rule 26.1.[2]

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[2] Counsel for CSAR did not request petitioners' position on the motion to intervene in this case. He did seek petitioners' position on CSAR's motion to intervene in a case that petitioners have filed in district court to challenge the same agency action that is the subject of this protective petition for review. Counsel for CSAR was unwilling to commit to disclose all changes in the entity's corporate membership to the district court.

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Dated: November 12, 2019

CERTIFICATE OF COMPLIANCE

The foregoing response to a motion contains 1,535 words and complies with the type-volume limit in Fed. R. App. P. 27(d)(2)(A). The document was prepared using Microsoft Word 365 in 14-point, Garamond font, and it complies with the typeface and typestyle requirements of Fed. R. App. P. 27(d)(1)(E).

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CERTIFICATE OF SERVICE

On November 12, 2019, I served the foregoing document and accompanying exhibits by filing them using this Court's CM/ECF system. All counsel in this case are registered CM/ECF users and will be served via the CM/ECF system.

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