ORAL ARGUMENT NOT YET SCHEDULED

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

UNION OF CONCERNED SCIENTISTS, et al.,	)	
Petitioner,	)	
v.	)	Case No. 19-1230 & Consolidated Cases
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,	)	
Respondent.	)	

MOTION OF THE STATES OF OHIO, ALABAMA, ALASKA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA, MISSOURI, NEBRASKA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST VIRGINIA, FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d), the States of Ohio, Alabama, Alaska, Arkansas, Georgia, Indiana, Louisiana, Missouri, Nebraska, South Carolina, Texas, Utah, and West Virginia ("the Intervening States") move for leave to intervene as respondents in the above-captioned case (and any current and future cases regarding the same agency action). For the reasons stated below, this litigation directly concerns the Intervening States, and the Intervening States

have a compelling interest in the outcome. Counsel for Petitioners and counsel for Respondent have no objection to the States' intervention.

I. INTRODUCTION

Twenty-three States, the District of Columbia, and the cities of New York and Los Angeles sued in the D.C. District Court to challenge a final regulation of National Highway Traffic Safety Administration. The regulation in question is the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, which this motion will call, "the Rule." The Rule will override California laws that set standards for certain vehicle emissions by declaring them preempted. It will also revoke California's waiver from the otherwise preemptive force of the Clean Air Act.

Several public-interest entities filed a similar suit, also in the D.C. District Court, challenging the same Rule. Many of these same entities also filed what they called a "protective petition" in this Court. That protective petition gave rise to this case, in which Ohio, Alabama, Alaska, Arkansas, Georgia, Indiana, Louisiana, Missouri, Nebraska, South Carolina, Texas, Utah, and West Virginia now move to intervene.

The Clean Air Act generally prohibits States or political subdivisions from enforcing "any standard relating to the control of emissions from new motor vehi-

cles." 42 U.S.C. § 7543(a). The Administrator of the Environmental Protection Agency may waive this preemption for California—and *only* California—if California's emissions standards meet certain criteria. *Id.* § 7543(b). Other States may adopt standards "identical to the California standards for which a waiver has been granted." 42 U.S.C. § 7507(1). California has received waivers from Clean Air Act preemption for many years. The Rule ends that waiver.

Ohio and the Intervening States seek a role in this litigation both because California's standards elevate California's sovereignty above other States and because those standards shape the market for the regulated vehicles nationwide. The outcome of this litigation will have a direct effect on the Intervening States' interests. In our Republic, no State is more equal than others. Allowing California alone to evade otherwise preemptive law upsets that balance, and the Intervening States have an interest in recalibrating it. In addition, this case implicates the Intervening States' interests because invalidating the Rule will result in their citizens having to pay higher vehicle costs. The federal government has an interest in its proposed final rule, but only Ohio and the Intervening States have an interest in protecting the equal dignity of all States and the citizens within their borders.

The Intervening States support the Rule; they seek to intervene to oppose any request to invalidate the Rule. Accordingly, the Intervening States request

leave to intervene in this action under Fed. R. App. P. 15(d) in support of the Rule. Further, pursuant to Circuit Rule 15(b), the Intervening States request that this motion to intervene be deemed filed in all cases challenging the Rule, including any later-filed cases.

II. ARGUMENT

A motion to intervene "must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). Aside from this language, Rule 15(d) offers no additional standards for intervention, so courts look to the "statutory design of the act" and the rules governing intervention under Federal Rule of Civil Procedure 24. *See Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985).

The Intervening States should be granted intervention of right pursuant to Fed. R. Civ. P. 24(a). Intervention of right is appropriate when: (1) the application is timely; (2) the applicant has an interest relating to the subject of the action; (3) as a practical matter, disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) the existing parties do not adequately represent the applicant's interest. *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

In the alternative, the Intervening States seek permissive intervention under Fed. R. Civ. P. 24(b). Rule 24(b) allows intervention if the intervenor "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). The Intervening States have, at a minimum, met the more relaxed standard for permissive intervention.

A. In light of the cooperative-federalism principles embedded in the Clean Air Act, the Intervening States should be heard in litigation about standards that affect all States and all States' citizens.

The Clean Air Act is designed to "encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." 42 U.S.C. § 7401(c). And regulation under the Act "is an exercise in cooperative federalism." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). Given that structure, the Intervening States deserve a seat at the table when this Court decides a question that affects the States as States. They also ought to be heard in suits about federal rules that impact their citizens.

B. The Intervening States' Motion is Timely

The Petitioners filed a Petition for Review in this Court on October 28, 2019. This Motion for Leave to Intervene is timely because it is filed within 30 days. Fed. R. App. P. 15(d).

C. The Intervening States Have a Substantial Interest in this Action

The Intervening States have a substantial interest in the outcome of this litigation. The Petitioning States challenge administrative action that will affect both the equal sovereignty of all States and the price of vehicles nationwide. It follows that the Intervening States should be allowed to participate in these actions.

The Intervening States have an interest in a Rule that restores the equal status of all States by blocking the effects of California's special status. The Supreme Court has long held that "the States in the Union are coequal sovereigns under the Constitution." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012); *see also Pollard v. Hagan*, 3 How. 212, 223 (1845); *Shelby Cty. v. Holder*, 570 U.S. 529, 588 (2013) (Ginsburg, J., dissenting) (recognizing that the majority holding extended this "equal sovereignty principle"). Ohio and the intervening States will argue that, not only *may* the federal government block California's special status to regulate emissions, it *must* do so because that special status is unconstitutional under the "fundamental principle of equal sovereignty" among the States. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U. S. 193, 203 (2009). Ohio and the Intervening States have a fundamental interest in their equal status with all other States. And only the States—not the federal government—can adequately advance that argument.

Ohio and the Intervening States also have an interest in this litigation because the Rule will affect the citizens of the Intervening States by lowering vehicle prices, improving the variety of vehicles on the market, and preserving jobs tied to manufacturing those vehicles. Any standard California sets will drive the market nationwide. In fact, when Congress expanded California's special status in 1977, a committee report justified the change *because* manufacturers would need "to produce vehicles meeting the California standards for sale in California" "in any event." *See* H.R. Rep. No. 95-294, at 310 (1977).

Most of Ohio's congressional delegation made the same point about California affecting other States in a comment during the rulemaking process. A letter from 11 Ohio members of the House of Representatives told federal regulators that Ohio consumers value "vehicle choice and competitive prices," and that Ohio counts nearly 630,000 jobs in the automotive industry. NHTA-2018-0067-1854 (July 23, 2018), online at https://www.regulations.gov/document?D=NHTSA-2018-0067-1854.

When a State's citizens are affected, a State may litigate to protect them. That includes instances where one State's regulations "threaten[] withdrawal" of a product from the market in another State. *See Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923). In such situations, the affected State "has an interest apart

from that of the individuals affected" and may sue, "as the representative of the public." *Id.* States have, that is, the right to "represent the interests of its residents in maintaining access to" specific goods. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 605 (1982).

D. Existing Parties Do Not Adequately Represent the Intervening States' Interests

Intervenors who seek to show that their interests would not be adequately represented by existing parties bear only a "minimal" burden. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). They "need only show that representation of [their] interest[s] 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). The standard for intervention is particularly forgiving when the existing defendants are governmental agencies like the United States. This Court has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736. Finally, States are entitled to special consideration when they seek to intervene. In the context of air-pollution regulation, the Supreme Court has recognized that they possess an interest in protecting their "quasi-sovereign" rights. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

The Intervening States have a unique interest in this matter that is separate from the interests of the existing parties—the relief sought by the Petitioning States would directly affect the Intervening States and their citizens. The Intervening States' interests are distinct from the broad regulatory interests advanced by the federal defendants; the Intervening States are obligated to protect the interests of their citizens. *See Fund for Animals*, 322 F.3d at 736 (granting Mongolia's motion to intervene even though its interests overlapped with the interests of the federal defendants). The Intervening States also cannot predict all of the arguments of Petitioning States' or the federal defendants' responses. *See Nat'l Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (declining to predict when intervenors "might wish to urge before the Court" arguments different from those of the EPA). The Intervening States are in the best position to advocate the merits of their arguments, as they have first-hand knowledge about the consequences to their own sovereign interests and the consequences to their citizens.

E. Intervention Will Not Unduly Delay or Prejudice the Parties' Rights

The parties will be neither delayed nor prejudiced by intervention. To date, the petition is merely a protective petition while the Petitioners and the federal respondent litigate the proper forum for the substantive questions. Further, counsel for the United States have stated that they do not oppose this motion for interven-

tion and counsel for the Petitioners have stated that they do not oppose this motion. Thus, delay and prejudice caused by intervention is not at issue here.

III. CONCLUSION

For the foregoing reasons, the Intervening States hereby request that the Court grant their motion to intervene as respondents.

Dated: November 26, 2019

Respectfully submitted,

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CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), I certify that the parties—including intervenors and amici curiae—are set forth below.

Petitioners: Center for Biological Diversity, Conservation Law Foundation, Environment America, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Inc., Public Citizen, Inc., Sierra Club, Union of Concerned Scientists

Respondent: National Highway Traffic Safety Administration

Intervenors: The Coalition for Sustainable Automotive Regulation and the Association of Global Automakers, Inc.

Amici Curiae: There are no amici curiae at the time of this filing.

/s/ Benjamin M. Flowers
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32 (f) and (g), I hereby certify that the foregoing motion complies with the limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(a)(2) because it contains 1,885 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of November, 2019, I caused the foregoing motion to be electrically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system. I further certify that a copy of the foregoing has been served via United States First Class Mail upon the following:

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