ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF TEXAS, et al., *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN *Respondents*.	Case No. 22-1031 (and consolidated cases)

MOTION OF NATIONAL COALITION FOR ADVANCED TRANSPORTATION TO INTERVENE AS A RESPONDENT

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the National Coalition for Advanced Transportation ("Transportation Coalition") respectfully moves to intervene in case 22-1031 and consolidated cases in support of Respondents, the United States Environmental Protection Agency ("EPA") and Michael S. Regan, Administrator. EPA has statutory responsibility under Clean Air Act Section 202(a)(1) to promulgate standards for emissions of air pollutants from any class or classes of new motor vehicles or new motor vehicle engines which cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521(a)(1). EPA fulfilled that responsibility by promulgating federal greenhouse gas emissions standards for passenger cars and light trucks for model years 2023 through 2026 ("the Standards"). 86 Fed. Reg. 74,434 (Dec. 30, 2021).

The petitions in these consolidated cases challenge EPA's greenhouse gas motor vehicle standards. Movant Intervenor Transportation Coalition participated in the proceedings leading to the actions challenged in this case, including by filing comments on EPA's proposed standards. And the Transportation Coalition has an unambiguous interest in defending the legality of the Standards. The Transportation Coalition is a group of companies and non-profit organizations that supports electric

vehicle and other advanced transportation technologies and related infrastructure.[1] The Transportation Coalition's members include electric vehicle manufacturers, power companies, and electric vehicle charging infrastructure companies. The Transportation Coalition's members collectively have invested and committed to investing hundreds of millions of dollars to build infrastructure to support increased electric vehicle deployment and are engaged in proceedings for integrating electric vehicle load to the electric grid. For all these reasons, the Transportation Coalition has a direct and immediate interest in this matter, and satisfies every factor for intervention as of right under Rule 15(d) and this Circuit's precedents. *See, e.g.*, *Crossroads Grassroots Policy Strategies v. Fed. Elec. Comm'n*, 788 F.3d 312, 316, 320 (D.C. Cir. 2015) (addressing factors for "intervention as of right"). The Transportation Coalition thus seeks to intervene as of right to defend the Standards as consistent with both the applicable legal requirements and the extensive technical

[1] The Transportation Coalitions' membership is listed on its website at https://www.lwncat.com/Membership.html, and currently includes Atlantic City Electric, Baltimore Gas & Electric, Commonwealth Edison Company, Constellation Energy Corporation, Delmarva Power, Edison International, EVgo, Exelon Corporation, Lucid USA, Inc. ("Lucid"), Pacific Gas and Electric Company, PECO, PEPCO, Plug In America, Portland General Electric, Rivian Automotive ("Rivian"), Sacramento Municipal Utility District, and Tesla, Inc. ("Tesla"). Transportation Coalition member Center for Climate and Energy Solutions is not participating in this litigation as this organization does not participate in litigation as a matter of general practice.

record before the agency. Alternatively, the Transportation Coalition meets the requirements for permissive intervention.

Counsel for the Transportation Coalition has conferred with counsel for Respondents and Petitioners. Respondents do not object to intervention. The State Petitioners (22-1031 and 22-1035) do not oppose. Petitioner American Fuel & Petrochemical Manufacturers (22-1035) takes no position at this time. Petitioners in the remaining cases did not provide a position on this motion.

BACKGROUND

Clean Air Act Section 202(a)(1) directs EPA to promulgate standards for emissions of air pollutants from any class or classes of new motor vehicles or new motor vehicle engines which cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521(a)(1). Following the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), holding that greenhouse gases are within the Clean Air Act's definition of "air pollutant", *id.* at 528-29, EPA in 2009 issued an Endangerment Finding for greenhouse gases. 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009). This finding obligated EPA to set greenhouse gas emissions standards for motor vehicles, which EPA has promulgated for light-duty vehicles in multiple rulemakings.

In 2012, EPA issued a final rule setting light-duty vehicle greenhouse gas emissions standards for model years 2017 to 2025 ("2012 Rule") based on a robust

technical record. Following the change in Administration, however, EPA reconsidered the standards set in the 2012 Rule, and in July 2020, EPA issued a final rule revising the model year 2021 to 2025 standards ("2020 Rule") to significantly reduce their stringency. 85 Fed. Reg. 24,174 (Apr. 30, 2020). Shortly after EPA's 2020 Rule was finalized, the Transportation Coalition, along with multiple groups of stakeholders—including States, air districts, public interest organizations and other industry stakeholders—challenged EPA's actions in the 2020 Rule as arbitrary and capricious and unlawful. *Competitive Enter. Inst., v. Nat'l Highway Traffic Safety Admin.,* No. 20-1145 (D.C. Cir.) (consolidated cases). However, before the D.C. Circuit ruled on these petitions for review, following another change in Administration, EPA voluntarily reconsidered the weakened standards. The consolidated cases were held in abeyance, pending the outcome of EPA's rulemaking process for the Standards. Order, *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.,* No. 20-1145 (D.C. Cir. Apr. 2, 2021), ECF No. 1892931 (order holding case in abeyance).

In 2021, EPA proposed revising the model year 2023 through 2026 greenhouse gas emission standards for light-duty vehicles to substantially increase the year-over-year stringency from the relaxed standards that were adopted in the 2020 Rule. 86 Fed. Reg. 43,726 (Aug. 10, 2021). EPA finalized the Standards in December 2021, adopting year-over-year stringency increases ranging from 5 to 10

percent (depending on the year) in comparison to approximately 1.5 percent year-over-year increases in the 2020 Rule. 86 Fed. Reg. 74,434, 74,438 (Dec. 30, 2021).

LEGAL STANDARD

Federal Rule of Appellate Procedure 15(d) provides that a motion for leave 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." Appellate courts refer to Federal Rule of Civil Procedure 24 when reviewing motions to intervene in administrative review petitions like this one. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (Fed. R. Civ. P. 24 policies "may be applicable in appellate courts"); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same). An applicant is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) if it satisfies five conditions. First, the applicant must demonstrate that it has Article III standing. *See Crossroads*, 788 F.3d at 316. The Court then applies a four-factor test, requiring that: (1) the motion to intervene be timely; (2) the applicant claims a legally protected interest; (3) the action, as a practical matter, impairs or impedes that interest; and (4) the potential intervenor's interest cannot adequately be represented by another party to the action. *See id.* at 320. Alternatively, under Federal Rule of Civil Procedure 24(b)(1)(B), "[o]n timely motion, the court may

permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."

ARGUMENT

Because the Transportation Coalition satisfies all of the requirements for intervention, this motion should be granted.

I. THE TRANSPORTATION COALITION HAS ARTICLE III STANDING

"The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads*, 788 F.3d at 316 (citation omitted); *see also Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002). An association has constitutional standing on behalf of its members if (1) at least one member would have standing in its own right, (2) "the interests the association seeks to protect are germane to its purpose," and (3) "neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Id.* at 898. As demonstrated below, the Transportation Coalition has standing to intervene as a respondent in this case.

At least one Transportation Coalition member has standing to be a party in its own right. Transportation Coalition members Tesla, Lucid and Rivian manufacture all-electric vehicles that are sold throughout the United States, are directly subject to the Standards that Petitioners challenge in these consolidated cases, and thus

easily satisfy the injury-in-fact requirement. *See* Declaration of Joseph Mendelson, III ("Mendelson Decl.") ¶ 8; Declaration of O. Kevin Vincent ("Vincent Decl.") ¶ 8. If a party "is 'an object of the [agency] action (or forgone action) at issue' . . . there should be 'little question'" regarding standing. *Sierra Club*, 292 F.3d at 900 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). Under the Standards, electric vehicle manufacturers earn and sell tradable compliance credits by producing vehicles that outperform the minimum requirements. *See* Mendelson Decl. ¶ 9; Vincent Decl. ¶ 8. Petitioners seek to vacate the Standards, directly threatening the continued availability of credits for Transportation Coalition members. *See* Mendelson Decl. ¶¶ 9-11, 13-15; Vincent Decl. ¶ 9; *see also Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984) (interest in receiving royalties supported intervention as of right).

Petitioners' challenge to the Standards is the cause of the potential harm to these Transportation Coalition members, and a decision in Respondents favor would redress the potential injury to the Transportation Coalition members. Because the Transportation Coalition members meet the injury-in-fact requirement, they necessarily meet the causation and redressability requirements for standing. Where a suit challenges an agency decision that was in the movant intervenor's favor, "it rationally follows [that] the injury is directly traceable to [plaintiff's] challenge." *Crossroads*, 788 F.3d at 316. In such cases, the causation and redressability

requirements for standing are met. *Id.* The same is true here where Petitioners' seek to vacate the Standards, directly threatening the compliance credits and investments of Transportation Coalition members.

The interests the Transportation Coalition seeks to protect in this suit are germane to its purpose. The Transportation Coalition's members collectively have invested and committed to investing hundreds of millions of dollars to build infrastructure to support increased electric vehicle deployment and are engaged in proceedings to establish rate structures and programs to maximize the benefits and minimize the costs of integrating electric vehicle load to the electric grid. *See* Declaration of Melissa Lavinson ("Lavinson Decl.") ¶¶4, 6-7, 9. The interests the Transportation Coalition seeks to protect here are directly relevant to the organization's purpose of promoting policies to foster electric vehicle and other advanced transportation technologies and related infrastructure. Indeed, the Transportation Coalition and its members participated in the proceedings leading to the actions challenged in this case, including by filing comments with the agencies. *See* 86 Fed. Reg. at 74,477, 74,513 (citing Transportation Coalition comments on EPA's proposed rule); Mendelson Decl. ¶ 12; Lavinson Decl. ¶ 10; Vincent Decl. ¶ 6. The Transportation Coalition would suffer injury if Petitioners succeed in vacating the Standards. The Standards, which require manufacturers to produce new vehicles with lower greenhouse gas emissions and improved fuel economy, reward

the production of vehicles that outperform the minimum standards and play a critical role in driving investments in zero or low greenhouse gas emissions vehicles and related infrastructure. *See* Mendelson Decl. ¶¶ 9-11. Vacating the Standards would undermine the regulatory drivers for vehicle electrification, and would threaten the Transportation Coalition's benefits of their investments. *See* Mendelson Decl. ¶ 14; Lavinson Decl. ¶ 13; Vincent Decl. ¶ 9. These type of economic injuries constitute cognizable harm sufficient to demonstrate constitutional standing. *See Carpenters Indus. Council v. Zinke,* 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant."). And the claims and relief requested do not require any individual member of the Transportation Coalition to participate in the litigation.

II. THIS MOTION IS TIMELY

Under Federal Rule of Appellate Procedure 15(d), a motion to intervene in a proceeding for judicial review of an administrative agency action must be filed within 30 days after the petition is filed. That requirement has been met here.

III. THE TRANSPORTATION COALITION HAS PROTECTABLE INTERESTS AT ISSUE

This Court has held that the existence of constitutional standing suffices to show a legally protected interest for purposes of Rule 24. *See Crossroads*, 788 F.3d at 320 ("[S]ince [the proposed defendant-intervenor] has constitutional standing, it *a fortiori* has 'an interest relating to the property or transaction which is the subject

of the action." (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003))); *see also Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003). As explained in Section I, the Transportation Coalition has protectable interests: Transportation Coalition members are subject to the Standards that Petitioners challenge in these consolidated cases and the Transportation Coalition has financial interests in the Standards. *See Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014) (permitting industry group to intervene where relief would result in expenses for members of the group); *N.Y. Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 351-52 (2d Cir. 1975) (pharmacists' financial stake in upholding a regulation was sufficient to support intervention as of right). For all of these reasons, the Transportation Coalition satisfies the significant protectable interest requirement.

IV. THE RELIEF SOUGHT WOULD IMPAIR THE TRANSPORTATION COALITION'S ABILITY TO PROTECT ITS INTERESTS

To satisfy the third part of the Rule 24(a)(2) test, the Transportation Coalition need only show that an unfavorable disposition of this action "may as a practical matter impair or impede" its ability to protect its interests. Fed. R. Civ. P. 24(a)(2).

Petitioners request that this Court vacate the Standards substantially endangers the Transportation Coalition's interests, because as explained in Section I, Transportation Coalition members are subject to the Standards and have significant financial interests in the Standards. Under Rule 24(a), impairment of

interests refers to "the 'practical consequences' of denying intervention, even where the possibility of future challenge to the regulation remain[s] available." *Fund For Animals*, 322 F.3d at 735 (citation omitted). If the task of reestablishing a prior regulation in separate litigation will be "difficult and burdensome," then a movant intervenor's interests are sufficiently threatened to justify present intervention. *Id.*

The D.C. Circuit in *Fund For Animals* addressed a situation in which an agency of the Mongolian government moved to intervene in litigation challenging a new regulation by the U.S. Fish and Wildlife Service that threatened importation of Mongolian sheep. The court found that while a later, separate lawsuit could in theory also reestablish the status quo ante, the Mongolian government's revenues still would be damaged in the interim period, justifying intervention. *Id.* Similarly, Transportation Coalition members' businesses would be adversely affected by any order vacating the Standards, regardless of whether it would be possible for the Transportation Coalition to sue regarding a future rulemaking.

V. THE TRANSPORTATION COALITION'S INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE EXISTING PARTIES

As this Court has explained, "a movant 'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation.'" *Crossroads*, 788 F.3d at 321 (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980)). This requirement is "not onerous" and represents a "low" threshold. *Id.* (quoting *Fund for Animals*, 322 F.3d at 735, 736 n.7).

The Transportation Coalition's interests in this action are not adequately represented by EPA. The Transportation Coalition has a significant interest in protecting its financial interests in the Standards. *See supra* Section I. EPA's "general interest" in seeing its decision upheld "does not mean [the parties'] particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). To the contrary, EPA's interests, as regulatory agency, differ from those of regulated private parties. *See, e.g.*, *Crossroads*, 788 F.3d at 321 ("[W]e look skeptically on government entities serving as adequate advocates for private parties.").

This Court has long recognized that the government does not adequately represent the specific, narrower economic and other interests of private parties that may be affected by the litigation. *See, e.g.*, *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912 n.41 (D.C. Cir. 1977). That is particularly true when a private-party intervenor asserts a "financial stake in the outcome" of the action. *Dimond*, 792 F.2d at 192. While the government has a duty to represent the interests of the public at large, private parties "seek[] to protect a narrow and 'parochial' financial interest not shared" by the general public. *Id.* at 193; *see also Fund for Animals*, 322 F.3d at 736-37 & n.9 (collecting cases recognizing that "governmental entities do not adequately represent the interests of aspiring intervenors").

Nor can states or other public interest group movant intervenors represent the Transportation Coalition's unique interests in the litigation. The Transportation Coalition represents the interests of private sector businesses in promoting electric vehicles and related infrastructure development and deployment. The Transportation Coalition's interests are therefore distinct and different from the interests of state and local governments and public interest group movant-intervenors. *See WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 17-18 (D.D.C. 2010) (permitting intervention where other industry parties did not represent particular interests of proposed intervenor).

VI. THE TRANSPORTATION COALITION ALSO SATISFIES THE STANDARDS FOR PERMISSIVE INTERVENTION

"On timely motion, the court may permit anyone to intervene who . . . 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). An applicant for permissive intervention should present the Court with "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citation omitted). The Transportation Coalition also satisfies this standard for permissive intervention.

First, this Court has an independent basis for subject matter jurisdiction over the defenses that the Transportation Coalition will advance. Because Petitioner's

claims arise under the laws of the United States—the Clean Air Act and the Administrative Procedure Act—and the Transportation Coalition has Article III standing, *see supra* Section I, this Court has original jurisdiction. *Second*, as explained above, this motion is timely. *See supra* Section II. Intervention at this early stage of litigation will not delay the proceeding, and the Transportation Coalition is prepared to meet any schedule set by this Court. *Third*, because the Transportation Coalition will raise defenses directly responsive to Petitioner's claims, it necessarily will assert a claim or defense in common with the main action and satisfies the "common question of law or fact" requirement.

As such, the criteria for permissive intervention likewise support the Transportation Coalition's motion to intervene.

CONCLUSION

For the foregoing reasons, the Transportation Coalition respectfully requests that this Court grant its motion to intervene.

Date: March 30, 2022

Respectfully submitted,

/s/ Stacey L. VanBelleghem

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 27(a)(2)(b) and 32, this document contains 3,143 words, as determined by the word-count function of Microsoft Word.

This document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: March 30, 2022

/s/ Stacey L. VanBelleghem
Stacey L. VanBelleghem

Counsel for the National Coalition for Advanced Transportation

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: The States of Texas, Alabama, Alaska, Arkansas, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and Utah (Case No. 22-1031); Competitive Enterprise Institute, Anthony Kreucher, Walter M. Kreucher, James Leedy, Marc Scribner, and the Domestic Energy Producers Alliance (Case No. 22-1032); the State Soybean Associations of the States of Illinois, Iowa, Indiana, Michigan, Minnesota, North Dakota, Ohio, and South Dakota, and Diamond Alternative Energy, LLC (Case No. 22-1033); American Fuel and Petrochemical Manufacturers (Case No. 22-1034); the State of Arizona (Case No. 22-1035); Clean Fuels Development Coalition, ICM, Inc., Illinois Corn Growers Association, Indiana Corn Growers Association, Kansas Corn Growers Association, Kentucky Corn Growers Association, Michigan Corn Growers Association, Missouri Corn Growers Association, and Valero Renewable Fuels Company, LLC (Case No. 22-1036); and Energy Marketers of America (Case No. 22-1038).

Respondents: United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency.

Proposed Intervenors: Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Public Citizen, Sierra Club, and Union of Concerned Scientists; the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, the Counties of Denver and San Francisco, and the Cities of Denver, Los Angeles, New York, and San Francisco; and American Lung Association, Clean Air Council, Clean Wisconsin, and National Parks Conservation Association.

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

Date: March 30, 2022

Respectfully submitted,

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner National Coalition for Advanced Transportation (the "Transportation Coalition") states as follows:

The Transportation Coalition is a coalition of companies and non-profit organizations that supports electric vehicle and other advanced transportation technologies and related infrastructure, including business leaders engaged in energy supply, transmission and distribution; vehicle and component design and manufacturing; and charging infrastructure production and implementation, among other activities. The Transportation Coalition is an unincorporated association and does not have a parent corporation. No publicly-held entity owns 10% or more of the Transportation Coalition.

The Transportation Coalition currently has the following members[1]:

- Atlantic City Electric
- Baltimore Gas and Electric Company
- Commonwealth Edison Company
- Constellation Energy Corporation
- Delmarva Power

[1] NCAT member Center for Climate and Energy Solutions is not participating in this litigation as this organization does not participate in litigation as a matter of general practice.

- Edison International
- EVgo
- Exelon Corporation
- Lucid USA, Inc.
- Pacific Gas and Electric Company
- PECO
- PEPCO
- Plug In America
- Portland General Electric
- Rivian Automotive
- Sacramento Municipal Utility District
- Tesla, Inc.

Dated: March 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2022, I caused the foregoing Motion to be electronically filed with the Clerk of the Court via the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

Date: March 30, 2022

/s/ Stacey L. VanBelleghem
Stacey L. VanBelleghem

Counsel for the National Coalition for Advanced Transportation