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] State of New York v. National Highway Traffic Safety Administration

Motion for: intervention in support of respondents

Set forth below precise, complete statement of relief sought:

The Alliance of Automobile Manufacturers, Inc. moves to intervene in support of respondents pursuant to Fed. R. App. P. 15(d).

MOVING PARTY: Alliance of Automobile Manufacturers, Inc. **OPPOSING PARTY:** see attached

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Erika Z. Jones **OPPOSING ATTORNEY:** see attached

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

Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006

Court- Judge/ Agency appealed from:

Please check appropriate boxes:

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

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

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

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

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

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/ Erika Z. Jones **Date:** 8/29/2019 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Counsel for petitioners

Yueh-ru Chu
Section Chief, Affirmative Litigation
New York State Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-6588
Yueh-ru.Chu@ag.ny.gov

Attorney for State of New York

David Zaft
Deputy Attorney General
Office of the Attorney General
300 S. Spring St., Suite 1702
Los Angeles, California 90013
(213) 897-2607
David.Zaft@doj.ca.gov

Attorney for State of California

Matthew I. Levine
Assistant Attorney General
Office of the Attorney General
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

Attorney for State of Connecticut

Loren L. Alikhan
Solicitor General
Office of the Attorney General
for the District of Columbia
441 4th Street, NW
Suite 600 South
Washington, D.C. 20001
Tel: (202) 727-6287
loren.alikhan@dc.gov

Attorney for District of Columbia

Kayli H. Spialter
Deputy Attorney General, Environmental Unit
Delaware Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, DE 19801
(302) 577-8400
kayli.spialter@delaware.gov

Attorney for State of Delaware

Bridget DiBattista
Assistant Attorney General
Office of the Attorney General
100 West Randolph St. 12th Floor
Chicago, Illinois 60601
Tel: (312) 814-2129
bdibattista@atg.state.il.us

Attorney for State of Illinois

Joshua M. Segal
Special Assistant Attorney General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6446
jsegal@oag.state.md.us

Attorney for State of Maryland

Christophe Courchesne
Assistant Attorney General
Chief, Environmental Protection Division
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
Tel: (617) 727-2200
christophe.courchesne@mass.gov

Attorney for Commonwealth of Massachusetts

Jeremy M. Feigenbaum
Assistant Attorney General
Office of the Attorney General
R.J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625
Tel: (609) 376-2690
Jeremy.Feigenbaum@njoag.gov

Attorney for State of New Jersey

Paul Garrahan
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

Attorney for Petitioner of Oregon

Tricia K. Jedele
Unit Chief, Environmental Advocacy
Special Assistant Attorney General
Office of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, Ext. 2039
tjedele@riag.ri.gov

Attorney for State of Rhode Island

Laura B. Murphy
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-3186
Laura.murphy@vermont.gov

Attorney for State of Vermont

Emily C. Nelson
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, Washington 98504
Tel: (360) 586-4607

emily.nelson@atg.wa.gov

Attorney for State of Washington

Counsel for respondents

H. Thomas Byron, III, Attorney
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue NW, Room 7529
Washington, DC 20530
(202) 616-5367
H.Thomas.Byron@usdoj.gov

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, 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, ELAINE 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 ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. TO INTERVENE IN SUPPORT OF RESPONDENTS

ERIKA Z. JONES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
ejones@mayerbrown.com
(202) 263-3000

Counsel for the Alliance of Automobile Manufacturers, Inc.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Alliance of Automobile Manufacturers, Inc., is a 501(c)(6) tax exempt corporation incorporated under the laws of the State of Delaware. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27(a) and Local Rule 27.1, the Alliance of Automobile Manufacturers, Inc. ("Alliance") respectfully requests leave to intervene in this action in support of respondents. The petition for review in this case challenges a final rule by the National Highway Traffic Safety Administration ("NHTSA") reconsidering NHTSA's earlier decision to increase, by nearly threefold, the penalty rate to which auto manufacturers are subject if they do not meet NHTSA's fuel economy standards. Any decision on NHTSA's action would have a direct impact on the Alliance's members,[1] who (along with other auto manufacturers) would be subject to more than $1 billion per year in increased costs industry-wide under the increased penalty rate that NHTSA has reconsidered. And NHTSA itself may not adequately represent the Alliance's interests in this matter. NHTSA is a governmental en-

[1] The Alliance's members include the BMW Group, FCA US LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda N.A., Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars N.A., Toyota Motor N.A., Volkswagen Group of America, and Volvo Car USA. The Alliance frequently participates in regulatory or litigation proceedings on behalf of its members, and it has standing to do so here because "(a) [the Alliance's] members would otherwise have standing to sue in their own right; (b) the interests [the Alliance] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

tity that may choose not to pursue en banc or certiorari review in the event of an unfavorable ruling from this Court, and it cannot, in any event, be relied upon to represent private industry or business. The motion to intervene should therefore be granted.

BACKGROUND

A. Regulatory background and the 2016 interim final rule

The Energy Policy and Conservation Act of 1975 ("EPCA") requires NHTSA to establish Corporate Average Fuel Economy ("CAFE") standards for cars and light trucks in each model year. 49 U.S.C. § 32902(a). Auto manufacturers that produce vehicles for sale in the United States and do not meet the standards are subject to a civil penalty, calculated by multiplying the applicable "penalty rate" times the number of tenths of a mile per gallon that their vehicle fleet falls short of the applicable CAFE standard, times the number of vehicles in the fleet. *See id.* § 32912(b). EPCA set the applicable penalty rate at $5 per tenth of a mile per gallon. *See id.* Prior to the events that gave rise to this case, NHTSA had increased the penalty rate to $5.50 per tenth of a mile per gallon, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (the "Inflation Adjustment Act"). *See* Civil Penalties, 81 Fed. Reg. 43,524, 43,526 (July 5, 2016).

Unlike typical statutory penalties, the "civil penalty" provided by EPCA is not simply a punishment for failing to meet a federal require-

ment. Instead, EPCA permits manufacturers to address a compliance shortfall in a number of different ways. Each year, a number of manufacturers routinely discharge their CAFE obligations by electing to pay civil penalties. Indeed, NHTSA itself has characterized the option of paying the civil penalty as one of several "compliance flexibilities"[2] under the law. Other ways to address a shortfall include applying credits earned in prior years or carried back from future years, trading credits with other manufacturers, or transferring credits from one manufacturer's compliance fleet to another of its compliance fleets. Thus, unlike most federal civil penalties, CAFE "civil penalties" can be paid as a legitimate compliance option.

In 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act (the "Improvements Act"), which replaced the Inflation Adjustment Act and adopted a new methodology for making inflationary adjustments to civil penalties enforced by federal agencies. The Improvements Act required agencies to make an initial "catch-up" adjustment to regulatory penalties in an interim final rule issued by July 1, 2016, and thereafter to make annual adjustments for inflation. *See* Pub. L. 114-74, § 701(b), 129 Stat. 584, 599 (2015), codified at 28 U.S.C. § 2461 note. The catch-up adjustment was to be based on the Consumer Price Index and was capped at 150 percent of the previous

[2] *CAFE Public Information Center*, perma.cc/BEL5-3QYW.

penalty. 28 U.S.C. § 2461 note, § 5(b)(2)(C). The law allowed the head of an agency to make the "catch-up" adjustment smaller than the amount that the statutory formula would otherwise dictate if the agency concluded that "increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact," or would impose social costs that exceed the benefits. 28 U.S.C. § 2461 note, § 4(c)(1)(A).

Following passage of the Improvements Act, NHTSA issued an interim final rule on July 5, 2016, adjusting the penalty rate for violations of the CAFE standards from $5.50 per tenth of a mile per gallon to $14 per tenth of a mile per gallon—the maximum 150 percent increase permitted by the Improvements Act. 81 Fed. Reg. at 43,526. As required by Executive Orders 12866 and 13563, NHTSA considered the impact of the penalty increase on the economy; it observed that "[o]ver the last five model years, NHTSA has collected an average of $20 million per model year in civil penalties" and concluded that increasing the penalty rate by 150 percent "would not result in an annual effect on the economy of $100 million or more"—a threshold that would trigger review of the rule by the Office of Information and Regulatory Affairs. *Id.* at 43,527.

B. The petition for partial reconsideration

The Alliance, along with the Association of Global Automakers (another association of automobile manufacturers) ("Global"), petitioned

NHTSA for partial reconsideration of the interim final rule. *See* Letter from Chris Nevers, VP of Energy & Env't, All. of Auto. Mfrs., and Julia Rege, Dir., Env't & Energy Affairs, Ass'n of Global Automakers, to Mark Rosekind, Adm'r, NHTSA (Aug. 1, 2016), perma.cc/R6TF-659F ("Petition for Reconsideration"). The petition expressed "serious concerns about the effects of the [interim final rule's] significant adjustment to the CAFE penalty." *Id.* at 1.

In particular, the petition argued that the interim final rule had substantially underestimated the economic impact of nearly tripling the CAFE penalty rate. The petition noted that, in the past, NHTSA had calculated the costs of CAFE rules according to the "Volpe model," which takes into account the fact that some manufacturers will choose to pay civil penalties in lieu of meeting applicable fuel economy standards. *Id.* at 6-7. Under the Volpe model, the economic costs of the proposed hike in the penalty rate would be approximately $1 billion annually—far more than the roughly $50 million in costs that NHTSA appeared to have estimated. *Id.* at 7.

The petition also expressed concern that NHTSA would apply the new proposed penalty rate retroactively, to model years that had already been completed or for which manufacturers had already set compliance plans. *Id.* at 3.

C. The Final 2016 Rule

On December 28, 2016—less than a month before a change in presidential administrations—NHTSA issued a final rule granting in part and denying in part the petition for reconsideration and finalizing the penalty rate proposed in the interim final rule. NHTSA acknowledged the force of the petition's concerns about retroactive penalties and thus decided to apply the new penalty rate only beginning in model year 2019. Civil Penalties, 81 Fed. Reg. 95,489, 95,491 (Dec. 28, 2016) ("2016 Final Rule"). NHTSA did not, however, address the other concerns raised by the industry petition.

D. NHTSA's delay of the Final 2016 Rule pending reconsideration, and litigation related thereto

On its own initiative, NHTSA determined that it should seek public comment on whether and how NHTSA should consider the economic effects of the penalty increase. To that end, on July 12, 2017, NHTSA issued a final rule indefinitely delaying the effective date of the 2016 Final Rule pending reconsideration. Civil Penalties, 82 Fed. Reg. 32,139 (July 12, 2017). NHTSA explained that the 2016 Final Rule "did not give adequate consideration to all of the relevant issues"—including the economic consequences detailed in the petition for reconsideration. *Id.* at 31,139. In a separate notice issued that same day, NHTSA sought public comment on

whether the previously proposed $14 per tenth of a mile per gallon penalty rate was the appropriate penalty in light of the dispute about the correct baseline year and the economic effects of increasing the penalty rate. Civil Penalties, 82 Fed. Reg. 32,140, 32,142-43 (July 12, 2017).

A number of organizational and state government petitioners challenged the delay rule in this Court. The Alliance (and Global) moved for and obtained leave to intervene in support of the government in that litigation. On the merits, the Court ultimately vacated the delay rule, holding that NHTSA exceeded its statutory authority and that it violated the Administrative Procedure Act by imposing the delay without notice and comment. *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018). As a result of its decision, this Court stated, the 2016 Final Rule "is now in force." *Id.* at 116.

E. The 2019 notice and comment period and Final Rule

In April 2018, NHTSA promulgated a proposed rule in which it announced that it was reconsidering the 2016 Final Rule and was proposing not to apply the Improvements Act to the CAFE civil penalty rate. Civil Penalties, 83 Fed. Reg. 13,904 (Apr. 2, 2018). During the ensuing notice and comment period, a number of commenters submitted comments, including the Alliance. In July 2019, after considering the comments, NHTSA announced that it had reconsidered the 2016 Final Rule and

would not apply the Improvements Act to CAFE's civil penalty rate, leaving the current rate in place. Civil Penalties, 84 Fed. Reg. 36,007 (July 26, 2019) ("2019 Final Rule").

NHTSA's decision to reconsider the 2016 Final Rule rested on two grounds. First, the Improvements Act, by its terms, does not apply to the CAFE civil penalty rate because the Improvements Act applies only to penalties that are "for a specific monetary amount as provided by Federal law" or have "a maximum amount provided for by federal law." 28 U.S.C. § 2461 note. The CAFE penalty rate, NHTSA explained, does not fit this definition, because it is an input used to *calculate* a penalty, rather than a penalty amount itself, and because it has no maximum amount—an automaker's ultimate penalty depends upon other factors in addition to the penalty rate. 84 Fed. Reg. at 36,016-17. Second, citing the economic concerns raised by the Alliance and Global, NHTSA concluded that allowing the CAFE penalty rate to increase to the level prescribed by the 2016 Final Rule would have a "negative economic impact," as provided in the Improvements Act. 28 U.S.C. § 2461 note, § 4(c)(1)(A).

A number of states petitioned for review of the 2019 Final Rule, commencing this proceeding.

ARGUMENT

Federal Rule of Appellate Procedure 15(d) provides expressly for intervention in cases, like this one, that challenge administrative rulemaking. Because "Rule 15(d) does not provide standards for intervention," the courts of appeals generally "have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24" to determine when intervention is appropriate. *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004) (citing *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (the "policies underlying intervention" in the district courts under Civil Rule 24 are "applicable in appellate courts")).

Civil Rule 24 provides for intervention as of right and permissively. "Intervention as of right under Rule 24(a)(2) is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006).

When intervention as of right is unavailable, 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)).

Applying these standards, this Court has previously allowed the Alliance to intervene to defend final agency actions that implicate the interests of its members—including the earlier litigation in this court over the same CAFE penalty regime at issue here. *See, e.g.*, *Nat. Res. Def. Council*, 894 F.3d at 102; *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 56 (2d Cir. 2003) (petition to review final rule regulating tire pressure monitoring systems). It should do so here as well.

A. The Alliance is entitled to intervene as of right.

The Alliance easily meets all four requirements for intervention as of right under Rule 15(d): Its members' interests are at stake in this litigation, and NHTSA may not adequately represent those interests. Because disposition of the rule challenge here may impair the legal rights of the Alliance's members, it is entitled to intervene as of right.

1. The 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. The petition for review here was filed on August 2, 2019. Thus, under Federal Rule of Appellate Procedure 26(a)(1)(C), the deadline to file a motion to intervene is September 3, 2019. This motion was filed before that date.

2. The Alliance's members have 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). The interest required by this prong of the test need not constitute a property right; an "economic interest," including an interest in "sustaining [a] regulation" that is being challenged, is sufficient. *Id.* at 130. This Court has therefore held that a trade association has "a sufficient interest to permit it to intervene [when] the validity of a regulation from which its members benefit is challenged." *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975).

Against this backdrop, there is no question that the Alliance and its members have a legal and economic interest at stake that justifies intervention. The Alliance's members—who account for 70% of all car and light truck sales in the United States (*see About the Auto Alliance*, perma.cc/9ZBG-GHC9)—will bear the brunt of the more than $1 billion increase in annual costs of compliance if the 2016 Final Rule's hike in the penalty rate remains in place. It is difficult to imagine an interest more "direct" or "substantial" than this. That interest is why the Alliance jointly filed the principal petition for reconsideration of the July 2016 interim final rule; it is why the Alliance intervened in the earlier CAFE proceeding

in this Court; and it is ample justification for the Alliance's intervention here.

3. Disposition of the petitions for review here also may impair or impede the ability of the Alliance to protect its members' legal and economic interest in avoiding a massive increase in penalties for failure to meet CAFE standards. If the petitions for review are granted, and NHTSA's action reconsidering the Final 2016 Rule is vacated, that rule will remain in place, subjecting the Alliance's members to the rule's increased penalties.

4. Finally, NHTSA may not adequately represent the Alliance's interests. As this Court has previously explained, a movant's burden of showing inadequacy of representation "'should be treated as minimal.'" *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). "The test here" is "whether the [another party's] interests [are] so similar to those of [the movant] that adequacy of representation [is] assured." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d at 132-33.

NHTSA's interests are clearly not similar enough to the Alliance's to make adequacy of representation "assured." Private business is just one among many varied and often competing NHTSA stakeholders, and NHTSA is answerable to the public as a whole. For this reason, courts

have readily recognized that an agency like NHTSA generally cannot adequately represent the interests of businesses. *See, e.g.*, *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009) (explaining that an "intervenor's showing is easily made when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor's particular interest." (quotation marks omitted)).

Additionally, while NHTSA can be counted on to "stick up for its actions in response to [a] petition for review," "if it loses the Solicitor General may decide that the matter lacks sufficient general importance to justify proceedings before the court en banc or the Supreme Court." *Sierra Club*, 358 F.3d at 518. In other words, the Alliance has no guarantee that NHTSA would exhaust its appellate remedies in the event of an unfavorable decision from this Court. Intervention is therefore necessary to ensure that the Alliance is placed "on equal terms" and allowed "to make [its] own decisions about the wisdom of carrying the battle forward" should the need arise. *Id*. That, by itself, is enough to satisfy the Alliance's "minimal" obligation to demonstrate that NHTSA's defense of this case may be inadequate to protect the interests of Alliance members. *U.S. Postal Serv.*, 579 F.2d at 191.

B. Alternatively, the Alliance should be allowed to intervene permissively.

Because the Alliance is entitled to intervene as of right, the Court need not reach the issue of permissive intervention—but if the Court believes otherwise, it should grant discretionary leave to intervene under Civil Rule 24(b). That rule provides that a court may allow a party to intervene if it merely "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). That is not an exacting standard, and the Alliance has met it for the same reasons that we submit make intervention proper as of right. *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") (internal quotation marks omitted).

CONCLUSION

The motion to intervene should be granted.[3]

Dated: August 29, 2019

Respectfully submitted,

/s/ *Erika Z. Jones*
ERIKA Z. JONES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
ejones@mayerbrown.com
(202) 263-3000

Counsel for the Alliance of Automobile Manufacturers, Inc.

[3] Counsel for the Alliance informed opposing counsel of its intent to file the present motion to intervene. At the time of filing, counsel for the Alliance had not received a response from petitioners. Respondents take no position on the motion.

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 3,187 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.

Dated: August 29, 2019 /s/ *Erika Z. Jones*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing motion with the Clerk of the Court using the appellate CM/ECF system on August 29, 2019. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: August 29, 2019 /s/ *Erika Z. Jones*