ORAL ARGUMENT NOT SCHEDULED

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

NATURAL RESOURCES DEFENSE COUNCIL, et al., Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, et al. Respondents.	No. 22-1080 (and consolidated cases)

MOTION BY THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, VERMONT, WASHINGTON, AND WISCONSIN, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, THE DISTRICT OF COLUMBIA, THE CITY AND COUNTY OF DENVER, AND THE CITIES OF LOS ANGELES, NEW YORK, AND SAN FRANCISCO FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure (FRAP) 15(d) and Circuit Rule 15(b), the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Vermont, Washington, and Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, the City and County of Denver, and the Cities of Los Angeles, New York, and San Francisco (collectively, "Movant-Intervenor States") hereby move the Court for leave to intervene in case numbers 22-1144 and 22-1145 in support of Respondents the National Highway Traffic Safety Administration (NHTSA), Administrator Cliff, the United States Department of Transportation, and Secretary Buttigieg.

Petitioners in case numbers 22-1144 and 22-1145 challenge NHTSA's May 2022 adoption of more stringent average fuel economy standards for passenger cars and light trucks for model years 2024-2026 (the Standards) that benefit the Movant-Intervenor States and our residents. Petitioners' challenges to the Standards implicate Movant-Intervenor States' interests in protecting our residents and state resources from high fuel costs, oil price shocks, and negative effects of higher fuel consumption, including harmful emissions from fuel refining activities. Accordingly, and as explained in

detail below, Movant-Intervenor States have compelling sovereign interests at stake in this litigation, which a decision in favor of Petitioners would impair. These interests are distinct from Respondents' interests and are not adequately represented by any party. Movant-Intervenor States thus satisfy the requirements for intervention and respectfully request that the Court grant this motion. This Court has recently granted intervention to similar groups of States to defend other federal regulatory actions on light-duty vehicles, involving some similar State interests,[1] and the same resulted is warranted here.

Counsel for the Petitioners in Case Nos. 22-1144 and for Respondents have indicated they do not oppose a timely intervention motion by Movant-Intervenor States. Counsel for Petitioners in Case No. 22-1145 have taken no position on the motion.

BACKGROUND

The Energy Policy and Conservation Act (EPCA) mandates, among other things, that the Department of Transportation require reductions in oil consumption through fleetwide average fuel economy standards. 49 U.S.C.

[1] ECF No. 1943675, *State of Texas v. EPA*, Case No. 22-1031 (Apr. 20, 2022); ECF No. 1952922, *State of Ohio v. EPA*, Case No. 22-1081 (June 30, 2022).

§ 32902. These standards, applicable to an automaker's fleet of vehicles manufactured in a given model year, require the fleet as a whole to achieve an average fuel economy reflecting the "maximum feasible" fuel economy levels that NHTSA establishes for each model year. *Id*. § 32902(a). Originally adopted as a response to the 1970s energy crisis, EPCA's fuel economy program was strengthened in the 2007 Energy Independence and Security Act, which requires NHTSA to adopt fleet-average fuel economy levels that increase progressively to at least 35 miles per gallon by 2020, and "maximum feasible" fuel economy standards thereafter. *Id.* § 32902(b)(2).

However, in 2020, NHTSA weakened its fuel economy standards for the 2021 model year and adopted standards for the 2022-2026 model years that were far weaker than it had previously projected would be feasible for those years, as part of a rulemaking known as "SAFE II." *See* 85 Fed. Reg. 24,174 (Apr. 30, 2020). Those 2020 NHTSA standards required fuel economy improvements of only about 1.5% year-over-year. A coalition of States led by California (many of which are likewise Movant-Intervenors here) challenged the SAFE II action in this Court in Case Number 20-1167,[2]

[2] Case Number 20-1167 was consolidated with related challenges to SAFE II under Case Number 20-1145.

arguing that the SAFE II standards violated EPCA's requirement of "maximum feasible" fuel economy levels. Those cases were only partially briefed when a new Administration took office, and, in light of President Biden's Executive Order 13,990 requiring reconsideration of SAFE II, the Court placed the SAFE II challenges in abeyance. Case No. 20-1145, ECF No. 1892931 (Apr. 2, 2021); *see also* ECF No. 1949799 (Jun. 8, 2022) (continuing abeyance of SAFE II challenges).

NHTSA thereafter proposed more stringent fuel economy standards to replace the SAFE II standards for model years 2024-2026. 86 Fed. Reg. 49,602, 49,603 (Sept. 3, 2021). Movant-Intervenor States commented on that proposal, strongly supporting increases to the stringency of NHTSA's fuel economy standards and urging the agency to consider the most stringent set of alternative standards proposed—which would require year-over-year increases in stringency of 10%—as the "maximum feasible." *See id.* at 49,745, 49,754-56 (overview of and request for comment on Alternative 3).

On May 2, 2022, NHTSA finalized the fuel economy standards at issue in these petitions. The Standards increase in stringency by 8% in model years 2024 and 2025 and by 10% in model year 2026. 87 Fed. Reg. 25,710, 25,710 (May 2, 2022). NHTSA concluded these finalized standards are the maximum feasible and estimated the standards would save approximately 60

billion gallons of gasoline, resulting in consumer savings of over $98 billion. *Id*. at 25,743, 25,745, 25,872.

On June 30, 2022, the American Fuel & Petrochemical Manufacturers (AFPM) and a group of States led by Texas (Texas Petitioners) each filed petitions for review of the Standards. ECF Nos. 1953159, 1953203. These Petitioners have indicated in rulemaking comments and in public statements that they seek weaker fuel economy standards, such as a return to the SAFE II fuel economy standards, and/or vacatur of the final rule.[3]

LEGAL STANDARD

Federal Rule of Appellate Procedure (FRAP) 15(d) authorizes intervention in circuit court proceedings to review agency actions on a motion containing "a concise statement of interest of the moving party and the grounds for intervention" that is filed "within 30 days after the petition

[3] *See, e.g.*, Comment by AFPM (Oct. 25, 2021), NHTSA-2021-0053-1530 (AFPM Comment), https://www.regulations.gov/comment/NHTSA-2021-0053-1530; Press Release, "AG Paxton Challenges Biden's National Highway Traffic Safety Administration Fuel Efficiency and Electric Vehicle Requirements" (Jun. 30, 2022) (Texas AG Press Release), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-challenges-bidens-national-highway-traffic-safety-administration-fuel-efficiency-and. In contrast, Petitioner Natural Resources Defense Council (NRDC) in Case No. 22-1080 likely seeks to strengthen the fuel economy standards. *See* Comment by NRDC Members (Oct. 26, 2021), NHTSA-2021-0053-1594, https://www.regulations.gov/comment/NHTSA-2021-0053-1594.

for review." In determining whether to grant intervention motions, this Court draws on the policies underlying Federal Rule of Civil Procedure 24 (FRCP 24). *E.g.*, *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (applying FRCP 24 to intervention for the purposes of appeal). Under FRCP 24, courts require a party requesting intervention as of right to satisfy four criteria:

> 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest.

Crossroads Grassroots Pol'y Strategies v. FEC, 788 F.3d 312, 320 (D.C. Cir. 2015); *see also Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232–33 (D.C. Cir. 2018) (resolving FRAP 15(d) motion to intervene by looking "to the timeliness of the motion to intervene and whether the existing parties can be expected to vindicate the would-be intervenor's interests").

A court may also grant permissive intervention when a movant makes a "timely application" and the "applicant's claim or defense and the main action have a question of law or fact in common." FRCP 24(b)(1); *see also EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998).

Under Circuit Rule 15(b), a motion to intervene in the review of an administrative action is deemed to seek intervention in all cases involving that agency action "unless the moving party specifically states otherwise." Here, Movant-Intervenor States seek to intervene in support of NHTSA only in Case Nos. 22-1144 and 22-1145, and not Case No. 22-1080.

ARGUMENT

I. MOVANT-INTERVENOR STATES ARE ENTITLED TO INTERVENTION AS OF RIGHT

Movant-Intervenor States easily satisfy the requirements for intervention as of right.

A. Movant-Intervenor States Have Article III Standing and Legally Protected Interests that Could Be Impaired

Under the law of this Circuit, "[t]he standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads Grassroots*, 788 F.3d at 316. Movant-Intervenor States can establish all three factors.

This Court's "cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots*, 788 F.3d at 317. The final rule adopted by NHTSA details at length the benefits to Movant-Intervenor States and our residents

that would be lost if AFPM and the Texas Petitioners succeeded in their challenges to the Standards. *First*, NHTSA projects $98 billion in reduced fuel costs due to the Standards. 87 Fed. Reg. at 25,872. These fuel savings benefit both the residents of Movant-Intervenor States and States directly, given the hundreds of thousands of vehicles our state and local government fleets own and operate.[4] *Second*, NHTSA projects significant health and environmental benefits from the reduced production and combustion of petroleum fuels.[5] More than one-third of the largest 100 crude oil refineries nationally are located in or upwind of Movant-Intervenor States, producing criteria and hazardous pollution that worsens our air quality, interferes with States' attainment and maintenance of national ambient air quality standards, and harms our residents' health, especially in overburdened communities.[6]

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[4] *See* Office of Hwy. Policy Information, "Highway Statistics Series: Publicly Owned Vehicles – 2020" (Table MV-7) (Dec. 2021) (estimating 1.2 million light-duty vehicles owned by state and local governments), https://www.fhwa.dot.gov/policyinformation/statistics/2020/mv7.cfm.

[5] 87 Fed. Reg. at 25,877 (finding lower demand for these fuels from improved fuel economy reduces the criteria and greenhouse gas emissions from "[e]xtracting and transporting crude petroleum, refining it to produce transportation fuels, and distributing fuel").

[6] U.S. Energy Information Admin., "Top 10 U.S. refineries operable capacity" (updated June 21, 2022), https://www.eia.gov/energyexplained/oil-and-petroleum-products/refining-crude-oil-refinery-rankings.php. For example, our comments on NHTSA's proposal highlighted Colorado and

Reducing demand for petroleum fuels by improving vehicles' fuel economy will thus reduce the burdens on state health and environmental programs and improve the health of our residents and natural resources. *Third*, NHTSA projected the Standards would prevent 605 million metric tons of carbon dioxide emissions, which harm Movant-Intervenor States by exacerbating climate change's effects. 87 Fed. Reg. at 25,745.[7] If Petitioners succeed in vacating the Standards, Movant-Intervenor States and their residents would lose the benefits of the Standards' significant greenhouse gas reductions.

It "rationally follows" that the lost fuel savings, criteria and hazardous pollution reduction, and climate benefits Movant-Intervenor States would face are "directly traceable" to Petitioners' challenges to the Standards and that Movant-Intervenor States "can prevent the[se] injur[ies] by defeating" Petitioners' challenges. *Crossroads Grassroots*, 788 F.3d at 316. The

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New Jersey's challenges in meeting federal ozone standards in areas where heavy vehicle traffic and refineries produce significant oxides of nitrogen (NOx) emissions, a key ozone precursor. Comments by State of California, et. al., at p. 20 (Oct. 26, 2021), NHTSA-2021-0053-1499_attachment2 (Movant-Intervenor States' Comment), https://www.regulations.gov/comment/NHTSA-2021-0053-1499.

[7] Movant-Intervenor States' Comment, *supra* note 6, at pp. 12-17; Declaration of Michael Fitzgibbon, ¶¶ 6-13, 18-31.

Movant-Intervenor States meet all three requirements for Article III standing as to the Texas Petitioners' and AFPM's challenges to the Standards.

For the same reasons, Movant-Intervenor States also meet the FRCP 24(a) requirements for legally protected interests that may be impaired or impeded by this litigation. This Court has observed that the FRCP 24(a) and Article III standing requirements overlap substantially. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("One court has rightly pointed out that any person who satisfies Rule 24(a) will also meet Article III's standing requirement."). As discussed above, if Petitioners are successful in their efforts to vacate NHTSA's Standards, Movant-Intervenor States' interests in fuel savings, reduced refinery pollution, and climate mitigation will certainly be impaired. Movant-Intervenor States thus satisfy the interest requirements for intervention as of right under FRCP 24(a), as well as the requirements for Article III standing.

B. Movant-Intervenor States Also Satisfy the Other Requirements for Intervention as of Right

Timeliness: This motion is timely. FRAP 15(d) provides that a party seeking intervention must do so "within 30 days after the petition for review is filed." The petitions in Case Nos. 22-1144 and 22-1145 were filed on June

30, 2022. ECF Doc. Nos. 1953203, 1953159. This motion is thus within the 30-day period provided by FRAP 15(d).

Vindication of Interests by Existing Parties: Under *Old Dominion*, this Court considers "whether the existing parties can be expected to vindicate the would-be intervenor's interests," 892 F.3d at 1232–33, and under FRCP 24(a), this Court similarly considers whether "existing parties adequately represent" the would-be intervenor's interests, FRCP 24(a). The requirement is "not onerous," and movants will be allowed to intervene "unless it is clear that" the existing parties "will provide adequate representation." *Crossroads Grassroots*, 788 F.3d at 321. "[G]eneral alignment" between would-be intervenors and existing parties is not dispositive. *Id.*

Movant-Intervenor States more than meet this "minimal burden." *Id.* They have unique sovereign interests in fuel savings for government fleets, attaining or maintaining federal ambient air quality standards, and protecting state lands, infrastructure, and resources from climate change. These state sovereign interests are distinct from NHTSA's interests in promulgating and defending its final rule, even if Movant-Intervenor States and NHTSA are generally aligned in contending that the petitions should be denied. As a consequence, NHTSA and Movant-Intervenor States may choose to advance different arguments or make different strategic choices in this litigation.

Indeed, the history of NHTSA's 2020 rollback of fuel economy standards and the renewed stringency of its 2022 Standards illustrates how NHTSA and Movant-Intervenor States have not always agreed on the questions at issue in this litigation and indicate that Respondents may not adequately represent these States' interests. Movant-Intervenor States therefore satisfy this final requirement for intervention as of right.

II. ALTERNATIVELY, MOVANT-INTERVENOR STATES ARE ENTITLED TO PERMISSIVE INTERVENTION

While Movant-Intervenor States readily satisfy the requirements for intervention as of right, they also satisfy the requirements for permissive intervention. Courts may "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact" if the motion is timely and intervention will not "unduly delay or prejudice the rights of the original parties." FRCP 24(b)(1)(B), (3). As discussed above, this motion is timely, and there is no basis for a conclusion that Movant-Intervenor States' intervention at this early stage will cause undue delay or prejudice.

Moreover, as evidenced by our comments in the rulemaking, Movant-Intervenor States have developed extensive arguments on many of the same issues that Petitioners anticipate raising in their challenges, including the

feasibility of the Standards under the factors in section 32902 of EPCA, NHTSA's methodology in developing the Standards, and the assumptions about electric vehicle sales in NHTSA's fleet-modeling analyses.[8] The claims and defenses of Movant-Intervenor States thus share common questions of law and fact with the petitions, which will likely seek to attack the Standards on these same issues.[9]

Moreover, to the extent that any "party's claim or defense"—especially Petitioners' arguments about NHTSA's modeling of electric vehicle sales—is based on Movant-Intervenor States' own regulations and programs,[10] the state agencies that administer those programs are eligible for permissive intervention under FRCP 24(b)(2).[11] Fed. R. Civ. Proc. 24(b)(2) (permissive

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[8] *See especially* Movant-Intervenor States' Comment, *supra* note 6, at pp. 23-31, 39-41 (discussing EPCA's factors for evaluating "maximum feasible" fuel economy and appropriateness of NHTSA modeling analyses).

[9] AFPM Comment, *supra* note 3, at pp. 2-11, 16-21 (criticizing NHTSA's balancing of EPCA's factors, cost-benefit analysis, and electric vehicle projections); Texas Attorney General Press Release, *supra* note 3 (contending "NHTSA violated the express statutory prohibition on its mandating electric vehicles in setting the CAFE standards").

[10] *See* AFPM Comment, *supra* note 3, at pp. 12-13 (challenging NHTSA's consideration of California vehicle greenhouse gas emission standards and zero-emission vehicle sale standards in modeling analyses).

[11] In this action, the State of California includes the California Air Resources Board, which administers the vehicle greenhouse gas emission

intervention for a "state governmental officer or agency" where a "party's claim or defense is based on" a statute or regulation administered by the officer or agency).

CONCLUSION

Movant-Intervenor States respectfully request that this Court grant them intervention as of right or, in the alternative, permissive intervention, for the reasons discussed above.

Dated: August 1, 2022

Respectfully submitted,

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standards and zero-emission vehicle regulations at issue in AFPM's attack on NHTSA's fleet-modeling analyses.

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CERTIFICATE OF PARTIES ADDENDUM

Pursuant to Circuit Rule 27(a)(4) and 28(a)(1)(A), I certify that the parties are set forth below.

Petitioners: Petitioners in Case No. 22-1144 are the States of Texas, Arkansas, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, South Carolina, and Utah.

Petitioner in Case No. 22-1145 is American Fuel and Petrochemical Manufacturers.

Petitioner in Case. No. 22-1080—in which Movant-Intervenor States do not seek to intervene, but which is consolidated with Case Nos. 22-1144 and 22-1145—is the Natural Resources Defense Council.

Respondents: Respondents are the National Highway Traffic Safety Administration (all cases); Steven Cliff, in his official capacity as Administrator of the National Highway Traffic Safety Administration (Case Nos. 22-1080 and 22-1144); the U.S. Department of Transportation (Case Nos. 22-1144); and Pete Buttigieg, in his official capacity as Secretary of the U.S. Department of Transportation (Case Nos. 22-1080 and 22-1144).

Intervenors: On July 29, 2022, the Clean Fuels Development Coalition; Diamond Alternative Energy, LLC; ICM, Inc.; Illinois Corn Growers Association; Kansas Corn Growers Association; Kentucky Corn Growers Association;

Michigan Corn Growers Association; Minnesota Soybean Growers Association; Missouri Corn Growers Association; Texas Corn Producers Association; Wisconsin Corn Growers Association; and Valero Renewable Fuels Company, LLC moved to intervene in support of Petitioners in Case Nos. 22-1144 and 22-1145. ECF No. 1957144. On August 1, 2022, the National Coalition for Advanced Transportation and Zero Emission Transportation Association moved to intervene in support of Respondents in the same two cases. ECF No. 1957366. There are no other intervenors or movant-intervenors at the time of this filing.

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

Dated: August 1, 2022

/s/ Theodore McCombs
Theodore McCombs
Attorney for State of California, by and through its Governor Gavin Newsom, its Attorney General Rob Bonta, and the California Air Resources Board

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,711 words. I further certify that this motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: August 1, 2022

/s/ Theodore McCombs
Theodore McCombs
Attorney for State of California, by and through its Governor Gavin Newsom, its Attorney General Rob Bonta, and the California Air Resources Board

CERTIFICATE OF SERVICE

Case Name:	**Natural Resources Defense Council et al. v. National Highway Traffic Safety Administration, et al.**	Case No.	**22-1080** **22-1144** **22-1145**

I hereby certify that on August 1, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MOTION BY THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, VERMONT, WASHINGTON, AND WISCONSIN, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, THE DISTRICT OF COLUMBIA, THE CITY AND COUNTY OF DENVER, AND THE CITIES OF LOS ANGELES, NEW YORK, AND SAN FRANCISCO FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 1, 2022, at San Diego, California.

Charlette Sheppard	Charlette Sheppard
Declarant	Signature