ORAL ARGUMENT NOT SCHEDULED

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

STATE OF OHIO, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency Respondents.	No. 22-1081 (and consolidated cases)

UNOPPOSED MOTION BY THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON; THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA; THE DISTRICT OF COLUMBIA; AND THE CITIES OF LOS ANGELES AND NEW YORK 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, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts and Pennsylvania; the District of Columbia; and the cities of Los Angeles and New York (collectively, "Movant-Intervenor States") hereby move the Court for leave to intervene in case number 22-1081 and all consolidated cases in support of Respondents United States Environmental Protection Agency (EPA) and Administrator Regan.

Petitioners in these consolidated cases challenge EPA actions that directly affect Movant-Intervenor States' abilities to enforce the state vehicular emission standards they have chosen to adopt in order to protect their residents and their States' resources. Accordingly, and as explained in more detail below, Movant-Intervenor States have undeniable sovereign interests at stake in this litigation. Movant-Intervenor States also have substantial interests in the benefits—including emission reductions—that the state laws at issue are designed to provide. Movant-Intervenor States easily

satisfy the requirements for intervention and respectfully request the Court grant this motion.

Counsel for all Petitioners and for Respondents indicated they do not oppose Movant-Intervenor States' intervention.

BACKGROUND

Through a series of Clean Air Act amendments beginning in 1967, Congress has carefully constructed a regulatory regime to control harmful emissions from new motor vehicles. Specifically, Congress determined that automakers could be subject to two, but only two, sets of emission standards, striking a balance between automakers' fears of "having to meet fifty-one separate sets of [state and federal] emissions control requirements" and the technological innovation and air quality benefits derived from differential regulation in limited markets. *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA* (*MEMA I*), 627 F.2d 1095, 1109 (D.C. Cir. 1979).

Under this carefully balanced regime, EPA must establish federal standards for new motor vehicles to control emissions that it determines "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a). And, while States are generally preempted from establishing their own standards for new motor vehicle emissions, 42 U.S.C. § 7543(a), Congress's regime provides

two ways for States to adopt and enforce a second set of standards—standards different from EPA's.

First, recognizing, *inter alia*, that California began regulating vehicular emissions before other States or the federal government, Congress opted to permit California to "improve on its already excellent program of emissions control." *MEMA I*, 627 F.2d at 1109-10 (internal quotation marks omitted). Specifically, Congress required EPA to grant a preemption waiver for California's new motor vehicle emission standards unless one of three limited criteria for denial of a waiver request is met. 42 U.S.C. § 7543(b)(1).[1] In so doing, Congress recognized the "harsh reality" of California's air pollution problems, as well as the regulatory expertise California had developed in this field. H.R. Rep. No. 90-728, at 96-97 (1967); *see also* S. Rep. No. 90-403, at 33 (1967). Congress also valued, and wanted to continue, the "benefits for the Nation" that had been realized from California implementing its own regulatory regime, including the

[1] The statutory provision requires EPA to grant such a waiver to "any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966." 42 U.S.C. § 7543(b)(1). "California is the only state which had adopted emission control standards (other than crankcase emission standards) before March 30, 1966. It is thus the only state eligible for a waiver." *MEMA I*, 627 F.2d at 1101 n.1.

development and commercialization in the California market of vehicular emission control technologies that EPA might later decide to require nationwide for the benefit of all Americans. *MEMA I*, 627 F.2d at 1109-10 (internal quotation marks omitted).

Second, Congress recognized that States other than California face challenges with air pollution control and might want the option to adopt and enforce vehicular emission standards different from—and often more stringent than—the federal standards promulgated by EPA. To that end, in Section 177 of the Clean Air Act, Congress authorized other States to adopt and enforce the vehicular emission standards for which California had obtained a preemption waiver, under certain conditions. 42 U.S.C. § 7507. In this way, Congress maintained the emission-reduction and other benefits that flow from the state regulatory experimentation that is foundational to our system of federalism while ensuring automakers can be subject to no more than two sets of emission standards.

This regulatory regime has operated as Congress intended for more than half a century. California has "expand[ed] its pioneering efforts" to reduce new motor vehicle pollution, pursuant to preemption waivers granted

by EPA. *See MEMA I*, 627 F.2d at 1111.[2] Seventeen other States—sometimes referred to as "Section 177 States"—have adopted some or all of California's vehicular emission standards, having decided that those standards serve their States better than EPA's standards.[3] And EPA has continued to "draw[] heavily on the California experience to fashion and to improve the national efforts at emissions control," thereby reducing vehicular air pollution nationwide. *See MEMA I*, 627 F.2d at 1110.[4]

Pursuant to this regulatory regime, in 2013 EPA granted California a preemption waiver for the State's Advanced Clean Cars program, which included, among other things, the continuation of California's zero-emission-vehicle and greenhouse gas emission standards, with increasing stringency, for model years 2017 through 2025. 78 Fed. Reg. 2112 (Jan. 9, 2013). (EPA had previously granted California waivers for these standards

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[2] *See* https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations#notices, *last visited* May 16, 2022.

[3] *See* § 177 States (8-5-2021) (NADA sales) (ca.gov), *last visited* May 16, 2022. New Mexico adopted California's light-duty vehicle emission standards on May 5, 2022. *See* New Mexico adopts Clean Car Rule — City of Albuquerque (cabq.gov).

[4] *See also* October 26, 2018 California Air Resources Board Comments on the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks at 44-48 (EPA-HQ-OAR-2021-0257-0132, Appendix F).

for earlier model years. 58 Fed. Reg. 4166 (Jan. 13, 1993); 71 Fed. Reg. 78,190 (Dec. 28, 2006); 74 Fed. Reg. 32,744 (July 8, 2009).)

In 2019, however, EPA dramatically changed course and withdrew the 2013 waiver for California's zero-emission-vehicle and greenhouse gas emission standards. 84 Fed. Reg. 51,310 (Sept. 27, 2019). This withdrawal was unprecedented. In the more than fifty years that California has been obtaining preemption waivers for its vehicular emission standards, EPA had never previously withdrawn a waiver, in whole or in part. *See id.* at 51,332-33. In the same Federal Register notice, EPA also announced an interpretation of Section 177 of the Clean Air Act, 42 U.S.C. § 7507, that would prohibit other States from enforcing California's greenhouse gas emission standards, even if California had a waiver for them. 84 Fed. Reg. at 51,350-51. Many Petitioners, including all of the Movant-Intervenor States, sought judicial review of EPA's actions in this Court. Case No. 19-1230 (and consolidated). After a change in presidential administrations, those cases were put into abeyance pending reconsideration by EPA.

EPA has now completed its reconsideration and has reversed its 2019 actions. Petitioners here challenge those reversals. Specifically, Petitioners seek to vacate 1) EPA's reinstatement of the portions of the 2013 waiver it withdrew in 2019 and/or 2) EPA's withdrawal of its 2019 interpretation of

Section 177. Some Petitioners may seek an even more dramatic remedy: a declaration that the waiver provision in the Clean Air Act is unconstitutional.[5] Movant-Intervenor States include States that have adopted one or both set of California standards at issue here. These States seek to intervene to defend EPA's actions in order to enforce their existing laws. All the Movant-Intervenor States, including those that have not adopted the California standards at issue, seek to protect the option to adopt and enforce state vehicular emission standards, as provided under the regulatory regime Congress constructed.

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 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

[5] Certain States have previously taken the position that Congress violated principles of equal sovereignty when it created the existing regulatory regime. Case No. 19-1230, Doc. No. 1862459 (Brief of Intervenors Ohio, et al).

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 factors:

> 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); or when "a federal or state governmental officer or agency" seeks to intervene and "a party's claim or defense is based on … (A) a statute or executive order administered by the officer or agency; or (B) any regulation,

order, requirement, or agreement issued or made under the statute or executive order," FRCP 24(b)(2).

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

"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 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. There is no question that California and the other States that have adopted California's standards, or may wish to do so, benefit from EPA's reinstatement of this preemption waiver. The waiver allows the Movant-Intervenor States who have already adopted these standards to enforce their own laws and allows other

qualifying States to decide for themselves, as Congress intended, whether to pursue that same course. *New Jersey v. EPA*, 989 F.3d 1038, 1045 (D.C. Cir. 2021) ("Standing is usually self-evident when the petitioner is an object of the challenged government action."). And if EPA's reinstatement were vacated by an unfavorable decision of this Court, those States would be injured by, once again, being preempted from enforcing their laws or exercising the options afforded to them by Congress. *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 444 (D.C. Cir. 1989) ("Inasmuch as this preemptive effect is the injury of which petitioners complain, we are satisfied that the States meet the standing requirements of Article III."); *see also Crossroads Grassroots*, 788 F.3d at 318 ("Losing the favorable order would be a significant injury in fact.").

In addition to infringing upon their sovereign authority and the rights afforded them by Congress, the inability to enforce existing state laws would result in increased vehicular emissions in Movant-Intervenor States. Those increased emissions cause Movant-Intervenor States other harms, including the inability to "employ a duly enacted [state law] to help prevent" harms to local residents and businesses, *Maryland v. King*, 567 U.S. 1301, 1303 (2012), the inability to achieve mandatory emissions reductions, damage to

publicly owned land and infrastructure, and increased expenditures of public funds.[6]

It also "rationally follows" that the injuries Movant-Intervenor States would face are "directly traceable" to Petitioners' challenges to EPA's waiver reinstatement and that Movant-Intervenor States "can prevent the injur[ies] by defeating" those challenges. *Crossroads Grassroots*, 788 F.3d at 316. Thus, all three requirements for Article III standing are met as to challenges to EPA's waiver reinstatement.

Movant-Intervenor States also have Article III standing to intervene to defend EPA's rescission of its 2019 interpretation of Section 177. According to that interpretation, no other State could adopt and enforce California's greenhouse gas emission standards even if California has a preemption waiver for those standards. 84 Fed. Reg. at 51,350-51. Movant-Intervenor States maintain that EPA has no authority to prevent States from exercising their congressionally authorized option to adopt California's vehicular emission standards. *See* 42 U.S.C. § 7507. Nonetheless, EPA's 2019 interpretation cast a cloud of uncertainty over Section 177 States'

[6] Decl. of Sylvia Vanderspek at ¶¶ 16-20, 22-23; Decl. of Elizabeth Scheehle at ¶¶ 15, 18, 21-28, 30; Decl. of Christopher M. LaLone a ¶¶ 2, 13-14, 15, 23, 25-30, 32-35; Decl. of Mark Hammond at ¶¶ 11, 13-16, 23, 29-31; Decl. of Christine Kirby at ¶¶ 16, 22-23, 30-31, 34-35.

adoption and implementation of California's greenhouse gas emission standards.

For example, EPA "acknowledge[d] that its action … may have implications for certain prior and potential future EPA reviews of and actions on" State Implementation Plans to meet federal National Ambient Air Quality Standards (NAAQS), suggesting EPA would not approve—or might attempt to rescind prior approval of—a State's plan that relied on adoption of California's greenhouse gas emission standards for some of its emission reductions. 84 Fed. Reg. at 51,338 n.256.[7] States would thus be forced into a perverse choice. They could choose to include or retain the California standards in their plans and risk disapproval (and the weighty consequences that can follow, *e.g.,* 42 U.S.C. § 7509(b)); or they could omit

[7] The Clean Air Act "establishes a joint state and federal program for regulating the nation's air quality, directing EPA to formulate national ambient air quality standards … and requiring states to develop EPA approved plans, known as State Implementation Plans …, describing how they will achieve and maintain the NAAQS. States that fail to comply with these requirements are subject to various sanctions …." *New Jersey*, 989 F.3d at 1042. California and the Section 177 States often rely on their adoption of California vehicular emission standards as part of their State Implementation Plans, and EPA has approved multiple States' plans that include state zero-emission vehicle and greenhouse gas emission standards (or both). *E.g.*, 82 Fed. Reg. 42,233 (Sept. 7, 2017) (Maine); 81 Fed. Reg. 39,424, 39,425 (June 16, 2016) (California); 80 Fed. Reg. 40,917 (July 14, 2015) (Delaware).

the California standards and consider imposing *additional* (and likely costly) emission-reducing measures on other sources of pollution in order to replace the emission reduction benefits of the omitted vehicular emission standards.

Movant-Intervenor States have strong interests in avoiding the injury involved in having to face such stark choices and, generally, in ensuring their abilities to attain and maintain the NAAQS. *See New Jersey*, 989 F.3d at 1047 (holding State had standing "based on harm to its ability to attain the NAAQS").[8] And, as above, because that injury is "directly traceable" to Petitioners' challenges to EPA's rescission and because Movant-Intervenor States "can prevent the injury by defeating" those challenges, all three requirements for Article III standing are met. *Crossroads Grassroots*, 788 F.3d at 316.

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

[8] *See also* Decl. of Sylvia Vanderspek at ¶¶ 17-23; Decl. of Mark Hammond at ¶¶ 18-22.

III's standing requirement."). Moreover, Movant-Intervenor States "clearly ha[ve] a legitimate interest in the continued enforceability of [their] own statutes," *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1004 (2022), and in the emission reduction benefits those laws are designed to produce, *Maryland*, 567 U.S. at 1303; *Alaska*, 868 F.2d at 444. It is not surprising, then, that this Court and other courts have consistently granted motions to intervene to defend these state interests with regard to other preemption waivers. *E.g.*, *MEMA I*, 627 F.2d at 1095; *Am. Trucking Associations, Inc. v. EPA*, 600 F.3d 624, 625 (D.C. Cir. 2010); *Chamber of Com. v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011); *Dalton Trucking, Inc. v. EPA*, 846 F. App'x 442, 443 (9th Cir. 2021). As discussed above, if Petitioners are successful in their efforts to vacate EPA's reinstatement, those interests 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 petition in Case No. 22-1081 was filed on May 12, 2022.

ECF Doc. No. 1946617. This motion is well 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). This final requirement for intervention is "not onerous," and a "movant ordinarily should be allowed to intervene unless it is clear that" 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 their abilities to 1) enforce their own, existing laws; and 2) exercise the congressionally granted option to adopt and enforce California vehicular emission standards (assuming the conditions in 42 U.S.C. § 7507 are satisfied). These state sovereign interests are different from EPA's interests in defending its actions and the grounds on which they were taken, even if Movant-Intervenor States and EPA are generally aligned in contending that the petitions should be denied. As a

consequence, EPA and Movant-Intervenor States may choose to advance different arguments or make different strategic choices in this litigation. Indeed, the history of EPA's 2013 waiver grant, its 2019 partial withdrawal, and its 2022 reinstatement indicates that EPA and Movant-Intervenor States have not always agreed on the questions at issue in this litigation and that EPA 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. Under Federal Rule of Civil Procedure 24(b)(1), 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" so long as the motion is timely and intervention would 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 discussed above, Movant-Intervenor States seek to intervene to protect their ability to adopt and enforce their own laws and to exercise their congressionally established rights to choose which vehicular emission standards will be enforceable within their respective jurisdictions. The claims and defenses of Movant-Intervenor States unquestionably share commonality with the petitions which seek to prevent these States from adopting and enforcing their own laws and from exercising their congressionally provided rights.

In addition, to the extent that any "party's claim or defense"—such as a party's claims concerning injuries as a basis for standing—is based on the state regulatory programs that are the subject of EPA's preemption waiver reinstatement, the Movant-Intervenor States that administer those programs are entitled to permissive intervention under Federal Rule of Civil Procedure 24(b)(2).

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.

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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. 22-1081 are the States of Ohio, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia.

Petitioners in Case No. 22-1084 are American Fuel and Petrochemical Manufacturers, Domestic Energy Producers Alliance, Energy Marketers of America, and National Association of Convenience Stores.

Petitioners in Case. No. 22-1085 are Clean Fuels Development Coalition, ICM, Inc., Illinois Corn Growers Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Missouri Corn Growers Association, and Valero Renewable Fuels Company, LLC.

Respondents: Respondents are the U.S. Environmental Protection Agency and (in Case No. 22-1081) its Administrator, Michael S. Regan, in his official capacity.

Intervenors: 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: May 19, 2022

/s/ M. Elaine Meckenstock
M. Elaine Meckenstock
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 3,481 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: May 19, 2022

/s/ M. Elaine Meckenstock
M. Elaine Meckenstock
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

I hereby certify that on May 19, 2022 I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

I further certify that all parties are participating in the Court's CM/ECF system and will be served electronically by that system.

Dated: May 19, 2022

/s/ M. Elaine Meckenstock
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