

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

COMPETITIVE ENTERPRISE
INSTITUTE, *et al.*,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC
SAFETY ADMINISTRATION, *et al.*,

Respondents.

No. 20-1145

**CORRECTED MOTION OF THE ALLIANCE FOR AUTOMOTIVE
INNOVATION TO INTERVENE IN SUPPORT OF RESPONDENTS**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the Alliance for Automotive Innovation (“Auto Innovators”) respectfully moves for leave to intervene in support of respondents in the above-captioned proceedings. This motion is timely because it is being filed within 30 days of the filing of the petition for review. Fed. R. App. P. 15(d).

I. INTRODUCTION

Petitioners seek review of joint action by the U.S. Environmental Protection Agency (“EPA”) and the National Highway Traffic Safety Administration (“NHTSA”) pertaining to the control of greenhouse gas (“GHG”) emissions and the

Corporate Average Fuel Economy (“CAFE”) program applicable to new passenger automobiles and light trucks sold in the United States. In their joint action, EPA amended its GHG standards for those vehicles beginning in model year (“MY”) 2021, and NHTSA amended its CAFE standards for the same vehicles in MY 2021 and set CAFE standards for those vehicles in MYs 2022-2026. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020). Petitioners appear to contend that the joint rule is too stringent, and that the agencies should have promulgated standards that require significantly less improvement in motor vehicle fuel economy and GHG emissions. *See* Comments of the Competitive Enterprise Institute, Docket No. EPA-HQ-OAR-2018-0283-12015, at 2-8 (filed Oct. 26, 2018). Indeed, petitioner Competitive Enterprise Institute argued in its rulemaking comments that the agencies “should consider freezing the standard at the current 2018 level.” *Id.* at 3.

Formed in 2020, Auto Innovators is the singular, authoritative and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the United States. The newly established organization, a combination of the Association of Global Automakers (“Global Automakers”) and the Alliance of Automobile Manufacturers

(“Auto Alliance”), is directly involved in regulatory and policy matters impacting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, and technology and other automotive-related companies. Auto Innovators is headquartered in Washington, DC, with offices in Detroit, MI and Sacramento, CA.¹ New-vehicle manufacturers are subject to EPA’s GHG and NHTSA’s CAFE standards, and they are directly affected by the agencies’ joint action. 85 Fed. Reg. at 24,174-175.

Auto Innovators and its members believe that enhanced control of GHG emissions from all sectors of the U.S. economy and continued diversification of the nation’s energy sources are important national priorities. The members of Auto Innovators are committed to doing their part. They have invested billions of dollars to develop and commercialize technologies needed to meet increasingly stringent GHG and CAFE standards. Appropriate increases in the stringency of GHG and CAFE standards serve to protect the environment, improve public health, reduce dependence on foreign oil, meet consumer demand, provide automakers with

¹ See Alliance for Automotive Innovation, <http://www.autosinnovate.org>. The following automaker members of Auto Innovators are not participating in this action, and this motion is therefore not being brought on their behalf: American Honda Motor Co., Inc., BMW of North America, LLC, Ford Motor Company, Mercedes-Benz USA, LLC, Porsche Cars North America, Inc., and Volkswagen Group of America, Inc.

regulatory certainty, and afford the industry a return on its investment in advanced emissions-reduction and fuel economy technologies.

The final joint rule rejected the agencies' "preferred alternative" in their August 2018 notice of proposed rulemaking,² which would have held future GHG and CAFE standards flat from MY 2021 through 2026. Effectively, the final rule also rejected a proposal from one petitioner, the Competitive Enterprise Institute, for the agencies to "freeze" the standards to the level of stringency required by the MY 2018 standards. Comments of the Competitive Enterprise Institute, *supra*, at 2-8. The auto industry has consistently opposed any such freeze in the GHG and CAFE standards. As Global Automakers stated in response to the proposal that led to EPA's and NHTSA's joint action, the auto industry needs GHG and CAFE standards that create "a reasonable, steady ramp rate" that increases the year-over-year stringency of those standards:

Steady increases allow for long-term planning and create an environment of security that fosters ongoing investment in vehicle technology and consumer confidence in purchasing newer vehicles. It also provides a level-playing field upon which automakers can compete.

² See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (proposed Aug. 24, 2018).

Comments of Global Automakers, Docket No. EPA-HQ-OAR-2018-0283-5704, at A-11 (filed Oct. 26, 2018). “Maintaining a trajectory of increasing standards ... provides certainty for research and development direction, encourages investment in manufacturing, and provides consumers a full spectrum of options.” *Id.*; *see also* Comments of Auto Alliance, Docket No. NHTSA-2018-0067-12073, at 8 (filed Oct. 26, 2018) (proposing adoption of standards that “continue stringency increases at an achievable rate supported by updated market and industry data”).

In short, petitioners’ challenge to the agencies’ joint rule conflicts with the substantial interest of Auto Innovators and its members in ensuring that increases in the stringency of the GHG and CAFE standards are implemented in a reasonable and steadily increasing manner. Auto Innovators therefore seeks leave to intervene in order to urge denial of the petition for review.

II. INTERESTS OF AUTO INNOVATORS

NHTSA regulations and EPA test procedures have governed new-vehicle fuel economy since the 1970s. NHTSA sets the CAFE standards that vehicle manufacturers must achieve for their passenger automobile and light-truck fleets under the Energy Policy and Conservation Act of 1975, as amended (“EPCA”), and EPA regulates the methodology manufacturers use to determine their per-model year performance. Starting in MY 2012, EPA has set GHG standards for the same cars and trucks pursuant to section 202(a) of the Clean Air Act, 42 U.S.C. §7521(a). The

joint action published in the Federal Register on April 30, 2020, is the most recent such action taken by NHTSA and EPA.³

Auto Innovators represents the interests of its members, the very entities directly regulated by the joint action at issue here, in maintaining the nation's progress to lower GHG emissions and higher fuel economy. Auto Innovators and its members have a direct and obvious interest in the federal CAFE and GHG standards governing the vehicles that those members produce. Both Auto Innovators' trade association predecessors and several of its individual members participated in the SAFE Rule rulemaking process that led up to the challenged joint action, in which they urged EPA and NHTSA to promulgate standards requiring year-over-year increases in stringency and to reject the petitioners' requested "freeze" of future standards.

Auto Innovators is moving for leave to intervene in this action because petitioners' challenge seeks to overturn the agencies' standards that properly balance improvement in fuel economy and GHG emissions performance. Petitioners' challenge therefore conflicts with Auto Innovators' substantial interest in ensuring

³ Given the direct and mathematical relationship between motor vehicle fuel economy and the emission of carbon dioxide (the principal GHG emitted from cars and trucks), EPA and NHTSA have consistently conducted joint rulemaking so as to ensure that automakers are not subject to overlapping and inconsistent regulations governing the same aspect of vehicle performance.

that increases in the stringency of GHG and CAFE standards are implemented in a reasonable and steady manner, and would set back efforts to address climate change and achieve greater energy independence. Automakers differ in their customer bases, in the segments in which they compete, and in their specific technology approaches, and so are differently situated with respect to the standards. But Auto Innovators believes that the agencies lawfully exercised their discretion in setting their standards in accordance with the applicable statutory requirements.

III. GROUNDS FOR INTERVENTION

In addition to setting forth its interests in the proceedings, a proposed intervenor must state concisely its grounds for intervention, *see* Fed. R. App. P. 15(d), and under Circuit precedent must also establish standing to intervene. *Ala. Mun. Distribs. Grp. v. FERC*, 300 F.3d 877, 879 n.2 (D.C. Cir. 2002). While “Rule 15(d) simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought,” *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991), evaluation of an intervention motion under Rule 15(d) can be informed by reference to the criteria for intervention in actions in the federal district courts under Federal Rule of Civil Procedure 24. *See Sierra Club v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). Auto Innovators has the standing needed to support intervention, and meet this Court’s requirements for Rule 15(d) intervention as well as those that apply under Civil Rule 24.

A. Auto Innovators Has Standing to Intervene.

Auto Innovators has standing to intervene on behalf of its members because “(a) its members would otherwise have standing to [intervene] in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the [position] asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977); *see also Air All. Houston v. EPA*, 906 F.3d 1049, 1058 (D.C. Cir. 2018); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

Standing under Article III requires (1) injury-in-fact, (2) causation, and (3) redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). An asserted injury qualifies as a legally cognizable “injury in fact” if it is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Id.* at 560 (citations omitted). Those requirements are easily met here. The GHG and CAFE standards in the joint action directly regulate the vehicle manufacturers who are members of Auto Innovators, and those manufacturers have a legally protected interest in benefitting from the certainty those regulations provide. Those manufacturers would be directly, and adversely, affected by any decision to grant the petition for review and remand the joint rule. *See supra* pp.5-6. Conversely, rejecting the petition would preserve the regulatory clarity that the new standards provide for Auto Innovators and its

members. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015) (injury-in-fact exists “where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party’s benefit”); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733-34 (D.C. Cir. 2003) (same); *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998) (same).⁴

The other requirements for organizational standing are also met here. Auto Innovators’ mission includes representing its members’ interests in litigation concerning regulations that directly apply to its members. *See Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000) (describing the “requirement of germaneness [as] undemanding; mere pertinence between litigation subject and organizational purpose is sufficient”) (internal citation and quotation marks omitted). This Court has regularly permitted the predecessors of Auto Innovators to intervene in similar proceedings that challenge EPA and NHTSA actions without the participation of such predecessors’ members. *See, e.g., California v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019) (intervention by the Auto Alliance and Global Automakers in challenge to EPA’s decision to reconsider previously adopted GHG standards for MYs 2022-2025); *Public Citizen v. NHTSA*, 374 F.3d 1251 (D.C. Cir. 2004)

⁴ *Accord Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (finding intervention under Rule 15(d) warranted for parties who are “directly affected” by the action under review); *see also, e.g., Sierra Club*, 358 F.3d at 518 (“Persons whose legal interests are at stake are appropriate intervenors”).

(intervention by Auto Alliance in support of NHTSA against challenge to crash-test regulation); *Public Citizen v. NHTSA*, 848 F.2d 256 (D.C. Cir. 1988) (allowing intervention by the Automobile Importers Association, a predecessor of Global Automakers, in proceedings to review CAFE standards); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322 (D.C. Cir. 1986) (same).

B. The Criteria for Intervention as of Right Under Civil Rule 24(a) Support Allowing Auto Innovators To Intervene.

Federal Rule of Civil Procedure 24(a) provides in relevant part that

“[o]n timely motion, the court must permit anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). This Court has recognized that a party has an absolute right to intervene under Rule 24(a)(2) if it satisfies four requirements: (1) the motion is timely; (2) the applicant demonstrates a “legally protected interest in the action”; (3) the action “threaten[s] to impair” that legally protected interest; and (4) no party to the action will adequately represent the applicant’s interests. *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008) (quoting *SEC v. Prudential Secs. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)).

The first of those requirements is plainly satisfied here. This motion for leave to intervene has been filed within 30 days of the filing of the petition for review, and is therefore timely. Fed. R. App. P. 15(d).

As to the second requirement, if a proposed intervenor shows it has standing under Article III, then that showing “is alone sufficient to establish that [it] has ‘an interest relating to the property or transaction which is the subject of the action’” under Rule 24(a)(2). *Fund For Animals*, 322 F.3d at 735; accord *Jones v. Prince George’s Cty.*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003); see also *Am. Horse Prot. Ass’n, Inc. v. Veneman*, 200 F.R.D. 153, 157 (D.D.C. 2001) (“[I]t is impossible to conjure a case in which an intervenor would have constitutional standing to intervene but not have a sufficient ‘interest in the litigation’ to justify intervention under Fed. R. Civ. P. 24(a)(2).”).

As to the third requirement, “[i]n determining whether a movant’s interests will be impaired by an action, courts in this circuit look to the ‘practical consequences’ to [the] movant of denying intervention.” *Am. Horse Prot. Ass’n*, 200 F.R.D. at 158. The 2021 model year, the first model year governed by the new GHG and CAFE standards, is already under way; several manufacturers have early-introduction MY 2021 vehicles in dealers’ showrooms or on the way there. Remand (or worse, vacatur) of the new standards would throw into unprecedented confusion the multi-year capital investment planning, product development, and performance validation for hundreds of new-vehicle models intended for the U.S. market that vehicle manufacturers around the world are now designing so that they can meet the new GHG and CAFE standards applicable not just to MY 2021 vehicles, but also

standards for later model years. That is sufficient practical impairment to Auto Innovators' ability to protect its members' interests to satisfy the impairment prong of the Rule 24(a)(2) intervention test.

Finally, as to the fourth requirement, the existing parties cannot adequately represent Auto Innovators' interests. Under the familiar test set long ago by the Supreme Court, a proposed intervenor is only required to show that representation of its interests "may be' inadequate," and "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Auto Innovators easily clears that bar. Respondents are federal agencies and officers responsible for the standards being litigated; *ipso facto*, respondents do not represent the manufacturers' interests. Courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors" because an agency's obligation "is to represent the interests of the American people" writ large, not the more particular interests of a company or organization. *Fund for Animals*, 322 F.3d at 736; *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). As the advocate for nearly all manufacturers selling vehicles in the United States, Auto Innovators can articulate the impact that the petitioners' challenge, if successful, would have on the auto industry in a manner that the government cannot. No other entity has the same interest in the rapid disposition of the petition for review. *See Nat. Res. Def. Council v. Costle*, 561 F.2d

904, 912 (D.C. Cir. 1977) (finding association's interests more "focused" than the government interest). That is sufficient to find that the government will not adequately represent the industry's interests.

C. The Criteria for Permissive Intervention Under Civil Rule 24(b) Likewise Support Permitting Auto Innovators to Intervene.

Civil Rule 24(b) provides that "[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."). This is not a restrictive standard: "Rule 24(b) . . . provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact," *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967), so long as intervention would not "unduly delay or prejudice the rights of the original parties." *Acree v. Republic of Iraq*, 370 F.3d 41, 49 (D.C. Cir. 2004), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). This Court has read that rule broadly, and "eschewed strict readings of the phrase 'claim or defense.'" *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

For the same reasons given above with respect to intervention as of right under Civil Rule 24(a)(2), Auto Innovators readily meets these less burdensome requirements for permissive intervention under Civil Rule 24(b). Auto Innovators has Article III standing; its intervention here is timely; and granting a motion by Auto Innovators under Rule 24(b) would not prejudice the rights of the original

parties or cause delay. Auto Innovators seeks to participate in this proceeding to address the same legal issue raised by the petition, which is whether EPA and NHTSA complied with their legal obligations and acted within their broad discretion in issuing the challenged joint rule. *See* Petition for Review at 2. As such, the criteria for permissive intervention under Civil Rule 24(b) likewise support Auto Innovators' motion to intervene.

CONCLUSION

For the foregoing reasons, Auto Innovators respectfully requests that the Court grant its motion for leave to intervene.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 15(c)(6) and 26.1, the Alliance for Automotive Innovation certifies that it is a not-for-profit trade association of motor vehicle manufacturers, original equipment suppliers, and technology and other automotive-related companies. The Alliance for Automotive Innovation operates for the purpose of promoting the general commercial, professional, legislative, and other common interests of its members. The Alliance for Automotive Innovation does not have any outstanding shares or debt securities in the hands of the public, nor does it have a parent company. No publicly held company has a 10% or greater ownership interest in the Alliance for Automotive Innovation.

CERTIFICATE AS TO PARTIES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), the Alliance for Automotive Innovation submits this certificate of persons who are currently parties, intervenors, or amici:

Petitioners:

Competitive Enterprise Institute
Anthony Kreucher
Walter M. Kreucher
James Leedy
Marc Scribner

Respondents:

National Highway Traffic Safety Administration
James C. Owens, in his official capacity as Acting Administrator, National
Highway Traffic Safety Administration
Environmental Protection Agency
Andrew Wheeler, in his official capacity as Administrator of the
Environmental Protection Agency

**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

I hereby certify that:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3077 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

s/John C. O'Quinn

John C. O'Quinn

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/John C. O'Quinn

John C. O'Quinn