ORAL ARGUMENT NOT YET SCHEDULED

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 and consolidated cases

Respondents' Opposition to Motion to Intervene

This Court—like all other Article III courts—has jurisdiction over only cases and controversies. That jurisdiction, in turn, confines the Court to resolving disputes among parties with actual, concrete, and redressable injuries.

The five automakers' motion to intervene fails to do what all successful intervention motions must: Identify an injury in fact that supports standing. For that reason alone, this Court should deny Movants' request. *See, e.g.*, *NRDC v. EPA*, 896 F.3d 459, 462-63 (D.C. Cir. 2018).

But that is not the only flaw. Movants say they take no position on the merits of the petitions for review (which challenge, among other things, certain federal emission standards). That is because four of the Movants have a special side deal with petitioner California to not challenge the state's authority to regulate

emissions covered by the federal standards. In exchange, California bestowed regulatory largesse on those Movants in the form of state emission standards whose stringency increases at lower rates than those required of other automakers.

At the same time, Movants vaguely claim interest in an "appropriate and achievable" remedy. In judicial reviews of agency actions, any remedy is strictly limited to remand, either with or without vacatur. Presumably Movants are worried about a vacatur that resurrects earlier federal standards—with more stringent terms—that they think are unachievable. But their motion never says that. Nor have Movants shown any other possible injury flowing from whether the challenged action survives judicial review. And they certainly have not shown that any such injury would be redressable—especially given their side deal to not challenge California's regulatory authority.

If Movants want to share their views on any aspect of this case, they are free to file a brief as *amici curiae*. But they are not entitled to some special new form of intervention based on how the merits decision might turn out. This Court has long required would-be intervenors to show standing before allowing them to participate as parties. It should follow that rule and deny the motion to intervene.

Background

These petitions for review challenge a 2020 rule that sets federal standards for greenhouse-gas emissions and for fuel economy in cars and light trucks.

I. The 2012 rule

The Clean Air Act directs the Environmental Protection Agency (EPA) to set emission standards for certain pollutants from new motor vehicles. 42 U.S.C. § 7521(a)(1). Those pollutants include greenhouse gases like carbon dioxide. 83 Fed. Reg. 42,986, 42,987/1-2 (Aug. 24, 2018). The Energy Policy and Conservation Act directs the National Highway Traffic Safety Administration (NHTSA)[1] to set certain fuel-economy standards for automobiles (for up to 5 model years at a time). 49 U.S.C. § 32902(a), (b)(3)(B).

In 2012 EPA and NHTSA finalized a rule that set standards for passenger cars and light trucks. *See* 77 Fed. Reg. 62,624 (Oct. 15, 2012). EPA set greenhouse-gas standards for model years 2017 to 2025. And NHTSA set fuel-economy standards for model years 2017 to 2021 (while also announcing potential standards for model years 2022 to 2025). *See id.*; 83 Fed. Reg. at 42,987/2 (summarizing 2012 rule). These standards would generally increase in stringency by 5 percent a year. 77 Fed. Reg. 62,638/3.

In the 2012 rule, the agencies also agreed to conduct a "Mid-Term Evaluation" by April 2018. This allowed EPA to evaluate whether its standards for model years 2022 to 2025 remain appropriate. The evaluation would also help

[1] NHTSA is an operating administration of the U.S. Department of Transportation.

inform NHTSA's rulemaking to set final standards for those model years. *See* 77 Fed. Reg. at 62,628/1, 62,784/1-2.[2]

II. The 2020 rule

In 2018, and in keeping with their 2012 commitments, EPA and NHTSA proposed the "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rules for Model Years 2021-2026 Passenger Cars and Light Trucks." 83 Fed. Reg. at 42,986. That proposal was finalized in two separate actions.

The first action, finalized in 2019, clarified that federal law preempts state regulation of tailpipe greenhouse-gas emissions from automobiles. 84 Fed. Reg. at 51,310. It also withdrew a waiver, granted by EPA to California under section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b), that had allowed the state to regulate certain tailpipe emissions. *Id.* This action, the subject of other petitions for review in this Circuit, applies to California's greenhouse-gas standards and zero-emission-vehicle program. *See generally id.*; *Union of Concerned Scientists v. NHTSA*, Case No. 19-1230 and consolidated cases.

Then, earlier this year, the agencies finalized the second part of the SAFE proposal. The resulting rule set new uniform national standards for some model

[2] In litigation over the Mid-Term Evaluation, the Alliance of Automobile Manufacturers—whose members include Movants—filed a brief that questioned the 2012 standards' achievability. *See* Brief for Intervenors, *California v. EPA*, No. 18-1114 (D.C. Cir. Apr. 15, 2019), at 11-13.

years that were the subject of the 2012 rule. 85 Fed. Reg. 24,174 (Apr. 30, 2020). In this 2020 rule—the action under review—EPA amended its greenhouse-gas standards for model years 2021 and later. 85 Fed. Reg. at 24,174/1.[3] NHTSA both amended its existing fuel-economy standard for model year 2021 and set new standards for model years 2022 to 2026. *Id.* These new standards will increase in stringency by 1.5 percent a year from model year 2020's levels. *Id.* at 24,175/2. As finalized, the standards are higher than those in the SAFE proposal (which would have left the standards flat over time) but lower than the 2012 rule's 5 percent annual increases. *See id*. at 24,182/3.

III. Movants' side deal with California

Meanwhile, in the midst of the agencies' SAFE rulemakings, California changed its own tailpipe regulations. It first amended its regulations so that state greenhouse-gas standards can be satisfied *only* by complying with EPA's standards from the 2012 rule. 84 Fed. Reg. at 51,311 & n.3. This means that had California's standards not been preempted (as they now are), they would now be higher than federal standards.

[3] Though the amended standards deal broadly with EPA's suite of greenhouse-gas standards, the 2020 rule often calls EPA's standards the carbon-dioxide standards. 85 Fed. Reg. at 24,175 n.3. For simplicity we refer to them here as greenhouse-gas standards.

Next, in July 2019, two months before the agencies finalized their preemption regulations and waiver withdrawal, California struck a special side deal with four of the Movants.[4] In that deal, California allowed those automakers to, among other things, comply with lower state greenhouse-gas standards for model years 2022 to 2026 than what California otherwise required at the time. These special standards would increase in stringency by 3.7 percent a year from model year 2021's levels. "Of the 3.7% annual stringency, 1% can be achieved using the advanced technology multiplier credits"—that is, credits from various kinds of electric vehicles.[5] So under their side deal, Movants selling enough electric vehicles would, in effect, enjoy greenhouse-gas standards with increasing stringency of only 2.7 percent a year. That is only 1.2 percent higher than the 1.5 percent rate set by the agencies in the 2020 rule. In other words, the side deal allows the four Movants (if they sell enough electric vehicles) to benefit from a rate of stringency increase far closer to the 2020 rule's rate than to the 5 percent required by the 2012 rule (and then-existing California law). In return, the four Movants promised to not support the agencies' regulatory revisions.[6]

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[4] The side deal, which did not include Movant Rolls-Royce Motor Cars NA, is available at https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf (last visited July 9, 2020). *See also* 84 Fed. Reg. at 51,311/1 (describing deal).

[5] https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf

[6] https://ww2.arb.ca.gov/sites/default/files/2019-07/Auto%20Terms%20Signed.pdf ("Participating companies are choosing to pursue a voluntary agreement in which

Movants now want to intervene without taking a position on the merits of California and other petitioners' challenge to the 2020 rule. Mot. at 2.

Argument

Movants have not shown a cognizable injury

To prevail under Fed. R. Civ. P. 24(a)(2), a would-be intervenor must satisfy Article III's standing requirements. *See, e.g.*, *City of Cleveland, Ohio v. Nuclear Reg. Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994) (per curiam); *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017) (requiring intervenors as of right to have Article III standing to pursue relief not requested by plaintiff). Those requirements are well-known: (1) an injury in fact that is (2) causally connected with the conduct complained of and (3) redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Movants have not said how they have been injured.[7] In fact, their motion never once uses the words "injury" or "harm"—likely for good reason: How Movants can possibly be injured here is puzzling given that they take no position on the merits. *See, e.g.*, Mot. at 2, 5. After all, any injury must be causally linked to the challenged action—the 2020 rule. *See Lujan*, 504 U.S. at 560. If Movants have nothing to say about the 2020 rule's soundness—if they have nothing to

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California accepts these terms as compliance with its program, given its authority, rather than challenge California's GHG and ZEV programs.").

[7] Nor have Movants mentioned causation or redressability in their brief.

complain about—then surely any effects they feel from the 2020 rule cannot be the sort of "invasion of legally protected interest" that presents an Article III case or controversy. *Id.* at 559-60; *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (internal brackets and quotation marks omitted)).[8]

What Movants instead say is that if the Court grants the petitions for review, they have "substantial interests in ensuring that any remedy" is "appropriate and achievable." Mot. at 6. But those interests offer no path to standing. That is because in judicial reviews of agency actions, the universe of possible remedies is limited to two options: Remand with, or without, vacatur. *See* 42 U.S.C. § 7607(d)(9); 5 U.S.C. § 706(2); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Either way, the Court cannot dictate to the agencies how to exercise their discretion on remand. *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Palisades Gen. Hosp. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005). On any remand, if the agencies

[8] Movants note in passing that they satisfy the requirements for permissive intervention because they have "a claim or defense that shares with the main action a common question of law or fact." Mot. at 7 n.4; Fed. R. Civ. P. 24(b)(1)(B). But if—as Movants repeatedly avow—they take no position on the merits, then they can have no such claim or defense. *See, e.g.*, Mot. at 2.

choose to revise their standards, that rulemaking process will be open to public comment. *See* 42 U.S.C. § 7607(h); 49 U.S.C. § 32902(a). Movants can advocate for an "appropriate and achievable" outcome before the agencies at that time. Mot. at 6.

Of course, what is implied from their concern about an "achievable" remedy *if* the petitions were granted is that Movants know that the 2012 rule's standards are, in fact, *un*achievable. That is presumably also why they have a side deal with California to only have to meet standards with stringency increases of as little as 2.7 percent a year (if they sell enough electric vehicles)—far less than the 5 percent that the 2012 rule required before being modified by the agencies.

Logically, then, if the Court were to grant the petitions for review, Movants must intend to oppose vacating the 2020 rule (and its 1.5 percent annual increases), and to oppose reverting to what they implicitly concede as the unachievable 2012 rule (and its 5 percent annual increases). But if that is the case, Movants needed to say so to justify intervention. They did not.

Instead, Movants chose to take no position on the merits. That choice leaves the Court to guess at what their real interest and standing could possibly be. And having made that choice, Movants must now live with it.

Conclusion

Movants have not met their burden to show standing or otherwise justified intervention. The Court should deny their motion.

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I certify that this filing complies with Fed. R. App. P. 27(d)(1)(E) because it uses 14-point Times New Roman, a proportionally spaced font.

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Finally, I certify that on July 9, 2020, I electronically filed this brief with the Court's CM/ECF system, which will serve each party.

/s/ Sue Chen
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