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

Calpine Corporation, et al. Petitioner, v. EPA, et al., Respondents.	)	Case No. 20-1177 (and consolidated cases) **NOT YET SCHEDULED FOR ORAL ARGUMENT**

REPLY IN SUPPORT OF MOTION TO INTERVENE OF AUTOMOBILE MANUFACTURERS

The Government contends that four[1] of the largest automobile manufacturers in the world, which collectively manufacture approximately one out of every three light-duty automobiles sold in the United States, have no legally cognizable interest in the outcome of a challenge to a joint EPA and NHTSA rule setting greenhouse gas and fuel economy standards for the next five years. This contention is as meritless as it sounds.

As the Automobile Manufacturers explained in their motion, they "are regulated by SAFE Rule Part Two" and "seek to intervene to protect their interest

[1] Rolls-Royce Motor Cars NA, LLC, a wholly-owned subsidiary of BMW (US) Holding Corp, also joins this motion.

with respect to any remedy the Court issues in the event a petition for review is granted." *See* Mot. at 2, 9. This remedy, if imposed, "will presumably address what greenhouse gas regulations will apply in future model years." *Id.* at 7. The challenged SAFE Rule Part Two substantially relaxed EPA greenhouse gas standards announced in the 2012 rule, while relaxing NHTSA's fuel economy standards for Model Year 2021 and setting new fuel economy standards for 2022-2025. *Id.* at 3-5; Opp. at 3-6. If a petition for review were granted, outright vacatur of the SAFE Rule Part Two standards could result in immediate reinstatement of the preexisting standards. In that scenario, the Automobile Manufacturers would be harmed: such a reinstatement would upend their business plans and unsettle their considerable efforts to curb emissions and improve fuel economy in a sustainable, consistent, and cost-effective manner throughout the United States. The Automobile Manufacturers thus "have a substantial interest both in the process of deciding what [any] remedy should be, and in the remedy itself." Mot. at 7.

The Government's principal objection is the Automobile Manufacturers allegedly did not spell out that interest in sufficient detail. It asserts that the proffered interest is too "vague"—leaving the Court to "guess at" what the Automobile Manufacturers' "real interest and standing could possibly be." Opp. at 2, 9. But the Rules call for a "concise" statement of the interest in intervention. Fed. R. App. P. 15(d). And that interest is readily obvious from the motion and requires no

guesswork by the Court here. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("there is ordinarily little question" that person has standing where he "is himself an object of" challenged governmental regulation). Indeed, the Government itself surmised one of the Automobile Manufacturers' potential injuries in its response: "Movants are worried about a vacatur that resurrects earlier federal standards—with more stringent terms." Opp. at 2; *see id*. at 9 ("Movants must intend to oppose vacating the 2020 rule (and its 1.5 percent annual increases), and to oppose reverting to" the stricter prior standards).

This Court has regularly granted automobile manufacturers' requests for intervention in similar circumstances. In *California v. EPA*, for example, this Court granted a motion to intervene by a group of a dozen automobile manufacturers in a challenge to an earlier iteration of the standards at issue here, where the manufacturers asserted only that they "would be directly affected by any decision to retain the current standards, or to delay or impede EPA's rulemaking efforts." Alliance of Automobile Mfrs.' Mot. to Intervene at 6, *California v. EPA*, No. 18-1114 (D.C. Cir. May 25, 2018); *see* Order, *California v. EPA*, No. 18-1114 (D.C. Cir. Oct. 18, 2018) (granting intervention motion). Other examples abound. *See, e.g.*, Order, *California v. EPA*, No. 08-1063 (D.C. Cir. Apr. 3, 2008) (granting intervention motion by various automobile manufacturers in challenge to EPA Clean Air Act § 209(b) waiver decision); *Public Citizen v. NHTSA*, 848 F.2d 256 (D.C.

Cir. 1988) (allowing intervention by automobile manufacturer trade association in proceedings to review CAFE standards); *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322 (D.C. Cir. 1986) (same). Indeed, the motion to intervene of the automobile trade association in this case similarly asserts that "its members have a direct an obvious interest in the federal CAFE and GHG standards governing the vehicles that those members produce." Mot. of Alliance for Automotive Innovation to Intervene in Support of Respondents at 6.

The Government nevertheless asserts that the Automobile Manufacturers have no interest in the remedy issue because "the universe of possible remedies is limited to two options: Remand with, or without vacatur," and any new emissions standards will be determined on remand. Opp. at 8-9. Even if one accepts the Government's premise that these are the only possible remedies, the choice between remand with and without vacatur could result in different future standards that would profoundly affect the Automobile Manufacturers' compliance obligations and business plans going forward. As noted above, the Government itself acknowledges the potential impact on Automobile Manufacturers if the SAFE Rule Part Two standards were vacated and the prior standards reinstated. Opp. at 2, 9.

In fact, however, the Government's premise is not correct, as it greatly oversimplifies the range of possible outcomes if the petitions are granted, and ignores how those outcomes could affect the Automobile Manufacturers. For one

thing, the Rule could be set aside only in part; determining which parts of the rule should be subject to remand or vacatur could be quite complex. *See, e.g.*, *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017) (granting and denying petitions in part, vacating rule "to the extent it requires manufacturers to replace HFCs with a substitute substance," and remanding to EPA for further proceedings). At a minimum, the Rule as well as the prior rule ratchet the stringency of the standards for each of the next several model years. Depending on how long the litigation takes and when the Court issues its decision, the Court may face complicated and crucial questions not only about whether to vacate but also about when any vacatur should take effect. The answers to these questions will depend, *inter alia*, on the timetable for compliance, sunk investments, reliance interests, and potential market disruptions. The Automobile Manufacturers have a critical interest in advocating how the Court should address these topics in the event a petition is granted.

For another thing, to the extent the Court considers vacating the rule, "a party" may move the Court to exercise its equitable discretion to postpone the impact of vacatur on regulated parties by staying the issuance of its mandate. D.C. Cir. R. 41(a)(2); *see Cement Kiln Recycling Co. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001). The Court has done so in comparable cases to allow regulated entities sufficient time to come into compliance with any new regulatory obligations. *See, e.g.*, *Delaware*

Dep't of Natural Res. v. EPA, 785 F.3d 1, 19 (D.C. Cir. 2015) (inviting "EPA" or "any of the parties to this proceeding" to "file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards"); Order, *Delaware Dep't of Natural Res. v. EPA*, No. 13-1093 (D.C. Cir. Aug. 14, 2015) (granting EPA's motion to stay the mandate for nine months). The Automobile Manufacturers (as directly affected entities) would have a significant interest in advocating whether and how the Court should stay its mandate in the event of vacatur. There is no legal or factual basis to relegate the Automobile Manufacturers (the only group for which the Government opposes intervention) to amicus status. *See* Opp. at 2.

The Government also suggests—again, without any legal support—that the Automobile Manufacturers' election not to take a position on the merits of the petitions somehow undercuts their standing. Opp. at 7, 9. But the Government conflates standing with a party's choice of issues to brief. The prerequisite that a party show a concrete interest affected by the outcome of the litigation does not require an intervenor to brief all or any particular issues. Rather, intervenors may address any issue in the case that affects their distinct interests, which the remedy in the event of a granted petition in these proceedings surely does. This Court has squarely recognized that entities have standing to intervene where, as here, the relief sought by petitioners would harm them. S*ee, e.g.*, *Crossroads Grassroots Policy*

Strategies v. FEC, 788 F.3d 312, 318 (D.C. Cir. 2015) ("For standing purposes, it is enough that a plaintiff seeks relief, which, if granted, would injure the prospective intervenor."); *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) ("These CMA members would suffer concrete injury if the court grants the relief the petitioners seek; they would therefore have standing to intervene in their own right.").

The most telling aspect of the Government's response is what it does *not* say: It does not dispute that this Court's ruling on Rule Part Two will profoundly affect the entire automobile industry. Nor does it claim that the Automobile Manufacturers' interests are adequately represented by another party in these proceedings.[2] Nor does it contend that intervention for limited purposes would cause prejudice to the existing parties or otherwise disrupt the litigation. In the event that a petition is granted, the Court should not rule on the complex and consequential remedy issue without allowing the full participation of several of the nation's largest automobile manufacturers. The Court should grant the motion.

[2] The Alliance for Automotive Innovation's May 22, 2020 motion to intervene in support of Respondents was not on behalf of the Automobile Manufacturers. *See* Mot. of Alliance for Automotive Innovation to Intervene in Support of Respondents at 3 n.1.

CONCLUSION

For the foregoing reasons, the Court should grant the Automobile Manufacturers' motion to intervene.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. The foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,540 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. This foregoing motion complies with the typeface and type style requirements of Fed. R. App. P. 27(a)(5)-(6) because it was prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ Elisabeth S. Theodore
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CERTIFICATE OF SERVICE

I certify that, on July 16, 2020, I caused the foregoing motion to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. All participants in the consolidated cases are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Elisabeth S. Theodore
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