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

COMMONWEALTH OF KENTUCKY, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents.*	)	No. 24-1087 (Consolidated with Nos. 24-1100, 24-1132)

MOTION OF ALLIANCE FOR AUTOMOTIVE INNOVATION FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d) and Rule 15(b) of this Court, the Alliance for Automotive Innovation ("Auto Innovators") respectfully moves for leave to intervene in the above-captioned proceedings.

The Petitions for Review challenge a Final Rule published by the U.S. Environmental Protection Agency ("EPA") on April 18, 2024, entitled *Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles* (the "Final Rule").[1] Auto Innovators moves to intervene in support of Respondents with respect to two features of the Final Rule which, as explained below, will be essential to automakers' efforts to comply EPA's new

[1] 89 Fed. Reg. 27,842.

greenhouse gas ("GHG") emissions standards. One feature establishes standards on a fleet-average basis and includes battery-electric vehicles ("BEVs"), which have no GHG emissions, in determining vehicle manufacturers' annual average fleetwide GHG emissions levels. The other feature provides that GHG emissions released in the production of electricity used by BEVs and plug-in hybrid electric vehicles ("PHEVs"), so-called "upstream" GHG emissions, should not be attributed to vehicle manufacturers when EPA determines vehicle manufacturers' annual fleetwide GHG emissions.[2]

The Final Rule, which sets standards for GHG and other emissions for model year ("MY") 2027 to MY 2032 cars and light trucks, dovetails with regulations EPA adopted in December 2021 setting GHG standards for the same vehicle types in MY 2023-2026 and beyond.[3] The same two features in the Final Rule in support of which Auto Innovators seeks to intervene here—the setting of fleet-average GHG standards that include BEVs in compliance determinations, and the exclusion of "upstream"

[2] Battery-electric vehicles and plug-in hybrid electric vehicles are included in the broader term electric vehicles ("EVs"), which for the purposes of this motion include BEVs, PHEVs and also fuel cell electric vehicles ("FCEVs").

[3] *Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards,* 86 Fed. Reg. 74,434 (Dec. 30, 2021). The Final Rule's GHG emissions regulations supersede the GHG regulations adopted by EPA in December 2021 for model years after MY 2026. This motion refers to EPA's December 2021 regulations as the "MY 2023-2026 GHG regulations."

GHG emissions—are part of EPA's regulations for MY 2023-2026 vehicles. Petitions for review of EPA's MY 2023-2026 GHG regulations, consolidated as *Texas v. EPA*, No. 22-1031 (D.C. Cir.), were argued and submitted on September 14, 2023.

In *Texas v. EPA*, Auto Innovators moved to intervene in order to defend each of the two features of the MY 2023-2026 GHG regulations they seek to defend in these proceedings. As Auto Innovators explained in *Texas v. EPA*, EPA's approach to regulating GHG emissions includes "critically important flexibilities that allow manufacturers to use a range of approaches to reduce air pollution while also adopting new technologies including electric vehicle technology."[4] Just as it did in *Texas v. EPA*, the Court should grant this motion to intervene.

I. Interest of the Moving Party

Auto Innovators is a trade association whose members include automobile manufacturers who collectively sell over 95% of the new cars and light trucks in the United States. Those members of Auto Innovators are directly regulated by the Final Rule. Auto Innovators has a longstanding and obvious interest in GHG regulation.

[4] Motion for Leave to Intervene by Alliance for Automotive Innovation at 3, *Texas v. EPA*, No. 22-1031 (Mar. 30, 2022) 3; *see also id.* (explaining Auto Innovators' necessary participation as intervenor to "ensure that those critical regulatory provisions supporting electric vehicle technology are maintained").

Auto Innovators or predecessor associations have participated in every EPA GHG rulemaking, including the rulemaking that produced the Final Rule.

The Final Rule creates the most consequential carbon-reducing policy for motor vehicles since EPA began regulating automotive GHG emissions more than a decade ago. Nevertheless, the Final Rule maintains important points of continuity with earlier GHG emissions regulations. Two provisions of the Final Rule are essential if vehicle manufacturers are to have any possibility of demonstrating compliance with the GHG reduction targets mandated in the Final Rule.[5]

- *Fleet-Average GHG Standards that Include Battery Electric Vehicles in Compliance Demonstrations.* Like prior GHG regulations, the Final Rule provides for enforcement of fleetwide-average emissions requirements specific to each vehicle manufacturer, based on the size (or "footprint") of the vehicle models in a manufacturer's sales fleet, and a sales-weighted average of the GHG emissions from the manufacturer's sales in a given model year.[6] Petitioners objected to inclusion of

[5] To be sure, achieving those GHG reductions depends on many factors, including the auto industry's capital investment constraints, development of a sufficient and reliable network of public charging facilities for electric vehicles, reductions in electric vehicle production costs and improvements in their component and system supply chains, and consumer acceptance of electric vehicles as substitutes for conventional gasoline-powered vehicles.

[6] In addition to fleet-average emissions requirements, EPA also enforces carbon-related emissions standards specific to each vehicle model type that a manufacturer produces.

BEVs in GHG fleetwide emissions averages during the rulemaking process that produced the Final Rule.[7] After considering Petitioners' objection, EPA decided in the Final Rule to maintain the fleetwide averaging provisions that include BEVs. *See* 89 Fed. Reg. at 27,856-57, 27,923. EPA stated in the Final Rule that the Agency's "fleet average standards compliance program [would] help manufacturers to employ a wide range of compliance paths." *Id.* at 27,856. Notwithstanding EPA's analysis pointing to a range of compliance paths, automakers will need to rely on EVs in order to try to comply with the Agency's MY 2027-2032 GHG emissions requirements. The auto industry's prospects for compliance with the Final Rule depend on preservation of the Final Rule's continuation of EPA's longstanding practice of establishing standards on a fleet-average basis that includes BEVs.[8]

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[7] *See* 89 Fed. Reg. at 27,854; Commonwealth of Kentucky and State of West Virginia, Comments on Proposed Rule titled *Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles*, at 4 (July 5, 2023), https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0829-0649. Those comments, submitted by the attorneys general of Kentucky and West Virginia, were cosigned by the attorneys general of Alabama, Alaska, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia and Wyoming, and the provisional attorney general of Texas.

[8] In the rulemaking that preceded *Texas v. EPA* and in the current proceedings to review EPA's MY 2023-2026 GHG regulations, interest groups comprised of liquid fuels producers also challenged the provisions of EPA's MY 2023-2026 GHG regulations that include BEVs in manufacturers' fleet-average emissions determinations.

- *Exclusion of "Upstream Emissions" from GHG Compliance Demonstrations.* A GHG regulation adopted by EPA in 2012 had envisioned that the Agency would consider accounting for a portion of nationwide carbon dioxide emissions from the production of electricity that EPA thought attributable to EVs ("upstream emissions") in determining manufacturers' compliance with GHG standards, starting with MY 2022.[9] The plan to include upstream emissions in GHG compliance determinations was postponed in later GHG rulemakings. In the notice of proposed rulemaking for the MY 2027-2032 GHG program, EPA proposed permanent elimination of any plan to attribute upstream emissions to EVs in fleetwide compliance determinations. Petitioners objected to the Agency's proposal as arbitrary and capricious "[b]ecause the [Clean Air Act] announces no policy for special treatment of EVs."[10] The Final Rule adopted the Agency's proposal to eliminate consideration of upstream emissions from GHG fleetwide compliance determinations. *See* 89 Fed. Reg. at 27,923. In addition to presenting significant

[9] EPA's treatment of upstream emissions attributable to electricity used in BEVs dates back to the Agency's first GHG emission standards. *See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule,* 75 Fed. Reg. 25,324 (May 7, 2010). There, EPA excluded upstream emissions for the first 200,000 BEV units in 2012-2016. *Id.* at 25,695. That aspect of the 2010 rule was not challenged and the cap has since been eliminated.

[10] Comments of the Commonwealth of Kentucky and the State of West Virginia, *supra* note 6, at 8.

and likely insoluble problems in attributional analysis, attempting to include upstream emissions in manufacturers' GHG compliance demonstrations (whether for EVs or internal combustion vehicles) would jeopardize manufacturers' efforts to comply with EPA's increasingly stringent GHG reduction targets in the MY 2027-2032 timeframe. The possibility that this portion of the Final Rule and the Agency's underlying interpretation of the Clean Air Act might be invalidated is an issue of concern to members of Auto Innovators.[11]

II. Grounds for Intervention

Auto Innovators represents its members in regulatory and policy matters impacting the light-duty vehicle market across the country. Members of Auto Innovators would be directly and adversely affected by invalidation of the two features of the Final Rule described above. Indeed, Auto Innovators was permitted to intervene in *Texas v. EPA* to defend similar provisions in EPA's MY 2023-2026 regulations. Auto Innovators should therefore be permitted to intervene in these proceedings.

[11] In EPA's rulemaking for the MY 2023-2026 GHG regulations and in *Texas v. EPA*, liquid fuels petitioners also challenged the postponement of upstream emissions accounting in GHG compliance determinations in EPA's MY 2023-2026 regulation.

A. Auto Innovators Has Standing to Intervene.

Auto Innovators has standing to intervene on behalf of its members. Under the Supreme Court's familiar test for associational standing in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), "its members would otherwise have standing to [intervene] in their own right; … the interests it seeks to protect are germane to the organization's purpose; and … neither the [position] asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343; *see also UAW v. Brock*, 477 U.S. 274, 281 (1986) ("[A]n association may have standing … as the representative of its members." (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975))); *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).[12]

Standing under Article III requires (1) injury-in-fact, (2) causation, and (3) redressability. An 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.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). "[T]here is ordinarily little question" that a person has standing where "[he] is himself an object" of a challenged

[12] "Intervenors become full-blown parties to litigation, and so all would-be intervenors must demonstrate Article III standing." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232-33 (D.C. Cir. 2018).

regulation, *id.* at 561-62, and those requirements for standing are easily met here.

The vehicles produced by the members of Auto Innovators are the direct objects of regulation in the Final Rule. Those automakers benefit directly from the Final Rule's provisions that establish fleet-average GHG emission targets and include BEVs in demonstrations of compliance, as well as EPA's decision to not attribute upstream GHG emissions to EVs and other vehicles included in those compliance determinations. The standing of those manufacturers to defend those features of the Final Rule is "self-evident." *Sierra Club*, 292 F.3d at 899-900. 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." *Crossroads Grassroots Pol'y Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015); *see also Mil. Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (reasoning that companies that benefitted from agency's interpretation of rule challenged by petitioners "would suffer concrete injury" if court granted petition for review).[13]

The other requirements for organizational standing are also present here. Auto Innovators' mission includes representing its members' interests in litigation concerning regulations that apply to its members. *See Nat'l Lime Ass'n v. EPA*, 233

[13] When a regulated party's standing is "self-evident," as it is for Auto Innovators in these proceedings, there is no requirement that a party file an evidentiary submission in support of its standing. *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733-34 (D.C. Cir. 2003) (quoting *Sierra Club*, 292 F.3d at 899-900).

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" (cleaned up)). This Court has regularly permitted Auto Innovators and its predecessors to intervene in similar proceedings that challenge EPA vehicle regulations and related actions by EPA without the participation of their members without requiring evidentiary submissions. *See, e.g.*, *Texas v. EPA*, No. 22-1031 (D.C. Cir. Apr. 20, 2022) (Per Curiam Order) (granting Auto Innovators' motion for leave to intervene in challenges to EPA's MY 2023-2026 GHG regulations); *California v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019) (intervention by predecessors of Auto Innovators in challenge to EPA's decision to reconsider previously adopted GHG standards).[14]

B. Auto Innovators Meets the Intervention Requirements of Rule 15(d).

Auto Innovators' motion is timely. The Petition for Review in Case No. 24-1087 was filed on April 18, 2024, the same day EPA published the Final Rule in the Federal Register. The thirtieth day after the filing of that Petition being Saturday,

[14] *See also Iowa v. Granholm*, No. 24-1721 (8th Cir. May 16, 2024) (Order) (granting intervention by Auto Innovators in challenge to U.S. Department of Energy regulations governing regulations to be used by EPA to determine the petroleum-equivalent fuel economy of BEVs); *California v. EPA*, No. 08-70011 (9th Cir. Feb. 14, 2008) (Order) (granting intervention by Auto Innovators' predecessor association in state government's challenge to letter from EPA Administrator concerning request for waiver of federal preemption for state motor vehicle emissions standards).

May 18, the thirty-day period for intervention continues until today. *See* Fed. R. App. P. 26(a)(1)(C).

Auto Innovators' standing to represent its members in this proceeding, *see supra* pp. 8-9, demonstrates that it readily meets Rule 15(d)'s substantive requirements for intervention. Auto Innovators should be permitted to defend the interests of its members in the two provisions of the Final Rule of concern, inasmuch as they are "directly affected" by those provisions. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986); *see also New Mexico Dep't of Hum. Servs. v. HCFA*, 4 F.3d 882, 884 n.2 (10th Cir. 1993) ("substantial and unique interest in the outcome" warrants intervention); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) ("substantial interest" warrants intervention). Auto Innovators' full participation in EPA's Multipollutant rulemaking also supports intervention here. *See Synovus Fin. Corp. v. Bd. of Governors of Fed. Rsrv. Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991) (intervenor "fully participated in the proceedings" before the agency).

In this regard, although "Rule 15(d) simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought," *id.*, the criteria for intervention in actions in district courts under Federal Rule of Civil Procedure 24 can be informative. *See Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). A movant 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 Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998)). If the framework of Civil Rule 24 were applied, Auto Innovators would be entitled to intervene.

Because these are proceedings under Appellate Rule 15, timeliness is governed by Rule 15(d), and Auto Innovators has established its motion is timely. *See supra* pp. 10-11. 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 (quoting Fed. R. Civ. P. 24(a)(2)); *accord Jones v. Prince George's County*, 348 F.3d 1014, 1018-19 (D.C. Cir. 2003); *see also Am. Horse Prot. Ass'n 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. Simply put, without inclusion of BEVs in fleet-average compliance determinations, full-line automakers like the members of Auto Innovators cannot comply with the Final Rule's enforceable targets. 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, were there any question whether the federal parties' defense of the auto industry's interests in the two BEV-related provisions of concern in the Final Rule would be "adequate" under Civil Rule 24(a)(2), it has long been settled that it is sufficient if existing parties' representation of a proposed intervenor's 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) (quoting 3B J. Moore, *Federal Practice* 24.09-1[4] (1969)). Because "[a] government entity … is charged by law with representing the public interest" and "would be shirking its duty were it to advance [a proposed intervenor's] narrower interest at the expense of its representation of the general public interest," then "no presumption exists that the [government] will adequately represent" the interests of a proposed intervenor. *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). Likewise, Auto Innovators' grounds for intervention are reinforced by the possibility that "if the case is disposed of by settlement rather than by litigation,

what [EPA] perceives as being in its interest may diverge substantially" from the interests of Auto Innovators' members. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993).

CONCLUSION

For the foregoing reasons, Auto Innovators' motion for leave to intervene should be granted.

Respectfully submitted,

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May 20, 2024

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 in No. 24-1087: Commonwealth of Kentucky; State of West Virginia; State of Alabama; State of Alaska; State of Arkansas; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Iowa; State of Kansas; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of New Hampshire; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Utah; Commonwealth of Virginia; State of Wyoming.

Petitioner in No. 24-1100: State of Texas.

Petitioners in No. 24-1132: Warren Petersen, President of the Arizona State Senate; Ben Toma, Speaker of the Arizona House of Representatives; Arizona Trucking Association.

Respondents in Nos. 24-1087, 24-1100, and 24-1132: U.S. Environmental Protection Agency; Michael S. Regan, Administrator of the U.S. Environmental Protection Agency.

Proposed Intervenors in Nos. 24-1087, 24-1100, and 24-1132: Alliance for Automotive Innovation; Alliance of Nurses for Healthy Environments; American Lung Association; American Public Health Association; Appalachian Mountain Club; Center for Biological Diversity; Clean Air Council; Conservation Law Foundation; Environmental Defense Fund; Environmental Law & Policy Center; National Parks Conservation Association; Natural Resources Defense Council; Public Citizen; Sierra Club; State of California; State of Arizona; State of Colorado; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Michigan; State of Minnesota; State of New Mexico; State of New Jersey; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; District of Columbia; City and County of Denver; City of Chicago; City of Los Angeles; City of New York.

Amici Curiae in Nos. 24-1087, 24-1100, and 24-1132: None appear on the dockets.

CERTIFICATE OF COMPLIANCE

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 3,051 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 type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

s/John C. O'Quinn
John C. O'Quinn

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2024, 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