ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1230

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

UNION OF CONCERNED SCIENTISTS; CENTER FOR BIOLOGICAL DIVERSITY; CONSERVATION LAW FOUNDATION; ENVIRONMENT AMERICA; ENVIRONMENTAL DEFENSE FUND; ENVIRONMENTAL LAW & POLICY CENTER; NATURAL RESOURCES DEFENSE COUNCIL, INC.; PUBLIC CITIZEN, INC.; and SIERRA CLUB,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent,

COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION and ASSOCIATION OF GLOBAL AUTOMAKERS, INC.,

Movant Intervenors-Respondents,

PETITIONERS' RESPONSE IN OPPOSITION TO INTERVENTION BY THE COALITION FOR SUSTAINABLE AUTOMOTIVE REGULATION

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INTRODUCTION

One of the two movants, the Coalition for Sustainable Automotive Regulation (CSAR), should be denied leave to intervene unless and until it complies with this Court's rules governing disclosure statements, which demand transparency as to parties' identities and affiliations and help judges identify situations in which recusal is necessary.

An unincorporated association like CSAR must file along with its motion to intervene a separate statement disclosing the names of all association members that have issued shares or debt securities to the public. D.C. Cir. R. 15(c)(6) & 26.1(b). CSAR's motion reveals that it has such members. Indeed, CSAR relies on publicly-held companies that manufacture automobiles as the source of its "interest" in this litigation, Fed. R. App. P. 15(d), as well as its standing to intervene as of right. *See* Mot. for Leave to Intervene (Mot.) 16–21. Yet CSAR's disclosure statement lists no corporate members, in violation of this Court's rules and in derogation of the transparency they foster. Because those rules have the force of law, *see Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010), CSAR should be denied leave to intervene unless and until this violation is cured.[1]

[1] Petitioners filed this petition as a protective measure in the event that jurisdiction is deemed proper in this Court to review the challenged action of the National Highway Traffic Safety Administration. Petitioners believe that this Court lacks original jurisdiction to review that agency action, and that their challenge instead must proceed in district court. *See Envtl. Def. Fund v. Chao*, No. 1:19-cv-02907-KBJ (D.D.C. compl. filed Sept. 27, 2019). But this Court may rule on the instant motion to intervene without resolving that jurisdictional issue. *See Nat'l Ass'n of Clean Water Agencies v. Envtl. Prot. Agency*, 734 F.3d 1115, 1160–61 (D.C. Cir. 2013) (denying motion to intervene on procedural grounds without addressing subject-matter jurisdiction, because "jurisdiction is vital only if the court proposes to issue a judgment on the merits" (citation omitted)).

ARGUMENT

I. CSAR's disclosure statement under Circuit Rule 26.1 is deficient.

This Court's rules provide that "[a]ny disclosure statement required by Circuit Rule 26.1 must accompany a motion to intervene." D.C. Cir. R. 15(c)(6). The statement accompanying CSAR's motion to intervene describes CSAR as "an unincorporated nonprofit association." ECF Doc. No. 1813676, at 30 (filed Oct. 31, 2019). This Court's rules further mandate that if a movant intervenor "is an unincorporated entity whose members have no ownership interests, the statement *must include* the names of any members of the entity that have issued shares or debt securities to the public." D.C. Cir. R. 26.1(b) (emphasis added). CSAR's disclosure statement is deficient in this regard.

CSAR's motion represents that the entity has five "automobile manufacturer[]" members: "FCA US LLC …, General Motors LLC …, Mazda Motor of America d/b/a Mazda North American Operations …, Mitsubishi Motors North America …, [and] Toyota Motor North America, Inc." Mot. 4. The motion then relies on those entities—each of which is publicly held or has a publicly-held parent company—to support CSAR's claim to Article III standing and its asserted interest in this litigation. *See id.* at 16–21. However, CSAR does not list any member companies in its disclosure statement.

CSAR is not a trade association exempt from the member-disclosure requirement. Circuit Rule 26.1(b) defines a "trade association" as "a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership." CSAR

apparently has only a handful of members, and it is an ad hoc group rather than a continuing association that promotes the general interests of its members. Public reporting indicates that CSAR was formed very recently for the specific purpose of intervening in this case (and parallel proceedings in the district court, *see supra*, note 1) to support the federal government's position. Coral Davenport & Hiroko Tabuchi, *White House Pressed Car Makers to Join Its Fight Over California Emissions Rules*, N.Y. Times, Oct. 30, 2019, page B1 (Ex. A). The automobile industry is divided with respect to participation in this case, *see* Mot. 4 n.1 (noting that "this motion is … not brought on … behalf" of "American Honda Motor Co., Inc."), and the automakers that have decided to intervene in defense of the federal government apparently wish to be parties here without naming themselves as such, *see* Press Release, Toyota Newsroom, "Toyota's Statement Regarding Uniform National Fuel Economy and Greenhouse Gas Emissions Standards" (Oct. 29, 2019) (Ex. B) ("Toyota entered into [related litigation] not as a plaintiff or a defendant ….").

This Court's rules do not forbid those automakers from participating in this case under the aegis of an ad hoc, unincorporated entity, but the rules do demand that their new association comply with applicable disclosure requirements. It has not done so.

II. CSAR's violation of Circuit Rule 26.1 warrants denial of intervention unless and until the violation is cured.

"The rule of the court is the law of the court, as it is of the parties," *District of Columbia v. Humphries*, 11 App. D.C. 68, 78 (1897), and relief may be denied based on a violation of local rules. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101

F.3d 145, 150–54 (D.C. Cir. 1996). Unless and until CSAR cures its deficient disclosure statement, and also commits to update this Court whenever it "gains or loses" members, its motion to intervene should be denied. 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3972.10 (4th ed. 2008); *see* D.C. Cir. R. 26.1(a) ("A revised corporate disclosure statement must be filed any time there is a change in corporate ownership interests that would affect the disclosures required by this rule."). CSAR's noncompliance with Circuit Rule 26.1 threatens the integrity of these proceedings in multiple respects.

CSAR's violation of this local rule significantly undermines the rule's purpose. Circuit Rule 26.1 "supplement[s] the relevant Federal Rules" requiring "parties and/or attorneys [to] provide information needed for conflict screening" by judges. D.C. Cir. Judicial Council Mandatory Conflict Screening Plan § 3(c). Federal judges must recuse themselves from a proceeding if and when they "know[]" that they have "a financial interest … in a party," 28 U.S.C. § 455(b)(4), and the disclosure rules "assist judges in making [that] determination," Fed. R. App. P. 26.1, 1989 adv. comm. n. The rules thus require incorporated entities to disclose "any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity," D.C. Cir. R. 26.1(a); *accord* Fed. R. App. P. 26.1(a), so that judges may assess whether "a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock," Fed. R. App. P. 26.1(a), 1998 adv. comm. n. There is no principled reason to apply a lighter disclosure requirement to an unincorporated association consisting of only a few corporations, one of which (General Motors) is

among the largest companies in the United States. Compliance with Circuit Rule 26.1 is essential to ensure that ad hoc entities like CSAR are not used to evade the disclosure requirements applicable when corporations participate in litigation before this Court.

It is not sufficient for an unincorporated association to name some or all its current members somewhere in the body of a motion to intervene, as CSAR seems to have done here. *See* Mot. 4. "[J]udges are not like pigs, hunting for truffles buried in briefs." *Jones v. Kirchner*, 835 F.3d 74, 83 (D.C. Cir. 2016) (citation omitted). By not placing this information in the separate disclosure statement that must be updated if and when its membership changes, CSAR has unnecessarily heightened the risk that this Court's conflict-screening procedure will not capture the relevant information and that a judge will be made aware of a conflict only after being assigned to consider the case—if even then.

A failure to disclose and update membership also makes it harder for this Court to determine whether CSAR continues to satisfy the requirements for intervention and Article III standing. CSAR's asserted "interest" in this case, Fed. R. App. P. 15(d), stems from its claim to represent "automobile manufacturers and industry groups who collectively produce and sell a substantial percentage of passenger vehicles and light-duty trucks sold in the United States." Mot. 4; *see also id.* at 16, 20. But, absent compliance with Circuit Rule 26.1, automakers may "withdraw their legal support at any point" and exit CSAR without public notice, Ex. A, leaving the association as nothing but a shell purporting to represent a sizable portion of the industry. CSAR needs to be transparent regarding changes in membership in order to ensure the integrity of these proceedings.

CONCLUSION

CSAR should be denied intervention for failure to comply with Circuit Rule 26.1.[2]

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[2] Counsel for CSAR did not request petitioners' position on the motion to intervene in this case. He did seek petitioners' position on CSAR's motion to intervene in a case that petitioners have filed in district court to challenge the same agency action that is the subject of this protective petition for review. Counsel for CSAR was unwilling to commit to disclose all changes in the entity's corporate membership to the district court.

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Dated: November 12, 2019

CERTIFICATE OF COMPLIANCE

The foregoing response to a motion contains 1,535 words and complies with the type-volume limit in Fed. R. App. P. 27(d)(2)(A). The document was prepared using Microsoft Word 365 in 14-point, Garamond font, and it complies with the typeface and typestyle requirements of Fed. R. App. P. 27(d)(1)(E).

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CERTIFICATE OF SERVICE

On November 12, 2019, I served the foregoing document and accompanying exhibits by filing them using this Court's CM/ECF system. All counsel in this case are registered CM/ECF users and will be served via the CM/ECF system.

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Exhibit A

The New York Times

White House Pressed Car Makers to Join Its Fight Over California Emissions Rules

By Coral Davenport and Hiroko Tabuchi

Oct. 30, 2019

WASHINGTON — Monday's surprise move by General Motors, Toyota and other auto giants to back President Trump in his fight with California over pollution rules came after days of White House pressure to support one of the administration's biggest efforts to weaken climate regulations.

Previously, many automakers had indicated to California that they would not take a stand, according to Mary D. Nichols, chairwoman of California's clean air regulator, the Air Resources Board.

Late last week, their stance quickly changed.

Andrew Olmem, a top policy aide to Mr. Trump, began calling car companies to push them to sign on to the administration's effort in the courts to eliminate California's right to set its own auto emissions rules on planet warming pollution, a power granted under the Clean Air Act of 1970. He was joined on the phone in some cases by Justice Department officials, according to a person familiar with the matter.

The auto industry was already divided. In July four other major companies — Ford, Honda, Volkswagen and BMW — publicly sided with California.

Carmakers have long feared that Mr. Trump might retaliate, either with tariffs or trade restrictions, if they didn't support his effort to dismantle the rules, which were designed to fight climate change. After California struck its deal with the four automakers, the administration and Justice Department pushed a series of unusual legal and policy moves against the state and those companies — including an antitrust investigation — that were widely perceived as retaliatory.

Representatives from General Motors and Fiat Chrysler declined to comment on the record, since the legal case is still unfolding. In a statement, Toyota said that it had "entered into this legal action not as a plaintiff or a defendant, and not to favor any political party. Toyota is intervening to impact how emissions standards are applied."

On Wednesday Mr. Trump wrote on Twitter, "Thank you" to General Motors, Toyota, Fiat Chrysler and the other automakers, "for standing with us for Better, Cheaper, Safer Cars for Americans. California has treated the Auto Industry very poorly for many years, harming Workers and Consumers. We are fixing this problem!"

The split among the auto giants is far more consequential than simply the pursuit of divergent legal strategies among corporate competitors. "This is a huge rift. These vehicle manufacturers are splitting up in unique ways," said Barry Rabe, a professor of public and environmental policy at the University of Michigan. "Imagine an administration unleashed in a second term to confront any industry that does not do the political bidding of the president," he said.

It was that calculus that concerned many automakers at a gathering earlier this month in the sleek Washington office of the Alliance of Automobile Manufacturers, the industry's powerful lobbying arm. The companies were split over whether to back Mr. Trump's revocation of the right of California and other states to set strict state rules on climate-warming tailpipe pollution.

General Motors, Toyota and some other members of the alliance thought it was a safer bet to back the White House, which is fighting a lawsuit against the administration filed by California and more than 20 other states. But other alliance members, namely Ford, BMW and Volkswagen, along with Honda (not part of the manufacturers' alliance), had already struck a deal to side with California and abide by its tougher rules, publicly opposing Mr. Trump.

Given that its members were divided, the Alliance told the White House it would not be publicly siding with the Trump administration, according to a person familiar with the matter.

The White House sprang into action. It faced a deadline — this past Monday — for any other parties to legally support its position, but as of last Friday afternoon, according to four people familiar with the matter, there were no plans for major car companies to back the White House.

Since the opening days of his administration, Mr. Trump has touted his rollback of vehicle pollution rules as helping both automakers and car buyers, who he said would benefit from lower sticker prices.

Mr. Olmem, the White House policy aide, along with some Justice Department officials, started calling car companies to push them to sign on to the administration's side of the lawsuit. The case, which is ultimately expected to play out before the Supreme Court, could potentially have far-reaching consequences for both climate change and states' rights.

The calls appeared to work.

Over the weekend, the companies rapidly worked out their plan.

On Monday, more than a dozen automakers filed a legal intervention siding with the White House's effort to revoke the right of California and other states to enact tougher emissions rules than those set by the federal government. The final details were still being worked out as late as Monday morning, said three people familiar with the matter.

People with knowledge of Mr. Olmem's calls to the auto companies said he did not make explicit threats for lack of support. But behind the scenes, automakers have expressed concerns over an administration that has shown a willingness to reward or retaliate against other industries. Foreign automakers, in particular, have worried that Mr. Trump might consider tariffs on imported cars or car parts, or even label foreign-car sales a national security issue, which could further complicate imports.

The Trump administration and the Justice Department have also pursued a host of legal measures against California and the car companies that have sided with it.

Last month, for example, days after California filed its suit fighting the administration's revocation of its emissions authority, the Justice Department opened its antitrust inquiry into the four automakers that had joined with California. The administration also sent a letter to the state threatening to withhold federal highway funds if it did not comply with certain Environmental Protection Agency demands. And last week, the Justice Department sued California over its effort to extend its climate change initiative into Canada.

The decision by General Motors and the others to side with the administration was criticized by officials in California. "They have consistently said that they wanted a negotiated agreement that California could agree to. But now they are parroting, almost copying, the Trump administration's lies," said Ms. Nichols, the California clean-air official.

During the Obama administration, California wanted to set one of the world's most ambitious standards to curb vehicle carbon dioxide emissions. Carbon dioxide, a heat-trapping greenhouse gas, is one of the largest contributors to global warming, and tailpipes are the world's largest source.

Automakers pushed back against California's effort to create an ambitious state pollution standard, fearing it could split the auto market in two, with California and other states following one set of pollution rules and the federal government following another.

President Barack Obama, though, declared that the federal government would follow California's standard, ensuring a single national auto market. The Obama-era standard requires automakers to build vehicles that achieve an average fuel economy of 54.5 miles per gallon by 2025, which would eliminate about six billion tons of carbon dioxide pollution over the lifetime of those vehicles.

As soon as Mr. Trump came into office, he made it a priority to dismantle that rule.

In September, the administration revoked the legal authority of California and other states to set their own standards. Separately, the E.P.A. and Transportation Department are working on a new rule, which they expect to publish this winter, rolling back the national fuel economy standard to about 40 miles per gallon.

That crafting of that rule — which Trump administration officials had expected to unveil in May — has been plagued with confusion and delays, as many people familiar with the process say that Mr. Trump's appointees are struggling to prepare a plan that can withstand legal challenges.

General Motors and its peers have said that their decision to side with the administration does not mean they will support the final Trump rollback.

They point out that they can withdraw their legal support at any point — if, for example, they don't like the final rule. But by formally participating in this way, they say, it is more likely they will keep their seats at the table and hedge their bets.

Some experts questioned the automakers' legal reasoning for siding with the administration. "It's hard to see how this intervention is anything other than a pretty hostile stance against California's authority," said Ann Carlson, co-director of the Emmett Institute on Climate Change and the Environment at the University of California Los Angeles Law School.

For years, she said, California's efforts to set tougher clean air rules amounted to pressure on the federal government to follow suit. "If you eliminate that authority, you eliminate that pressure. That's awfully convenient for the auto companies," she said.

A version of this article appears in print on Oct. 31, 2019, Section B, Page 1 of the New York edition with the headline: White House Pressure Bent Automakers' Resolve

Exhibit B

Toyota's Statement Regarding Uniform National Fuel Economy and Greenhouse Gas Emissions Standards

October 29, 2019

TOYOTA

Toyota is passionate about the environment and reducing our impact. Our drive for continuous improvement of society is built into our DNA, and as a leader in electrified vehicles, it's who we are as a company. The 179,000 Americans who support their families working for Toyota and our dealerships feel the same way. Toyota supports year-over-year improvements in fuel economy that provide meaningful benefits to our climate, while better aligning with what consumers want. That's why we remain committed to be an industry leader in the development of vehicles that help reduce greenhouse gases.

Toyota entered into this legal action not as a plaintiff or a defendant, and not to favor any political party. Toyota is intervening to impact how emissions standards are applied. We want to help forge a sustainable compromise for consumers and the environment. Without joining this legal action, we would have no ability to affect the outcome.

We do not believe that there should be different fuel economy standards in different states. There should be one standard for all Americans and all auto companies. That is why we decided to be part of this legal matter. Doing so does not diminish our commitment to the environment, nor does it lower our desire to manufacture vehicles that produce fewer emissions year-after-year.

Multiple standards will result in higher vehicle prices. And if vehicle prices increase, consumers are more likely to keep older, less efficient cars longer. We can do more to reduce greenhouse gases by focusing on the 250 million vehicles already on the road today. We need to encourage consumers to trade in older, less efficient vehicles for newer vehicles that have higher fuel economy and therefore emit fewer greenhouse gases. We won't be able to do that if prices are beyond what people are willing to or can afford.

We're proud of our history of environmental achievements and progress. Since 2000 here in the U.S., we've sold over 3.6 million hybrids which have saved over 7.6 billion gallons of fuel and kept over 68 million tons of CO2 from entering the atmosphere. That's the equivalent to taking 13.4 million vehicles off the road for a year. Currently, 11 percent of our sales consist of hybrid, plug-in hybrid and fuel cell electric vehicles—that's three times the industry average. **We sell more alternative powertrain vehicles than the rest of the industry combined.** And we're working on increasing these numbers. By 2020, our plan goes up to 15 percent of our sales and by 2025, that number jumps to 25 percent, or one of every four vehicles sold.

We're proud that our North America Headquarters in Plano, Texas, our Production Engineering and Manufacturing Center in Georgetown, Kentucky and our Supplier Center in York Township, Michigan were all certified LEED Platinum, the U.S. Green Building Council's highest rating.

Lastly, we would like to share Toyota's environmental sustainability position in North America as part of our 2050 Global Environmental Challenge, our latest environmental report and other examples of our efforts. To find out more, please click on this link.