No. 18-1114

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

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW FROM THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MOTION FOR LEAVE TO INTERVENE BY THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC.

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CORPORATE DISCLOSURE STATEMENT

The Association of Global Automakers, Inc. ("Global Automakers"), a Virginia not-for-profit corporation, states pursuant to Federal Rule of Appellate Procedure 26.1 that it has no parent company and that no publicly held corporation has a 10% or greater ownership interest in Global Automakers.

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and Rule 15(b) of this Court, the Association of Global Automakers, Inc. ("Global Automakers") moves for leave to intervene in the above-captioned case and each of its companion cases in support of Respondent. Global Automakers has a direct and substantial interest in this matter. The interest of Global Automakers and the grounds for intervention are set forth below.

STATEMENT OF INTEREST

1. The Association of Global Automakers represents the U.S. operations of international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Our automobile manufacturer members include: American Honda Motor Co., Inc., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Maserati North America, Inc., McLaren Automotive Ltd., Nissan North America, Inc., Subaru of America, Inc., Suzuki Motor of America, Inc., and Toyota Motor North America, Inc. Global Automakers works with industry leaders, legislators, regulators, and other stakeholders in the United States to create public policies that improve motor vehicle safety, encourage technological innovation, and address environmental needs. Our goal is to foster an open and competitive automotive marketplace that encourages investment, job

growth, and development of vehicles that can enhance Americans' quality of life. For more information, visit www.globalautomakers.org.

BACKGROUND

2. This action concerns a notice issued by the Administrator of the Environmental Protection Agency ("EPA") entitled "Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles," 83 Fed. Reg. 16,077 (April 13, 2018) (the "2018 Determination"). In that notice, the EPA reconsidered and withdrew a previous "Final Determination" concerning the appropriateness of light-duty vehicle greenhouse gas ("GHG") emission standards for model years (MY) 2022–2025, and instead determined that the current standards need to be adjusted. Importantly, the 2018 Determination does nothing to change existing GHG emission standards promulgated by EPA under Section 202(a) of the Clean Air Act (42 U.S.C. § 7521(a)), and has no impact on any rights or obligations of any party. Rather, the 2018 Determination signals the first step in a longer rulemaking process to determine appropriate light-duty GHG emission standards and to make any regulatory adjustments that are needed.

3. The 2018 Determination at issue in this challenge relates to a so-called "Midterm Evaluation" of MY 2022–2025 GHG emission standards promulgated by the EPA in 2012. The history of this regulatory program, however, goes back even

further to 2009, when the automobile industry and regulators from the EPA, the National Highway Traffic Safety Administration ("NHTSA"), and the California Air Resources Board ("CARB") reached a historic agreement for "One National Program" to address motor vehicle fuel economy and GHG emissions in a coordinated and harmonized fashion. This commitment resulted in joint fuel economy and GHG emission standards promulgated by the EPA and NHTSA in 2010. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

4. This One National Program was vitally important to the auto industry because it was faced with two federal agencies and one state agency regulating the same aspect of motor vehicle performance. NHTSA regulates motor vehicle fuel economy under the Energy Policy and Conservation Act, 49 U.S.C. § 32901 *et seq.*, while the EPA and CARB were separately attempting to regulate carbon dioxide emissions—which is essentially the same thing as fuel economy given the direct link between fuel consumption and carbon dioxide emissions. The joint, coordinated rule issued by NHTSA and the EPA was intended to "allow automakers to meet both the NHTSA and EPA requirements with a single national fleet, greatly simplifying the industry's technology, investment and compliance strategies." 75 Fed. Reg. at 25,329. For its part, California amended its GHG emission regulations to include a "deemed-to-comply" provision whereby

automakers could show compliance with its state GHG emission standards by complying with the EPA regulations. 13 C.C.R. § 1961.3(c).

5. The commitment to the One National Program was renewed in 2011 when the federal agencies proposed fuel economy and GHG emission standards covering MY 2017–2025, which were then finalized in 2012. *See* 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012) (the "2012 Final Rule"). Again, the EPA and NHTSA jointly issued a proposed rule and a final rule, so as to ensure that their respective standards were aligned with each other to the extent possible under their governing statutes.

6. Additionally, the 2012 Final Rule contained a regulatory provision for a "Midterm Evaluation," which was intended to determine whether the standards for MY 2022–2025 developed in 2012 are still appropriate, based on the most up-to-date data. 77 Fed. Reg. at 62,628. This evaluation was necessary because of the long time horizon of the standards (which extended more than ten years after the rulemaking) and the fact that the regulations were based on assumptions that may not hold true in the long term—assumptions on matters such as the effectiveness and costs of fuel-saving technologies, the price of gasoline, and consumer demand for vehicles with higher fuel economy.

7. The Midterm Evaluation was necessary also because of a provision in the fuel economy statute stating that NHTSA may promulgate regulations prescribing "average fuel economy standards for at least 1, but not more than 5, model years" at a time. 49 U.S.C. § 32902(b)(3)(B). Technically, therefore, the 2012 Final Rule resulted in final fuel economy standards for just MY 2017–2021, and "augural" standards for MY 2022–2025. *See* 77 Fed. Reg at 62,627. The Midterm Evaluation provided a process whereby NHTSA could determine whether, based on the most up-to-date information, the augural standards were still valid or needed adjustments, and allowed for *de novo* rulemaking to promulgate final standards for those years. *Id.* at 62,628.

8. In conjunction with NHTSA's *de novo* rulemaking, the Midterm Evaluation would result in EPA making a "determination" concerning whether its final GHG emission standards for MY 2022–2025 remain appropriate or should be adjusted. *Id.* at 62,784. The 2012 Final Rule set April 1, 2018 as the deadline for its determination, and laid out the relevant factors the agency was to consider in making the determination. *Id.* According to the preamble to the 2012 Final Rule:

> If, based on the evaluation, EPA decides that the GHG standards are appropriate under section 202(a), then EPA will announce that final decision and the basis for EPA's decision. The decision will be final agency action which also will be subject to judicial review on its merits. . . . Where EPA decides that the standards are not appropriate, EPA will initiate a rulemaking to adopt standards that are appropriate

> under section 202(a), which could result in standards that are either less or more stringent.

Id.

9. As was the case with both the 2010 rulemaking and the 2012 Final Rule, the Midterm Evaluation was to be coordinated and harmonized between the EPA and NHTSA to the greatest extent possible—from both a procedural and a substantive standpoint—consistent with their respective governing statutes. As explained in the preamble to the 2012 rulemaking:

> In order to align the agencies' proceedings for MYs 2022–2025 and to maintain a joint national program, if the EPA determination is that its standards will not change, NHTSA will issue its final rule concurrently with the EPA determination. If the EPA determination is that standards may change, the agencies will issue a joint NPRM and joint final rule.

77 Fed. Reg. at 62,633.

10. On January 12, 2017—just one week before the end of the previous administration—the EPA published its Final Determination on the Appropriateness of the Model Year 2022–2025 Light-duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation (the "2017 Final Determination"). The previous EPA took this action despite its earlier statements that a final determination was expected in 2018, *see, e.g.,* https://www.epa.gov/sites/production/files/2016-10/documents/grundler-sae-naipc-2015-09-17-presentation.pdf at 24 (indicating that the EPA Proposed Determination and NHTSA notice of proposed rulemaking would be released mid-2017 and the final

determination made in April 2018). Additionally, the 2017 Final Determination was issued without coordinating with NHTSA, which hadn't even published a proposed rule for MY2022–2025, let alone issued a final rule.

11. On February 21, 2017, Global Automakers petitioned the new EPA Administrator to withdraw the 2017 Final Determination, and to put the Midterm Evaluation back on the procedural track the agencies and stakeholders had previously agreed to. The EPA Administrator granted this petition and published a notice on March 22, 2017 stating his intention to reopen the Midterm Evaluation. *See* Notice of Intention To Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light Duty Vehicles, 82 Fed. Reg. 14,671 (March 22, 2017). The agency subsequently issued a Request for Comment on the reconsideration of the 2017 Final Determination, and opened a 45-day comment period. *See* Request for Comment, 82 Fed. Reg. 39,551 (August 21, 2017). Global Automakers submitted comments asking the EPA and NHTSA to (among other things) update their modeling, assumptions and data, and pointing out that revised findings would support the conclusion that adjustments to the regulations are needed.

12. On April 13, 2018, the EPA published the 2018 Determination being challenged here, and found that the current MY 2022–2025 light-duty GHG standards "are not appropriate in light of the record before EPA, and therefore,

should be revised as appropriate." 83 Fed. Reg. at 16,077. The agency made this finding based on "the significant record that has been developed since the January 2017 Determination," and its conclusion that "[m]any of the key assumptions EPA relied upon in its January 2017 Determination, including gas prices and the consumer acceptance of advanced technology vehicles, were optimistic or have significantly changed and thus no longer represent realistic assumptions." *Id.* at 16,078.

13. Significantly for the purposes of this action, the EPA explained in the 2018 Determination that:

> This Determination is not a final agency action. As EPA explained in the 2012 final rule establishing the [Midterm Evaluation] process, a determination to maintain the current standards would be a final agency action, but a determination that the standards are not appropriate would lead to the initiation of a rulemaking to adopt new standards, and it is the conclusion of that rulemaking that would constitute a final agency action and be judicially reviewable as such.

Id. (citing 77 Fed. Reg. at 62,784–62,785). Consequently, the 2018 Determination notes that the EPA and NHTSA "will initiate a notice and comment rulemaking in a forthcoming Federal Register notice to further consider appropriate standards for MY 2022–2025 light-duty vehicles, as appropriate." *Id.* In the meantime, "the current standards remain in effect and there is no change in the legal rights and obligations of any stakeholders." Id. at 16,087.

14. This action challenging the 2018 Determination was commenced on May 1, 2018, when Petitioners filed a petition for review pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

15. Global Automakers' member companies have a strong interest in fuel economy and GHG emission standards that are strong and achievable, and that are coordinated among all of the relevant regulatory agencies. Global Automakers intends to continue its engagement with the EPA, NHTSA, and CARB in the upcoming rulemaking process, and hopes that the outcome leads to a continuation of the One National Program and establishes standards that build on the industry's success in improving fuel economy and reducing emissions.

GROUNDS FOR INTERVENTION

16. The Petitioners' challenge to the 2018 Determination presents an unusual circumstance. By its own terms, the 2018 Determination was not a final agency action; it does not change the current GHG standards for MY 2022–2025 and has no impact on automakers' obligations to comply with those standards. Rather, it merely signals the beginning of a rulemaking process to amend them. It is therefore unclear what relief the Petitioners are seeking in this action, and how they could possibly establish that the 2018 Determination caused them a redressable harm so as to give rise to standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). It is possible that the Petitioners are

preemptively seeking an order from this Court preventing the EPA from initiating notice-and-comment rulemaking to amend the MY2022–2025 GHG standards, though Global Automakers knows of no authority that would support such an order.[1] To the extent that that is the Petitioners' objective and they have standing to pursue such an action (which Global Automakers does not believe they do), then Global Automakers has an interest in the outcome of this challenge, and should be allowed to intervene for the reasons set forth below.

A. Global Automakers Should Be Permitted to Intervene Pursuant to Federal Rule of Appellate Procedure 15(d)

17. Rule 15(d) of the Federal Rules of Appellate Procedure allows a party to intervene in a challenge to an agency action if the proposed intervenor files a motion "within 30 days after the petition for review . . . [with] a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). Before this Circuit will allow a proposed intervenor to enter the action, the "intervenor must . . . satisfy the requirements of Article III standing imposed on

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[1] It is axiomatic that an administrative agency always has the authority to reconsider its own rules and to amend them through notice-and-comment rulemaking. Indeed, this authority has been expressly granted to the EPA under Section 202(a) of the Clean Air Act. *See* 42 U.S.C. § 7521(a) (providing that EPA "shall by regulation prescribe (and from time to time revise)" motor vehicle emission standards). The fact that the 2012 Final Rule provided for a Midterm Evaluation to inform such a rulemaking action cannot in any way restrict the EPA's underlying authority to initiate such rulemaking.

petitioners." *Ala. Mun. Distrib. Grp. v. Fed. Energy Regulatory Comm'n*, 300 F.3d 877, 879 n.2 (D.C. Cir. 2002).

B. As the Trade Association Representing a Substantial Portion of the Regulated Industry, Global Automakers Has Standing Under Article III

18. It is well established in this Circuit that regulated parties or trade associations representing regulated parties have Article III standing in actions challenging agency action or inaction. This Court has "generally found a sufficient injury in fact 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 Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015). For example, in *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998), this Court held that a trade association representing munitions manufacturers had standing to intervene under Rule 15(d) in a challenge to the EPA's Military Munitions Rule. The decision explained that:

> [T]he [Chemical Manufacturers Association] has standing because some of its members produce military munitions and operate military firing ranges regulated under the Military Munitions Rule. These companies are directly subject to the challenged Rule, and they benefit from the EPA's . . . interpretation (under which most military munitions at firing ranges are not solid waste) . . . . These CMA members would suffer concrete injury if the court grants the relief petitioners seek; they would therefore have standing to intervene in their own right, and we agree with the litigants that the CMA has standing to intervene on their behalf in support of the EPA.

Id. at 954. Drawing on this language, this Court also allowed an agency of the Mongolian government to intervene under Federal Rule of Civil Procedure 24 in a challenge to a decision by the Fish and Wildlife Service under the Endangered Species Act. *The Fund for Animals v. Norton*, 322 F.3d 728, 733–34 (D.C. Cir. 2003). In that case, an environmental group challenged the agency's decision to list argali sheep in Mongolia as a threatened, rather than endangered, species. *Id.* at 730. Citing *Military Toxics Project*, the Court explained that "Mongolia's sheep are the subject of the disputed regulations, the country benefits from the FWS's current regulations, and Mongolia would suffer concrete injury if the court were to grant the relief the plaintiffs seek." *Id.* at 733.

19. To the extent that the Petitioners have a cognizable action challenging the 2018 Determination, then Global Automakers and its members will be significantly impacted by this Court's resolution of the challenge. Like the munitions manufacturers in *Military Toxics Project*, Global Automakers and its members support the 2018 Determination and would benefit from the anticipated rulemaking to update those standards. Global Automakers' members would therefore suffer concrete injury if the EPA's decision is reversed.

20. Further, Global Automakers' interest in this matter is evidenced by its extensive participation in the administrative events leading to this challenge. The 2018 Determination was one step in a long process of establishing, reevaluating,

and eventually amending fuel economy and GHG emission standards. Global Automakers: (a) was an active participant in the establishment of the One National Program; (b) submitted comments in connection with the previous Administration's premature 2017 Final Determination; (c) was one of the stakeholders who requested that the new EPA reconsider the 2017 Final Determination; and (d) submitted comments in connection with that reconsideration. As such, Global Automakers has an interest in whether the 2018 Determination will be overturned.

C. The Liberal Intervention Policies Underlying Federal Rule of Civil Procedure 24 Further Support Intervention Here

21. Although not expressly adopted by this Circuit, other circuits often look to the body of law governing intervention under Federal Rule of Civil Procedure 24 in evaluating a proposed intervenor's motion under Rule 15(d). *Sierra Club, Inc. v. EPA,* 358 F.3d 516, 517–18 (7th Cir. 2004) ("Rule 15(d) does not provide standards for intervention, so appellate courts have turned to the rules governing intervention in the district courts under Fed.R.Civ.P. 24."); *see also Int'l Union v. Scofield,* 382 U.S. 205, 209–10, 216–17 & n. 10 (1965). The underlying principles governing Rule 24 intervention further bolster Global Automakers' claim that it should be allowed to intervene in this challenge.

1. Intervention as of Right

22. Pursuant to Federal Rule of Civil Procedure Rule 24(a)(2), an applicant is entitled to intervene as of right upon establishing:

> (1) the timeliness of the motion; (2) whether the applicant "claims an interest relating to the property or transaction which is the subject of the action"; (3) whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) whether "the applicant's interest is adequately represented by existing parties."

The Fund for Animals, 322 F.3d at 731 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)).

a. Global Automakers' Application for Intervention Is Timely

23. Motions for intervention pursuant to Federal Rule of Appellate Procedure 15(d) must be filed within thirty days of the date on which the petition for review is filed. In this case, Petitioners filed their petition for review on May 1, 2018. By filing this motion within thirty days, Global Automakers has satisfied this requirement.

b. Global Automakers Claims an Interest Relating to the Property or Transaction Which Is the Subject of the Action

24. Once a party has established Article III standing to intervene in a challenge to agency action, it has effectively established an interest relating to the property or transaction which is the subject of the action. *The Fund for Animals*, 322 F.3d at 735; *cf. Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910–911 (D.C. Cir. 1977) (allowing industry to intervene in a rulemaking under Rule 24,

explaining that "the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process").

25. As a trade association representing a substantial portion of the industry that is directly impacted by the EPA's regulatory actions with respect to light-duty vehicle GHG emission standards, Global Automakers unquestionably has a direct and vital interest in this action. As explained above, Global Automakers participated extensively in the administrative events leading to the EPA's 2018 Determination and this challenge. Moreover, because Global Automakers' members' compliance obligations are established by the very GHG emission standards that the EPA found "are not appropriate in light of the record before [the agency]," 83 Fed. Reg. at 16,077, it should be permitted to intervene in support of that finding.

c. Disposition of the Action May as a Practical Matter Impair or Impede Global Automakers' Ability to Protect That Interest

26. The Advisory Committee notes to Rule 24 explain that, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24 advisory committee's note. Accordingly, this Circuit has interpreted this requirement "as looking to the 'practical consequences' of denying intervention,

even where the possibility of future challenge to the regulation remains available." *The Fund for Animals*, 322 F.3d at 735 (quoting *Natural Res. Def. Council*, 561 F.2d at 909).

27. Here, the Petitioners' challenge, if successful, could dramatically affect the interests of Global Automakers' members, depending on the relief sought from this Court. As discussed above, Global Automakers has an undeniable interest in GHG emission standards that are strong and achievable, and that do not impose unnecessary and costly compliance obligations due to multiple, inconsistent regulatory programs. Global Automakers anticipates that the rulemaking the EPA and NHTSA are currently undertaking, consistent with the 2018 Determination, will achieve this important policy goal. To the extent that the Petitioners seek to use this litigation as a means to upset that rulemaking activity (which it should not), then the interests of Global Automakers' members will be impacted by the outcome of this action.

d. Global Automakers' Interest Will Not Be Adequately Represented by Existing Parties in the Lawsuit

19. In adopting the Supreme Court's interpretation of Rule 24's inadequate representation requirement, this Circuit has explained that the burden of showing inadequacy is "minimal," and the applicant need only show that representation of its interests by existing parties "may be" inadequate. *The Fund*

for Animals, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

20. Respondent EPA does not adequately represent Global Automakers interests in this matter. Courts routinely find that a government party does not adequately represent the unique interests of private organizations because the government must represent a broader perspective. *Id.* at 737; *Dimond v. District of Columbia*, 792 F.2d 179, 192–93 (D.C. Cir. 1986). As a trade association that represents a substantial portion of the automobile industry, Global Automakers will be able to speak to the impact the 2018 Determination and the subsequent rulemaking will have on the regulated parties in a manner that the EPA cannot. This alone is sufficient to find that the government will not adequately represent the industry's interests.

22. As an intervening respondent, Global Automakers will contribute to the full and adequate presentation of the important issues involved in this action and will ensure representation of the interests of those members of the automobile manufacturing industry who would be adversely affected by adjudication in favor of Petitioners.

2. Permissive Intervention

23. Additionally, liberal intervention policies underlying Federal Rule of Civil Procedure 24(b) also support Global Automakers' motion for intervention.

This rule gives the federal court discretion in allowing intervention when the proposed intervenor demonstrates that its "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). For the same reasons stated above, Global Automakers easily meets the substantially less burdensome requirements for permissive intervention. Finally, this motion is timely and does not prejudice the right of the existing parties.

* * *

For the foregoing reasons, leave to intervene should be granted.

Date: May 25, 2018

Respectfully submitted,

/s/ Raymond B. Ludwiszewski

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion for Leave to Intervene complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 3915 words. I further certify that this Motion complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ Raymond B. Ludwiszewski

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2018, I electronically filed the foregoing Motion for Leave to Intervene with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's appellate CM/ECF system.

I further certify that service was accomplished on all participants in the cases via the Court's CM/ECF system.

/s/ Raymond B. Ludwiszewski

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