ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and NATIONAL AUTOMOBILE DEALERS ASSOCIATION, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, as Administrator of the United States Environmental Protection Agency Respondents.	Docket No. 09-1237

UNOPPOSED MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

The States of New York, Arizona, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, the State of Florida Department of Environmental Protection, and the Commonwealth of Pennsylvania Department of Environmental Protection (the "Proposed Intervenors") move to intervene in this action as party-respondents pursuant to Fed. R. App. P. 15(d).

1. On September 8, 2009, the Chamber of Commerce of the United States of America ("Chamber of Commerce") and the National Automobile Dealers Association ("NADA"), filed a Petition for Review with this Court seeking review of a final action by the United States Environmental Protection Agency ("EPA"), and its Administrator, Lisa P. Jackson. That final agency action granted California's request, under Section 209(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7543(b), for a waiver of preemption for California's regulations to control greenhouse gas emissions from new motor vehicles. These regulations would require reductions in fleet-average greenhouse gas emissions, including carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs), for most new passenger motor vehicles sold in California, beginning with the 2009 model year. This final agency action was published in the Federal Register on July 8, 2009, 74 Fed. Reg. 32,744 (July 8, 2009).

2. California has filed a motion to intervene in this action. The Proposed Intervenors likewise have a strong interest in defending EPA's decision because each of them has promulgated, or is contemplating promulgating, new motor vehicle greenhouse gas emissions regulations with standards identical to California's. If EPA's waiver of federal preemption is struck down, the regulations adopted by California and by Proposed Intervenors will be

unenforceable.

3. Many of the Proposed Intervenors here were granted intervenor status in California v. EPA (D.C. Cir. 07-1457), a case in which California challenged EPA's failure to issue a decision on California's request for a waiver of pre-emption pursuant to Section 209(b) of the CAA. As explained below, the same rationale warrants a grant of intervention here.

BACKGROUND

California's Authority to Set Emission Standards for Motor Vehicles

4. The CAA authorizes EPA to regulate tailpipe emissions from new motor vehicles. 42 U.S.C. § 7521. Although the statute generally prohibits states from adopting their own emission standards for new motor vehicles, Section 209(b) preserves California's authority to set its own emission standards because of its long-standing, severe air pollution problems, as well as its "efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation." Motor and Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1110-1111 (D.C. Cir. 1979). Under Section 209(b), California must request and be granted a waiver of preemption from EPA before it may enforce any emissions regulations. 42 U.S.C. § 7543(b).

5. Under Section 177 of the CAA, 42 U.S.C. § 7507, other states may adopt and enforce emission standards for new motor vehicles that are identical to those of California for which a waiver has been granted by EPA.

States' Adoption of Greenhouse Gas Emission Regulations and California's Request for Waiver

6. California adopted regulations in 2005 that limit the amount of greenhouse gases that may be emitted by light- and medium-duty passenger vehicles sold in California beginning in model year 2009.

7. Many of the Proposed Intervenors have adopted greenhouse gas emissions regulations for motor vehicles that are identical to California's regulations.[1] Like California, the Proposed Intervenors recognize that motor vehicles are one of the most significant sources of the greenhouse gases that cause global warming. Global warming is already seriously and negatively impacting the public health, economies and environments of the Proposed Intervenors, and its effects are expected to worsen in the absence of effective abatement prompted by immediate governmental action.

8. On December 21, 2005, pursuant to Section 209(b), California

[1] See Ariz. Admin. Code, Title 18, Ch. 2, Art. 18; Conn. Agencies Regs. § 22a-174-36b; Florida Administrative Code, Section 62-285.400; Code of Maine Regulations, 06-096 CMR Ch. 127; Code of Md. Regs. 26.11.34; 310 Code of Mass. Regs. 7.40; N.J. Admin. Code 7:27-29; New Mexico Administrative Code, sec. 20.2.88; Title 6 of the N.Y. Code of Rules and Regs. Part 218-8; Ore. Admin. Regs. 340-257-0100; 25 Pennsylvania Code §§ 126.411; R. I. Low Emission

requested a waiver of preemption from EPA for its greenhouse gas emission regulations. After California filed an action to compel EPA's decision on the waiver, a lawsuit in which the Court granted the intervention motion filed by many of the Proposed Intervenors here, EPA originally denied California's request. California brought a petition in this Court in March 2008 challenging the EPA's decision to deny the waiver. California v. EPA (D.C. Cir. 08-1178). The Proposed Intervenors here filed their own petition for review, New York, et al. v. EPA (D.C. Cir. 08-1179), which was consolidated with California's petition.

9. After the change in Administration, EPA reconsidered its denial and granted the waiver in a decision published on July 8, 2009, 74 Fed. Reg. 32,744 (July 8, 2009). After EPA published its decision granting the waiver, California and New York, et al. voluntarily withdrew their petitions against EPA's initial decision to deny the waiver.

10. Shortly before EPA's final decision on the waiver, the White House announced an agreement on May 19, 2009 designed to coordinate state and federal greenhouse gas emissions standards for mobile sources and to end litigation in this Court and in other courts between the automobile manufacturers and states. Among other things, the agreement called for certain modifications to be made in

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Vehicle Program, Air Pollution Control Reg. No. 37.; Vermont Air Pollution Control Regulations, Subchapter XI and Appendix F; Wash. Admin. Code Ch.173-423.

California's greenhouse gas emissions regulations, and for the federal government to adopt greenhouse gas emissions standards substantially similar to those in California's regulations governing the later model years.

11. Under the terms of the agreement, automobile manufacturers and their trade groups agreed to "not contest any final decision by EPA granting California's request for a waiver of preemption under Section 209 of the Clean Air Act for its greenhouse gas emissions standards." See, e.g., Commitment Letter of Alliance of Automobile Manufacturers, available at www.epa.gov/otaq/climate/regulations.htm.

ARGUMENT

A. The Interests of the Proposed Intervenors Warrant a Grant of Intervention Under Fed. R. App. Pro. 15(d).

12. Fed. R. App. P. 15(d) requires that a party seeking to intervene must explain its interest in the proceeding and move to intervene within 30 days after the petition for review is filed. Intervention under Fed. R. App. P. 15(d) is permitted where the intervenor has a direct and substantial interest in the outcome of the action. See, e.g., Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 744 (D.C. Cir. 1986) (allowing Rule 15(d) intervention because petitioners were "directly affected by application" of agency policy); New Mexico Dep't of Human Services v. HCFA, 4 F.3d 882, 884 n.2 (10th Cir. 1993) (permitting intervention

because intervenors had substantial and unique interest in outcome); Bales v. NLRB, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome of the petition").

13. The Proposed Intervenors have a direct and manifest interest in the outcome of this case. In states that have adopted regulations that track California's, the enforceability of their regulations depends on EPA granting California a waiver of preemption under Section 209(b). A reversal of EPA's grant of California's waiver would preempt these Proposed Intervenors' regulations as well as California's. See, e.g., Motor Vehicle Manufacturers Assoc. v. Jorling, 17 F.3d 521, 534 (2nd Cir. 1994) (New York can adopt, but not enforce, California emission standards without a waiver from EPA). Similarly, those states among the Proposed Intervenors who are in the process of adopting (or considering adopting) the California emission standards would be precluded from enforcing them once they adopted such standards. This Court granted a similar motion to intervene filed by many of the same Proposed Intervenors seeking to compel EPA to take action on California's request for a waiver of preemption, California v. EPA (D.C. Cir. 07-1457); the same direct and substantial interests are present in the case at bar.

14. The implementation of effective greenhouse gas emission regulations

would, at a minimum, begin the process of reducing the greenhouse gas emissions that cause global warming. It is not necessary that the Proposed Intervenors show that the regulations would solve the problem all at once. Massachusetts v. EPA, 549 U.S. 497, 524 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.").

B. The Liberal Intervention Policies Underlying Fed. R. Civ. Pro. 24 Further Support Granting Intervention Here.

15. The intervention policies underlying Fed. R. Civ. P. 24 provide guidance in analyzing intervention under Rule 15(d), although the requirements of Rule 24 do not directly apply to motions to intervene in challenges to administrative actions in the federal appellate courts. See United States v. Bursey, 515 F.2d 1228, 1238 n. 24 (5th Cir. 1975) (policies underlying intervention in the district courts may be applicable in the appellate courts, but are not controlling).

16. Addressing intervention as of right, Fed. R. Civ. P. 24(a)(2) provides that:

> Upon timely application, anyone shall be permitted to intervene in an action: .... when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a) is construed liberally in favor of granting intervention. See

United States v. City of Los Angeles, 288 F.3d 391, 397-98 (9th Cir. 2002); Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir. 2001); Fed. Savings & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). The Proposed Intervenors easily meet Rule 24(a)(2)'s criteria.

17. The preemption of Proposed Intervenors' motor vehicle greenhouse gas regulations as a result of any reversal of EPA's grant of California's waiver (or the preclusion of the enforcement of such regulations in the future) plainly "impairs or impedes" the Proposed Intervenors' interest in enforcing their own regulations. See Yniguez v. Arizona, 939 F.2d 727, 737 (9th Cir. 1991) ("the question ... is whether the district court's decision will result in practical impairment" of the interests of the applicants for intervention"). The courts are especially sensitive to the needs of states to intervene in actions that implicate state laws and policy interests. See Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert "California interests in a competitive system"). As a related matter, standing under the CAA is clear where a state sues on its own behalf to vindicate the administration of its air program. West Virginia v. EPA, 362 F.3d 861, 868 (D.C. Cir. 2004); see Massachusetts v. EPA, 549 U.S.

497, at 518-521 (a state suing to protect its sovereign interests is entitled to special solicitude in a standing analysis under the CAA).

18. Fed. R. Civ. P. 24(b), which provides for permissive intervention, gives a federal court discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that its "claim or defense and the main action have a question of law or fact in common." In exercising such discretion, courts "shall consider whether the intervention will unduly delay or prejudice the rights of the original parties." Fed. R. Civ. P. 24(b)(3); see also Citizens for an Orderly Energy Policy, Inc. v. Suffolk County, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (possibility of undue delay or prejudice is the "principal consideration").

C. EPA May Not Adequately Represent Proposed Intervenors' Interests.

19. Unlike Fed. R. Civ. P. 24(a), Fed. R. App. Pro. 15(d) does not, on its face, require an intervenor to show inadequate representation by the parties in the litigation. Nevertheless, Proposed Intervenors would satisfy this element of Rule 24(a). According to the Supreme Court, "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest '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); see Environmental Defense Fund v. Higginson, 631 F.2d 738, 740 (D.C. Cir. 1979) (a party seeking

intervention ordinarily is required to make "only a minimal showing" that representation of its interest may be inadequate).

20. A proposed intervenor need not show that the representation of its interest will in fact be inadequate. See Diamond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986). Moreover, "[a] governmental party that enters a lawsuit solely to represent the interests of its citizens ... differs from other parties, public or private, that assert their own interests, even when these interests coincide." United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 992 n.21 (2d Cir. 1984) (emphasis added). Any doubts about intervention should be resolved in favor of the Proposed Intervenors here. See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993).

21. Although Proposed Intervenors and EPA share the common goal of defending the Agency's decision to grant the waiver, EPA may not adequately represent Proposed Intervenors' interests. For example, EPA is unlikely to have as strong an interest as Proposed Intervenors in upholding a decision that limits the preemption of state authority. In addition, EPA and Administrator Jackson may choose to resolve or settle this action in a manner that does not square with the interests of the Proposed Intervenors. Accordingly, the Proposed Intervenors cannot rely on EPA to protect their interests. See Forest Conservation Council v.

U.S. Forest Service, 66 F.3d 1489, 1499 (9th Cir. 1995) (Arizona's interests were not necessarily represented by the Forest Service). Neither would California's participation as a Respondent-Intervenor in this case guarantee the Proposed Intervenors' ability to enforce its regulations. Some of the Proposed Intervenors have previously found themselves opposed to California in motor vehicle emissions regulations cases. See, e.g., Association of Int'l Auto. Mfrs. v. Comm'r, Mass. Dep't of Env. Prot., 208 F.3d 1, 5, 7-8 (1st Cir. 2000) (when California repealed its "Zero Emissions Vehicle" (ZEV) program and entered into a Memoranda of Understanding (MOA) with auto manufacturers, Massachusetts could not adopt the MOA for its own regulatory program because the content of the MOA was not considered "standards" under Sections 209 and 177 of the CAA). Accordingly, the interests of the Proposed Intervenors may not be adequately represented by EPA and its Administrator as Respondents, or by California as a Respondent-Intervenor.

D. Proposed Intervenors' Intervention Is Timely.

22. Fed. R. App. Pro. 15(d) provides in relevant part that a motion for intervention is timely if filed within 30 days after the petition for review is filed. This Motion for Leave to Intervene is being filed within this time period and is therefore timely.

23. Allowing the Proposed Intervenors to intervene to protect their own rights will also not unduly delay or prejudice the rights of any other party.

24. On September 29, 2009, counsel for the State of New York informed counsel for Respondents and Petitioners in this case of Proposed Intervenors' intent to file this motion. Respondents do not oppose this motion and counsel for Petitioners stated that they take no position on this motion.

25. Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), the undersigned counsel represents that all of the parties listed in the signature blocks have given their consent to the filing of this motion.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Proposed Intervenors respectfully request that this Court grant their motion to intervene as party-respondents.

Dated: October 8, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Unopposed Motion for Leave to Intervene as Respondents was filed on October 8, 2009 using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

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