

ORAL ARGUMENT NOT SET

No. 09-1237

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

**CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA ET AL. ,**

Petitioners,

v.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY ET AL. ,**

Respondents,

**STATE OF CALIFORNIA BY AND THROUGH
GOVERNOR ARNOLD SCHWARZENEGGER,
THE CALIFORNIA AIR RESOURCES BOARD,
AND ATTORNEY GENERAL EDMUND G.
BROWN JR.,**

Proposed Intervenor.

Petition for Review of Decision of the U.S. Environmental Protection Agency

MOTION TO INTERVENE

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Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the State of California, by and through Governor Arnold Schwarzenegger, the California Air Resources Board (CARB), and Attorney General Edmund G. Brown Jr., hereby moves to intervene as a respondent in this case. California has conferred with the parties to this action; petitioners Chamber of Commerce of the United States of America and National Automobile Dealers Association are not taking a position on this motion and respondents U.S. Environmental Protection Agency (EPA) and Lisa P. Jackson do not oppose this motion.

INTRODUCTION

On September 8, 2009, Petitioners filed this action seeking review of EPA's decision to grant California's request for a waiver of federal preemption, pursuant to Clean Air Act § 209(b), 42 U.S.C. § 7543(b), for its new motor vehicle greenhouse gas emission standards. *See California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32,744 (July 8, 2009).

California seeks to intervene in this action as a matter of right because Petitioners seek to invalidate EPA's waiver decision, which was requested by California and without which these California emission standards would be unenforceable. Thus, Petitioners' challenge directly threatens California's ability

to enforce its greenhouse gas emission standards. California's interests may not be adequately represented by EPA because, among other things, the federal government and California are different sovereigns with different interests at stake. With respect to the challenged waiver decision, EPA acts as an approving agency under the Clean Air Act; EPA's own regulations will not be affected by this action. By contrast, the Clean Air Act's waiver provision can limit California's police power authority to develop and set more stringent emission standards it determines are appropriate to protect its citizens' public health and welfare. Only California can adequately protect this interest. Permissive intervention is also appropriate because California's interests and this suit involve questions of law and fact in common. Indeed, the standards governing permissive intervention specifically contemplate intervention by a state agency in actions where, as here, its own regulations are at issue. Finally, California's intervention will not unduly delay this action, or prejudice any party to this action.

As with every other challenge to a waiver under Clean Air Act § 209(b), California should be granted intervention status in this action.

BACKGROUND

Section 209(a) of the Clean Air Act prohibits States from adopting or enforcing any standard relating to the control of emissions from new motor vehicles. 42 U.S.C. § 7543(a). Section 209(b) of the Act, however, waives this

prohibition for California to enact its own motor vehicle emissions regulations, which allows California to enforce its adopted standards upon EPA approval. 42 U.S.C. § 7543(b). In providing California with the continued ability to adopt its own regulations, Congress recognized the special environmental circumstances confronting the State as well as the leadership California has shown as a laboratory for developing clean air technologies. *See Motor & Equip. Mfrs. v. EPA* (“*MEMA I*”), 627 F.2d 1095, 1109 (D.C. Cir. 1979).

Section 209(b) requires EPA’s Administrator, after an opportunity for public hearing, to waive federal preemption if California has determined that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards. *Id.* § 7543(b)(1). The Administrator is authorized to deny a preemption waiver only if she finds that (1) California’s protectiveness determination is arbitrary and capricious, (2) California does not need separate standards to meet compelling and extraordinary conditions, or (3) California’s standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act (which requires, in part, that EPA regulations take effect “after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period”). *Id.*; *see also id.* § 7521(a)(2); *MEMA I*, 627 F.2d at 1118.

Section 177 of the Clean Air Act, enacted in 1977, allows other States to adopt California motor vehicle emission standards so long as those States' regulations are identical to California and certain other conditions are met. *See* 42 U.S.C. § 7507.

Since the adoption of § 209(b) in 1967, EPA has granted well over forty waivers for CARB regulations. This Court has observed that California has “unique status” under the Clean Air Act by its adoption of “an emissions control program that parallels the federal program in many respects.” *MEMA I*, 627 F.2d at 1103. Indeed, CARB is “California’s version of the federal EPA in the area of emissions control regulations.” *Id.*

California’s greenhouse gas emission standards were adopted in 2005. 74 Fed. Reg. at 32,747. They require manufacturers to meet fleet-wide greenhouse gas emission limits which begin in model year 2009 and gradually become more stringent through model year 2016. *Id.* at 32,746-47. CARB estimated that these regulations will decrease greenhouse gas emissions from the entire California car and truck fleet by 27% by 2030. *Id.* at 32,750 n.38. California adopted these regulations to address and mitigate the serious effects of global warming, including those related to smog. *E.g., id.* at 32,750; *see also* 2002 Cal. Stat. ch. 200 (A.B. 1493), §1 (California legislative findings regarding global warming in delegating rulemaking authority to CARB). A total of 13 States, plus the District of

Columbia, have adopted California's greenhouse gas emission standards under Clean Air Act § 177. 74 Fed. Reg. at 32,754 & n.59.

On December 21, 2005, California requested that EPA grant a waiver of federal preemption under Clean Air Act § 209(b) for these regulations. 74 Fed. Reg. at 32,747. Initially, EPA declined to act on the waiver, pending the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). 74 Fed. Reg. at 32,747. Subsequently, EPA denied the waiver, claiming that California's regulations were not needed to meet compelling and extraordinary conditions. *Id.*; *see also* California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008). California, and others, petitioned this Court for review of that decision. 74 Fed. Reg. at 32,747 n.6; *see also* *California v. EPA*, Nos. 08-1178, 08-1179, 08-1180 (D.C. Cir. filed May 5, 2008 and dismissed Sept. 3, 2009). On February 6, 2009, EPA announced that it was reconsidering its denial of the waiver. 74 Fed. Reg. at 32,747. On June 30, 2009, EPA granted the waiver that is the subject of Petitioners' challenge. 74 Fed. Reg. 32,744.

ARGUMENT

Federal Rule of Appellate Procedure 15(d) and Federal Rule of Civil

Procedure 24 (regarding intervention in the district courts) guide the Court's analysis in determining the appropriateness of a party's intervention before this Court. *See Int'l Union, United Auto., Aerospace, & Agric. Implement Workers Local 283 v. Scofield*, 382 U.S. 205, 216-17 n.10 (1965); *Building & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). This Court has recognized that Rule 24 was meant to liberalize the requirements for intervention, and that practical considerations guide the Court's analysis. *Nuesse v. Camp*, 385 F.2d 694, 700-01 (D.C. Cir. 1967); *see also Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 105 F.R.D. 106, 109-10 (D.D.C. 1985) (gathering and discussing D.C. Circuit's cases on intervention).

I. CALIFORNIA IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

California has a right to intervene in this action, both because its regulations are at issue and because it was the successful party in the EPA waiver proceeding. Moreover, California satisfies the criteria embodied in Federal Rule of Civil Procedure 24(a). This Court has previously granted California intervenor status in all four reported challenges to waivers granted under Clean Air Act § 209(b). *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 451 (D.C. Cir. 1998); *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1294 (D.C. Cir. 1979); *MEMA I*, 627 F.2d at 1100; *Am. Motors Corp. v. Blum*, 603 F.2d 978, 979 (D.C. Cir. 1979). The result should be the same here.

A. California May Intervene to Protect the Validity of California Law.

This Circuit has observed that “if a state may fashion such a statutory policy, it may appear in court to defend it.” *Nuesse*, 385 F.2d at n.4 (discussing *People of the State of California v. United States*, 180 F.2d 596 (9th Cir. 1950), where California was allowed to intervene to protect its water rights policies). Here, California has adopted regulations pursuant to state law and Clean Air Act § 209(b). It seeks to intervene to protect the validity of those regulations, and should be granted that status.

B. California May Intervene in a Challenge to the Granting of California’s Waiver Request.

The Supreme Court has also ruled that a successful party in an administrative proceeding has a right to intervene in a challenge to that proceeding’s decision. *Scofield*, 382 U.S. 205. This encourages judicial efficiency by avoiding unnecessary duplication of proceedings, as well as ensuring fairness to all parties. *Id.* While the Court’s discussion was “limited to Labor Board review proceedings,” *id.* at 210, the Court’s reasons for ruling so apply equally here. It is fair and efficient to allow California to be a party in this action. California successfully obtained this waiver from EPA, and thus can intervene in this action.

C. California Also Meets the Criteria in Federal Rule of Civil Procedure 24(a).

Looking to Federal Rule of Civil Procedure 24(a), as adopted by the courts in

applying Federal Rule of Appellate Procedure 15(d), this Circuit has described the requirements for intervention:

[Q]ualification for intervention as of right depends on the following four factors: [¶] “(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.’”

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir.1998) (quoting Fed. R. Civ. P. 24(a)(2))). These factors are satisfied here.

California’s motion for intervention is timely in that it has been filed and served well within thirty days of the petition being filed, as mandated by the Rules. *See* Fed. R. App. P. 15(d).

To show a sufficient interest under Rule 24(a), this Circuit has held that an intervenor must show it has constitutional standing, under Article III, and no more. *Mova Pharm.*, 140 F.3d at 1074, 1076; *S. Christian Leadership Conf. v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984). Constitutional standing requires a showing of concrete injury, causation, and redressability. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This Court has already ruled that States have standing with regard to federal actions affecting state air pollution programs.

See *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). Here, California would be injured by a resolution of this action in Petitioners' favor because California requested the waiver that EPA granted and because the validity of California law could be affected by this action. The regulations subject to the waiver were duly adopted by CARB, and California has a sovereign interest in their validity and enforcement. Moreover, these greenhouse gas emission standards were adopted to protect public health and welfare, and the disposition of this action may impair or impede California's ability to advance that public interest for its citizens. There is a causal connection between the potential injury and the action because, if successful, the action would invalidate EPA's decision granting the waiver, and thereby make California's regulations unenforceable. And, a decision favorable to California in this action (upholding EPA's decision) would redress the potential injury because California's regulations would remain intact, thereby promoting public health and welfare, and preserving state regulatory ability. California has a significant interest in this action.

In *Massachusetts v. EPA*, the Supreme Court decided that States have standing with regard to federal regulatory decisions related to global warming. See 549 U.S. 497, 516-26 (2007); see also *Connecticut v. Am. Elec. Power Co.*, Nos. 05-5104-cv, 05-5519-cv, ___ F.3d ___, ___, 2009 WL 2996729, at *16-*32 (2nd Cir. Sept. 21, 2009) (holding that California and other States sufficiently pled

standing to sue power companies for federal common law nuisance for global warming). The Supreme Court recognized that “[t]he harms associated with climate change are serious and well recognized.” *Massachusetts v. EPA*, 549 U.S. at 521. These harms include:

[A] precipitate rise in sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences, and an increase in the spread of disease.

Id. While the Court in *Massachusetts v. EPA* focused on the coastal damage in Massachusetts (the lead petitioner), *id.* at 522-23, EPA has acknowledged those – and many other – effects in California:

California has identified a wide variety of impacts and potential impacts within California, which include exacerbation of tropospheric ozone, heat waves, sea level rise and salt water intrusion, an intensification of wildfires, disruption of water resources by, among other things, decreased snowpack levels, harm to high value agricultural production, harm to livestock production, and additional stresses to sensitive and endangered species and ecosystems.

74 Fed. Reg. at 32,764-65; *see also Connecticut v. Am. Elec. Power Co.*, at *25 (discussing reduced size of California snowpack due to global warming). In *Massachusetts v. EPA*, the Supreme Court found causation and redressability because “reducing domestic automobile emissions is hardly a tentative step” even if it is a “small incremental step” and because “[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens

elsewhere.” 549 U.S. at 524-26. Thus, California has standing here.

With California’s interest identified, it is clear that disposition of this action may impair or impede California’s ability to protect its interest in CARB’s greenhouse gas emission standards. Thus, the third criterion in Rule 24(a) for intervention as a matter of right is met.

The final criterion under Rule 24(a) is whether California’s interests are adequately protected by existing parties. This Circuit has held that a party “seeking intervention ordinarily is required to make only a minimal showing that representation of his interest *may* be inadequate.” *Envtl. Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir.1979) (emphasis added); *see also Fund for Animals*, 322 F.3d at 735. In this case, while EPA and California will both defend EPA’s action, they cannot be said to share the same objectives or interests. California adopted its regulations after extensive investigation and substantial debate, and seeks to enforce them. In contrast, EPA acted only as an agency approving an administrative request, and its discretion to deny the request was limited. *See MEMA I*, 627 F.2d at 1122. Moreover, EPA is inherently unlikely to have as strong an interest as California does in upholding a decision that limits preemption of state authority. In fact, courts have previously recognized that the interests of one governmental entity may not be the same as those of another governmental entity. *See Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d

1489, 1499 (9th Cir. 1995) (finding that the interests of the State of Arizona and Apache County were not necessarily represented by the U.S. Forest Service). In summary, California's interests in this litigation are significant, its motor vehicle emissions program may be impaired by the outcome of the litigation, and EPA may not adequately represent California interests. California should be permitted to intervene as a matter of right.

II. EVEN WITHOUT A RIGHT TO INTERVENE, CALIFORNIA SHOULD BE PERMITTED TO DO SO.

In addition to being entitled to intervention as a matter of right, California also qualifies for permissive intervention.

Federal Rule of Civil Procedure 24(b) states, in part:

Upon timely application anyone may be permitted to intervene in an action . . . when [the] applicant's claim or defense and the main action have a *question of law or fact in common* When a party to an action relies for ground of claim or defense upon any statute . . . administered by a . . . federal or state . . . agency[,] or upon any regulation . . . issued or made pursuant to the statute[,] . . . the agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(Emphasis added.) Under this rule, California should be granted intervention.

First, the application is timely, and will not prejudice any party. California is moving to intervene well before the procedural motions deadline in this case and the thirty-day deadline in Federal Rule of Appellate Procedure 15(d). As evidence

of the lack of prejudice, no party is opposing California's motion to intervene.

Second, this action concerns the validity of CARB's greenhouse gas emission standards, which California seeks to defend. Because California's regulations are the subject of the challenged EPA waiver decision, the commonality of law or fact between the California regulations and the subject matter of the main action is clear. Moreover, Rule 24(b) specifically contemplates intervention by state agencies whose regulations become the subject of suit. In *Securities & Exchange Commission v. U.S. Realty Co.*, the Supreme Court recognized the advisability of a government agency's permissive intervention where its own regulatory scheme was at issue. 310 U.S. 434, 459-60 (1940).

CONCLUSION

For the reasons stated, California should be entitled to intervene as of right. California has also demonstrated that it qualifies for permissive intervention. California respectfully requests that this Court grant its motion to intervene as a

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respondent in this proceeding.

Dated: September 29, 2009

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case **Chamber of Commerce** Nos. **09-1237**
Name: **v. EPA**

I hereby certify that on September 29, 2009, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

MOTION TO INTERVENE

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On September 29, 2009, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Normand L. Rave, Jr.
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 29, 2009, at Oakland, California.

Marc N. Melnick
Declarant

/S/
Signature