ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK, STATE OF NEW JERSEY and THE CITY OF NEW YORK, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency, *Respondents*.	Case No. 19-1231

MOTION FOR LEAVE TO INTERVENE ON BEHALF OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the Air Stewardship Coalition (the "Coalition"), the Chamber of Commerce of the United States of America (the "Chamber"), and the National Association of Manufacturers ("NAM") (collectively, the "Movants") respectfully move for leave to intervene in support of Respondents U.S. Environmental Protection Agency and Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency (collectively, "EPA" or the "Agency"), in opposition to this

petition for review ("Petition"). Counsel for Petitioners and for Respondents have indicated they take no position on this motion.

The Movants'[1] members own, operate, or represent industrial facilities and electric generating units expressly named as targets for federal regulation in the underlying agency proceeding. In that proceeding, New York State petitioned EPA under Section 126 of the Clean Air Act ("CAA" or the "Act") to impose emission control strategies on 357 out-of-state, upwind sources, including the Movants' facilities. *See* Petition of the State of New York Pursuant to Section 126 of the Clean Air Act, EPA-HQ-OAR-2018-0170-0004 (Mar. 12, 2018) (the "NY 126 Petition"). The Movants submitted two sets of comments urging EPA to deny the NY 126 Petition.[2] After public comment, EPA concluded that no additional

[1] The Coalition's members are: the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Portland Cement Association, Kinder Morgan, Inc., Holcim US, Inc., Lima Refining Company, Marathon Petroleum Company LP, National Rural Electric Cooperative Association, Saudi Basic Industries Corporation (SABIC), and TC Energy Corporation. The Coalition is an unincorporated non-profit association under District of Columbia law. D.C. Code §§ 29-1102(5), 29-1105(a), (b). It is formed "for one or more common, nonprofit purposes"—in this case, to address interstate transport issues under the CAA—and is a distinct legal entity with capacity to sue in its own name. *See Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. Dist. of Columbia*, 846 F.3d 391, 400 (D.C. Cir. 2017).

[2] Air Stewardship Coalition Initial Comments in Response to New York Department of Environmental Conservation Section 126 Petition, EPA-HQ-OAR-2018-0170-0008 (Sept. 24, 2018); Air Stewardship Coalition Comments in Support of U.S. Environmental Protection Agency Proposal to Deny Clean Air Act Section

controls were required on the named sources under Section 126 and issued a final response denying the NY 126 Petition, *Response to Clean Air Act Section 126(b) Petition from New York*, 84 Fed. Reg. 56,058 (Oct. 18, 2019) (the "Response"), which Petitioners now challenge.

The Movants meet the standards for intervention in support of EPA in this litigation because: (1) the request is timely; (2) the Movants have material interests related to the Petition, as their members include and represent industrial facilities expressly targeted by the NY 126 Petition and thus are affected directly by EPA's Response; (3) disposition of the Petition may impair those interests, as any relief Petitioners might obtain might be borne directly by the Movants' members; and (4) neither Petitioners nor EPA can adequately represent the Movants, whose members have direct commercial interests in EPA's Response. For similar reasons, the Movants have standing, as they have a concrete interest in the outcome of the Petition. Accordingly, the Movants' motion should be granted.

BACKGROUND

Movants. The Coalition is a group of individual companies and trade associations whose members own or operate facilities named as sources in the NY 126 Petition. Likewise, as the world's largest business federation, the Chamber's

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126 Petition from New York Department of Environmental Conservation, EPA-HQ-OAR-2018-0170-0087 (July 15, 2019).

members include companies who own or operate facilities named in the NY 126 Petition. As the largest manufacturing association in the United States, NAM's members also include companies who own or operate facilities named in the NY 126 Petition.

These facilities are from highly regulated industry sectors, including cement, chemicals, electric generation, midstream oil and gas, and petroleum refining that already control emissions as required by federal and state law, and that have made significant investments to implement new control technologies or switch to lower emitting fuel sources. The Movants' members would incur significant additional costs were EPA to require additional emissions controls and other measures sought in the NY 126 Petition.

Statutory Background. The Clean Air Act directs EPA to set National Ambient Air Quality Standards ("NAAQS") for six criteria pollutants, including ozone. States must attain or maintain compliance with the NAAQS, as the standards are amended, by requiring emission reductions within their borders. Congress recognized, however, that air pollutants also can be carried by the wind from an upwind state to a downwind state and that those emissions may impact the ability of the downwind state to attain a NAAQS.

Accordingly, Congress created a system for addressing interstate transport of pollutants under the "Good Neighbor Provision," found in CAA Section 110. 42

U.S.C. § 7410(a)(2)(D)(i)(I). The Good Neighbor Provision gives upwind states the primary responsibility to address through their State Implementation Plans ("SIP") only those emissions that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in a downwind state. A SIP will include emission limitation requirements to address air quality, such as setting a presumptive cost-efficiency level of "reasonably available control technology" ("RACT") suited to that particular state.

If needed, EPA can impose emission control requirements to require upwind states to be a good neighbor and address pollutant transport to downwind states. EPA employs a four-step transport framework to identify and assess whether additional controls are required. But in so doing, the Supreme Court explained that the CAA's Good Neighbor Provision does not authorize EPA to "over-control" emissions. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1608-09 (2014).

CAA Section 126 incorporates the Good Neighbor Provision to address interstate transport. It allows a downwind state to petition EPA to impose emission control requirements on a major source or group of stationary sources, if the state proves the named major source or group of sources "emits or would emit" in violation of the Good Neighbor Provision. 42 U.S.C. § 7426(b). If EPA determines the petition satisfies the four-step transport framework, then EPA may (1) impose

controls and compliance schedules directly on the named major source or group of sources within upwind states to address the upwind states' good neighbor obligations within three years, or (2) require the named source or group to shut down within three months. *See* 42 U.S.C. § 7426(c). In doing so, EPA cannot "over-control" emissions.

New York's Section 126 Petition. The NY 126 Petition asserted that monitors in the New York Metropolitan Area and Chautauqua County, New York are experiencing attainment issues with respect to the 2008 and 2015 ozone NAAQS due to NOx emissions from 357 selected sources in Illinois, Indiana, Kentucky, Maryland, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia. These named sources include facilities owned, operated, or represented by the Movants' members. The NY 126 Petition asked EPA to impose New York's RACT requirements on these sources, or, for sources that already meet this "New York" RACT, to require additional emission control strategies selected by New York. New York provided no explanation of how the requested controls would address its alleged air quality issues.

EPA's Response. EPA evaluated the NY 126 Petition under the four-step transport framework. It proposed to deny New York's petition, 84 Fed. Reg. 22,787 (May 20, 2019), and then after receiving comment, determined NY failed to meet its burden, as required by Section 126. Response, 84 Fed. Reg. at 56,069.

EPA also assessed whether the Agency's own information and analysis justified imposing emissions controls on the named sources under Section 126. *See id.* at 56,079-81, 56,086 (discussing EPA's independent analysis under Steps One and Three of the transport framework). It again found no justification to impose these controls. *Id.* Petitioners now challenge EPA's Response.

ARGUMENT

I. The Movants Satisfy the Standard for Intervention.

As the NY Petition expressly names its members' facilities as targets for federal regulation, the Movants easily satisfy the standard for intervention. The standard for intervention under Federal Rule of Civil Procedure 24 informs the "grounds for intervention" under Federal Rule of Appellate Procedure 15(d). *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir 1985) (per curiam); *see Int'l Union, United Auto Workers of Am., Local 283 v. Scofield*, 382 U.S. 205, 216 n.10 (1965). Hence, to intervene as of right, an applicant must: (1) file a timely application; (2) claim an interest relating the subject of the action; (3) show that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect the interest; and (4) demonstrate that existing parties may not adequately represent the applicant's interest. *See, e.g.*, *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). The Movants satisfy each element.

A. The Motion to Intervene is Timely.

This motion is timely because it was filed within 30 days after the filing of the Petition on October 29, 2019. *See* Fed. R. App. P. 15(d). The Movants are seeking to join this case at the earliest possible stage, before Petitioners' initial filings are due and before the Court has established a schedule and format for briefing.

B. The Movants Have Interests Relating to the Subject of This Proceeding That May As a Practical Matter Be Impaired By the Outcome of This Petition.

The Movants have direct and substantial interests in the outcome of this case that may be impaired or impeded if Petitioners prevail. *See Karsner v. Lothian*, 532 F.3d 876, 885-88 (D.C. Cir. 2008). The NY 126 Petition requests that EPA impose controls on specifically named sources, many of which are facilities owned, operated, or represented by entities within the Coalition, the Chamber, or NAM.[3] EPA's final response to the NY 126 Petition directly informed whether these entities would be required to install additional emissions controls at their facilities. Petitioners now challenge EPA's determination that no additional controls are

[3] *See e.g.,* NY 126 Petition at Appendix B (listing stationary sources for which controls are requested). Appendix B expressly names facilities owned or operated by the Movants' members and their affiliates, such as: Marathon Petroleum Co LLC, SABIC Innovative Plastics Mt. Vernon LLC, Lima Refining Company, Holcim (US) Inc., ANR Pipeline Company (TC Energy parent), and Natural Gas Pipeline Company of America (Kinder Morgan parent).

required on the named sources. The Court's decision in this case would thus likewise directly inform whether the Movants' members or the many sources they represent would be required to make new investments to address any new requirements, above and beyond the significant resources they already invest to control emissions.

In addition, the Movants include associations who represent companies and not-for-profit electric cooperatives that are directly affected by the Response and thus fall within the class of parties this Court routinely allows to intervene in cases reviewing final agency action. *See, e.g.*, *Fund for Animals*, 322 F.3d at 735; *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (association whose members produced military munitions and operated military firing ranges permitted to intervene in a challenge to EPA's Munitions Rule); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41–44 (1st Cir. 1992) (commercial fishing groups subject to a regulatory plan to address overfishing had a cognizable interest in litigation over the plan's implementation); *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (industry representatives and pesticide manufacturers subject to challenged regulation had a legally protected interest supporting intervention).

Further, the outcome of this litigation could impair the Movants' ability to protect their interests. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014)

(impairment where the litigation "could establish unfavorable precedent that would make it more difficult for [the intervenor] to succeed" in any future suit to enforce its rights); *NRDC v. Costle*, 561 F.2d 904, 909-11 (D.C. Cir. 1977) (industry members' interests practically impaired if not permitted to intervene in proceedings which would determine which rulemakings EPA would initiate over which pollutants). If this Court were to reach a different conclusion from EPA's Response, the Agency would likely undertake additional rulemaking activity to impose controls or compliance schedules directly regulating the named sources owned, operated, or represented by the Movants' members.

C. Existing Parties Cannot Adequately Represent the Movants' Interests.

The Movants' interests will not be adequately represented by the existing parties. The burden of showing that the existing parties will not adequately support a movant's interest is "minimal," and a movant need only show that representation of its interests "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

Petitioners cannot adequately represent the Movants' interests because their interests are directly opposed to the Movants'. EPA likewise cannot adequately represent the Movants' interests because EPA is a government agency necessarily focused on a broad "representation of the general public interest." 792 F.2d at 192–

93. The Movants represent entities who have direct and substantial financial interests in this proceeding. This Court has long recognized the "inadequacy of governmental representation" when the government has no financial stake in the suit, but a private party does. *See e.g.*, *id.* at 192; *Fund for Animals*, 322 F.3d at 736; *Costle*, 561 F.2d at 912 & n.41.

II. The Movants Have Standing to Intervene.

The Movants have standing to intervene in support of EPA in this proceeding because, as discussed, they represent entities specifically identified for regulation in the underlying rulemaking.[4] An association has standing to intervene on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Under pre-2019 precedent in this Circuit,"[t]he standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and

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[4] Although this Court has previously required intervenor-respondents to demonstrate standing, *see NRDC v. EPA*, 896 F.3d 459, 462–63 (D.C. Cir. 2018), the Supreme Court recently clarified that an intervenor who is not invoking the Court's jurisdiction need not demonstrate standing, *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019). Regardless, the Movants have standing.

redressability." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015).

The Movants satisfy each of these elements. First, "at least some of the members" of the Coalition, the Chamber, and NAM "would have standing to [intervene] in their own right." *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996). As noted, the NY 126 Petition expressly names facilities owned, operated, or represented by the Movants' members.[5] These entities would have standing for the same reasons they fulfill the grounds for intervention. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) ("any person who satisfies Rule 24(a) will also meet Article III's standing requirement").

Because these entities' facilities are expressly named as targets for federal regulation in the NY 126 Petition, and the challenged agency action is EPA's response to that petition, there is "little question" that these entities have standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992) (a party who "is himself an object of [the governmental] action (or forgone action) at issue" has standing); *cf. Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012) (parties "easily" establish standing when agency action imposes "regulatory restrictions, costs, or

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[5] *See* note 3, *supra.*

other burdens" on them). The Movants' standing is thus "self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002); *see also Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013) (trade association had an "obvious interest in challenging [Federal Motor Carrier Safety Administration] rulemaking that directly—and negatively—impact[ed] its motor carrier members").

Second, the interests that the Movants seek to protect are germane to their organizational purposes. The Coalition's purpose is to promote the well-being of its members with respect to addressing issues related to interstate transport under the CAA. The Chamber's and NAM's purposes include representing the interests of their members in matters before Congress, the Executive Branch, and the courts. As explained above, the NY 126 Petition requests that EPA directly regulate emissions from sources owned, operated, or represented by the Movants' members.

Finally, the participation of individual member companies, member associations, or the associations' members is unnecessary. Petitioners request the Court to overturn a final agency action applicable to an array of sources, states, and industry sectors. This final agency action does not depend on the circumstances of any specific entity.

For these reasons, the Movants satisfy the elements to demonstrate Article III standing.

III. Alternatively, the Movants Should be Granted Permissive Intervention.

Although the Movants clearly satisfy the standard for intervention as of right, they also qualify for permissive intervention. This Circuit authorizes permissive intervention when, on a timely motion, the movant shows that its claim or defense has a question of law or a question of fact in common with the main action. *E.g.*, *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (supporting flexible reading of Rule 24(b)). Permissive intervention requires neither a showing of the inadequacy of representation nor a direct interest in the subject matter of the action.[6]

This motion is timely, and if permitted to intervene, the Movants will address the issues of law and fact that Petitioners present on the merits. Because the Movants and Petitioners maintain opposing positions on these common questions, and because permissive intervention would contribute to the just and equitable adjudication of the questions presented, it should be permitted.

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[6] This Circuit has not decided if standing is needed for permissive intervention. *E.g., In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972 (D.C. Cir. 2013). Under the recent *Virginia House of Delegates* decision from the Supreme Court, standing is not required here. Regardless, the Movants have standing. *See* Part II, *supra.*

CONCLUSION

For the foregoing reasons, the Movants respectfully request that this Court grant their motion to intervene in support of Respondents.

Dated: November 25, 2019

Respectfully submitted,

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the Air Stewardship Coalition, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers respectfully submit this Corporate Disclosure Statement and state as follows:

1. The Air Stewardship Coalition is an unincorporated nonprofit association of businesses and organizations formed to address issues related to interstate transport under the Clean Air Act. Because it is a continuing association of numerous businesses and organizations operated for the purpose of promoting

the general commercial interests of its membership, no listing of its members that have issued shares or debt securities to the public is required under Circuit Rule 26.1(b).

2. The Chamber of Commerce of the United States of America (the "Chamber") states that it has no parent companies, and no publicly-held company has a 10% or greater ownership interest in the Chamber.

3. The National Association of Manufacturers ("NAM") states that it has no parent companies, and no publicly-held company has a 10% or greater interest in NAM.

Dated: November 25, 2019

Respectfully submitted,

/s/ Samina M. Bharmal
Samina M. Bharmal

Counsel for the Air Stewardship Coalition, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers

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CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the Air Stewardship Coalition, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers ("Movants") hereby state as follows:

Petitioners in this matter are the State of New York, State of New Jersey, and the City of New York. Respondents are the U.S. Environmental Protection Agency ("EPA") and EPA Administrator Andrew Wheeler. The Movants are not aware of any *amici* in this matter.

Dated: November 25, 2019

Respectfully submitted,

/s/ Samina M. Bharmal
Samina M. Bharmal

Counsel for the Air Stewardship Coalition, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2) and 32(g), and D.C. Circuit Rules 27(a)(2) and 32(a), the undersigned certifies that the accompanying Motion for Leave to Intervene has been prepared using 14-point, Times New Roman typeface and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the document is proportionally spaced and contains 3,061 words exclusive of the accompanying documents excepted from the word count by Rule 27(a)(2)(B), (d)(2).

/s/ Samina M. Bharmal
Samina M. Bharmal

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to Intervene will be served, this 25th day of November 2019, through the Court's CM/ECF system on all registered counsel.

/s/ Samina M. Bharmal
Samina M. Bharmal