ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; CITY OF NEW YORK, *Petitioners*	)	
v.	)	No. 21-1028 (consolidated with No. 21-1060)
ENVIRONMENTAL PROTECTION AGENCY; JANE NISHIDA, IN HER OFFIICAL CAPACITY AS ACTING ADMINISTRATOR OF THE UNITED STATES ENVIORNMENTAL PROTECTION AGENCY, *Respondents*	)	

MOTION OF THE STATES OF TEXAS, ARKANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, AND MONTANA FOR LEAVE TO INTERVENE AS RESPONDENTS

In accordance with Federal Rules of Appellate Procedure 15(d) and 27 and D.C. Circuit Rules 15(b) and 27, the States of Texas, Arkansas, Louisiana, Mississippi, Missouri, and Montana respectfully move to intervene in support of respondents, Jane Nishida and the Environmental Protection Agency, as the final rule at issue directly implicates the proposed intervenor States' obligations under the Clean Air Act. In accordance with D.C. Circuit Rule 15(b), this motion is a request to intervene in all petitions for review regarding the EPA's review of the Ozone National Ambient Air Quality Standards.

Counsel for Texas contacted counsel for all parties regarding this motion. Neither petitioners nor respondents take a position regarding this motion.

BACKGROUND

The Clean Air Act obligates the EPA to set National Ambient Air Quality Standards for criteria pollutants, including ozone. As part of this responsibility, the EPA periodically reviews the relevant scientific information to determine whether existing standards appropriately protect the public health and welfare. 42 U.S.C. § 7409(d)(1). The EPA conducts these reviews at least once every five years.

In its 2015 review, the Obama Administration's EPA established new primary and secondary baselines for ozone pollution at 70 parts per billion. Texas, along with nine other states, filed suit challenging that standard. Among other reasons, Texas emphasized the practical difficulty with meeting the 70 ppb standards. *See* State Petitioners' Opening Brief, *Murray Energy Corp. v. U.S. E.P.A.*, 2016 WL 5390607, at *9 (D.C. Cir. 2019). In 2020, the Trump Administration's EPA reassessed ozone standards again, and, after a careful review of the most recent available scientific and

technical information, consultation with the agency's independent advisors, and consideration of over 50,000 comments, determined that the 2015 standards appropriately protected public health and welfare. It therefore retained those standards without revision. *See* Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87,256 (Dec. 31, 2020).

On January 19, 2021, New York, along with sixteen other states and one municipality, sought review of that 2020 determination. According to their available public statements, these States seek to further reduce the permissible ozone standards and to vacate the 2020 rule. *E.g.* Press Release, Cal. Dep't of Justice, *Attorney General Becerra Challenges Trump Administration Failure to Strengthen Standards Regulating Ozone Pollution* (Jan. 19, 2021). This Court promptly issued an order setting certain case-management deadlines, Order, Doc. No. 1881731, and respondents asked this Court to place this case in abeyance for 90 days. Unopposed Mot. to Hold in Abeyance, Doc. No. 1885865. Petitioners did not oppose the motion. *Id.*

As justification for the abeyance, respondents cited an executive order by President Biden that directed review of certain agency actions related to the environment taken during the Trump administration. Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021). That order identified a non-exclusive list of agency actions for agency heads to review, including the EPA's ozone determination. Respondents' implication, of course, is that the federal government is likely to change its position regarding the 2020 rule.

ARGUMENT

I. The Intervenor States Have a Direct and Substantial Interest in This Action Warranting Intervention Under Appellate Rule 15(d).

Federal Rule of Appellate Procedure 15(d) requires a proposed intervenor move the court within 30 days and to state the party's interest and grounds for intervention. Fed. R. App. P. 15(d); *see also Synovus Fin. Corp. v. Bd. of Gov's. of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991). A proposed intervenor satisfies the latter requirement by showing it has a direct and substantial interest in the outcome of the case. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 744 (D.C. Cir. 1986).

The intervenor States meet both of Rule 15(d)'s requirements. First, this petition in No. 20-1028 was filed on Jan. 19, 2021, and the petition in 21-1060, now consolidated with this case, was filed only a week ago. The intervenor States have filed within 30 days of both events. Second, the intervenor States have a direct and substantial interest in the outcome of this action. The Clean Air Act assigns the intervenor States "primary responsibility" for ensuring that national primary and secondary ambient air quality standards will be achieved and maintained. 42 U.S.C. § 7404(a); *Whitman v. Am. Trucking Assn's.*, 531 U.S. 457, 470 (2001). Accordingly, once the EPA establishes an ozone standard, the intervenor States are obligated to submit to the EPA state implementation plans that regulate and control ozone in designated areas.

Had the EPA chosen to lower the ozone standard, that revision would have compelled the intervenor States to redesign their state implementation plans, expending resources and risking federal takeover of the intervenor States' sovereign interests

should the EPA disapprove of the States' plans in whole or part. *See* 42 U.S.C. § 7410(c). The more stringent standards that petitioning States seek will force the intervenor States to impose unnecessary and wasteful burdens on economic activity, which will in turn undermine the intervenor States' growth and ability to meet mounting demand for energy, infrastructure, and related services. Petitioners seek to vacate the EPA's decision and ultimately impose policies in conflict with the intervenor States' interests. The intervenor States therefore possess the direct and substantial stake in the outcome of this petition for review that supports intervention under Rule 15(d).

II. The Liberal Intervention Policies Underlying Fed. R. Civ. P. 24 Further Support Granting the Intervenor States' Motion to Intervene.

Although the Federal Rules do not apply directly in appellate proceedings, multiple courts have recognized that the rules controlling district court intervention may serve as useful guidance regarding whether to permit intervention in other contexts. *E.g.*, *Int'l Union v. Scofield*, 382 U.S. 205, 217, 86 S. Ct. 373, 381 n.10 (1965); *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004); *State of Tex. v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985). The intervenor States meet these forgiving standards both as to intervention as of right and permissive intervention.

A. The Intervenor States would be entitled to intervene as of right.

The intervenor States would satisfy Rule 24(a)'s requirements to intervene as of right. Those include demonstrations that the States' motion is timely, that the States have legally protected interests at stake in this action, that the action threatens those interests, and that the States' interests are not adequately represented by the existing

parties. *United States v. Facebook, Inc.*, 456 F. Supp. 3d 105, 108 (D.D.C. 2020). "[T]he inquiry" into these factors "is a flexible one, which focuses on the particular facts and circumstances surrounding each application." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996); *see also Garcia v. Vilsack*, 304 F.R.D. 77, 83 (D.D.C. 2014), *aff'd*, 14-5175, 2014 WL 6725751 (D.C. Cir. Nov. 18, 2014) (noting that the D.C. Circuit endorsed a "flexible approach" to intervention . The intervenor States meet these requirements.

First, the motion is timely. Under Rule 15(d), a motion to intervene "must be filed within 30 days after the petition for review is filed." Here, petitioner States submitted their challenge to the EPA's review on January 19, 2021; plaintiff organizations did so on February 11. The intervenor States, meanwhile, submitted their motion on February 18, 2021, satisfying that deadline. Nor will the intervenor States' motion prejudice any of the existing parties, as both respondents indicate by seeking a 90-day abeyance, and petitioners indicate by not opposing that motion. Unopposed Mot. to Hold in Abeyance, Doc. No. 1885865. The intervenor States' motion to intervene comes a single day following that request: it is therefore inconceivable that the intervenor States could prejudice petitioners through delay—and courts "do not require timeliness for its own sake." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). If anything, the intervenor States' involvement will avert a potential disruption to this action should the EPA withdraw its support of the EPA's decision and refuse to defend it.

Second, as sovereign States charged with implementing and enforcing the ozone NAAQS, the intervenor States have clear and substantial interests in this action. Indeed, its interests are the mirror image of petitioner States' interests: while those States allege that they "are being injured by the [EPA's decision]," the intervenor States "w[ould] be injured by its invalidation." *Builders Ass'n of Greater Chi. v. City of Chicago*, 170 F.R.D. 435, 440 (N.D. Ill. 1996). As explained above, the states are primarily responsible for ensuring attainment and maintenance of ambient air quality standards. As a consequence, the intervenor States must seek EPA's approval of their state implementation plans in response to any changes made to the ozone standard. If the States fail to do so, or if the Administrator disapproves those plans, the EPA may impose a federal implementation plan of its own creation, infringing on the intervenor States' sovereign interests. 42 U.S.C. § 7410(c).

Third, disposition of this action may impair or impede the intervenor States' ability to protect their interests. Retention of the current ozone quality standards provides important benefits to the intervenor States; had the EPA imposed more restrictive standards, the intervenor States would have been obligated to needlessly expend substantial resources to comply with these standards through new implementation plans. These more-restrictive standards would impose significant and unrealistic constraints on economic activity, and the intervenor States would be put to the choice of suffering these losses with no corresponding public-health benefits, or otherwise risk losing control over how those standards are implemented in their sovereign territory. Petitioner States ask this Court to deprive the intervenor States of those benefits by vacating the EPA's decision. Because the intervenor States benefit

from the EPA's rule, invalidation of that rule necessarily impairs the States' interests. *See, e.g.*, *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 395 F. Supp. 3d 1, 20 (D.D.C. 2019); *Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 8 (D.D.C. 2018); *Envtl. Def. Fund, Inc. v. Costle*, 79 F.R.D. 235, 242 (D.D.C. 1978), *aff'd*, 12 E.R.C. 1255 (D.C. Cir. July 31, 1978).

Finally, none of the existing parties adequately represent the intervenor States' interests. As the EPA indicates in its unopposed motion to place this case in abeyance, Unopposed Mot. to Hold in Abeyance, Doc. No. 1885865, the Biden Administration intends to reassess the Trump EPA's decision to retain the existing ozone NAAQS.[1]

Rule 24(a)'s inadequate representation requirement is "not onerous." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). On its own, "the change in the Administration raises 'the possibility of divergence of interest' or a 'shift' during litigation," sufficient to satisfy Rule 24(a). *W. Energy All. v. Zinke*, 877 F.3d 1157, 1169 (10th Cir. 2017). The Biden Administration's statements, along with the EPA's decision hold this litigation in abeyance in response to these statements, illustrate why: a change in Administration often precedes substantial shifts in federal positions, and these shifts mean the EPA's interests are unlikely to overlap with the intervenor States' interests. *See Forest County Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 11 (D.D.C. 2016) (stating that all movant need show is "a *possibility* that its

[1] *See*, *e.g.*, *Fact Sheet: List of Agency Actions for Review*, The White House (Jan 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

interests may not be adequately represented absent intervention") (emphasis added).

The intervenor States cannot trust that the federal government will serve as adequate representatives of their interests—or that it will provide an adequate defense of the 2020 rule—going forward. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (holding that movants "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee"); *see also Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (holding that the burden is on the parties opposing intervention to demonstrate that existing representation is adequate). They would therefore be entitled to intervene as of right, and this Court should permit intervention here.

B. The Intervenor States would be entitled to permissive intervention.

The intervenor States would also be entitled to permissive intervention. Proposed permissive intervenors must show: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action. *Facebook*, 456 F. Supp. 3d at 108. "As its name would suggest, permissive intervention is an inherently discretionary enterprise." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). This Court has adopted "a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). The intervenor States easily satisfy that relaxed approach.

First, the intervenor States have an independent ground for subject matter jurisdiction, as this action raises a federal question, and the intervenor States would establish federal-question jurisdiction independent of plaintiff States' ability to do so. *See Int'l Paper Co. v. Inhabitants of Town of Jay, Me.,* 887 F.2d 338, 347 (1st Cir. 1989) (holding that independent jurisdiction exists when the state seeks to defend the statute against a challenge based on federal law). Second, the intervenor States' motion is timely, as Rule 15(d) requires proposed intervenors to submit their motion seeking to do so within 30 days of a petition for review, and this motion satisfies that deadline. Moreover, the intervenor States have not delayed, much less prejudiced, any existing parties. *See supra* Part II.A. Third, the intervenor States' position in support of the 2020 rule involves common questions of law and fact with petitioners' action. *Nat'l Children's Ctr.,* 146 F.3d at 1047 (noting courts in this jurisdiction "afforded this requirement considerable breadth"). Both "the main action" and the intervenor States' defense of the rule turn on whether the EPA's review of the ozone standards unlawful or arbitrary. Those common questions of law and fact are sufficient for permissive intervention. *See Weinberg v. Barry*, 604 F. Supp. 390, 392 n.1 (D.D.C. 1985).

Finally, the Court should exercise its discretion to permit intervention because the intervenor States seek to defend interests that will otherwise go unprotected in the proceeding. *See Humane Soc'y of U.S. v. Clark*, 109 F.R.D. 518, 521 (D.D.C. 1985) (judging it appropriate "[i]n light of the 'scope and complexity of plaintiffs' challenge,'" to have absent interests "directly represented"). Like the petitioner States, the intervenor States have statutory obligations under the Clean Air Act to implement and enforce the ozone standards. But unlike petitioners, the intervenor

States believe that the EPA's decision to retain the current standards not only reflects existing scientific evidence, but that it also advances these States' efforts to assure air quality within their borders without unnecessarily curtailing economic activity in the State. *See Costle*, 79 F.R.D. at 244 (considering whether movant will "supplement the position already taken by the other parties"). The intervenor States can defend EPA's review of the ozone standards from this perspective, enabling the Court to fully assess its validity through adversarial proceedings, despite the new Administration's change of position on the merits. *Clark*, 109 F.R.D. at 521 (granting intervention because movant showed "willingness and ability to contribute to the full development of the factual and legal issues presented").

CONCLUSION

The Court should grant the intervenor States leave to intervene in support of respondents.

Respectfully submitted.

LESLIE RUTLEDGE
Attorney General of Arkansas

/s/ Nicholas J. Bronni
NICHOLAS J. BRONNI
Arkansas Solicitor General
VINCENT M. WAGNER
Deputy Solicitor General
DYLAN L. JACOBS
Assistant Solicitor General
Office of the Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
Tel.: (501) 682-2007
Nicholas.Bronni@arkansasag.gov

JEFF LANDRY
Attorney General of Louisiana

/s/ Elizabeth B. Murrill
Elizabeth B. Murril
Solicitor General

Office of the Attorney General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
Tel: (225) 326-6085
murrille@ag.louisiana.gov

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

/s/ Judd E. Stone II
JUDD E. STONE II
Solicitor General

LANORA PETTIT
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1896
Fax: (512) 370-9191

Counsel for the State of Texas

LYNN FITCH
Attorney General of Mississippi

/s/ Krissy C. Nobile
Krissy C. Nobile
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205
Tel.: (601) 359-3680
Krissy.nobile@ago.ms.gov

ERIC S. SCHMITT
Attorney General of Missouri

/s/ D. John Sauer
D. John Sauer
Solicitor General
Missouri Attorney General's Office
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, Missouri 65102
Tel.: (573) 751-8870
Fax: (573) 751-0774
John.Sauer@ago.mo.gov

AUSTIN KNUDSEN
Attorney General of Montana

/s/ David M.S. Dewhirst
David M.S. Dewhirst
Solicitor General
Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Tel.: (406) 444-4145
David.Dewhirst@mt.gov

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

STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WISCONSIN; CITY OF NEW YORK, *Petitioners*	)	
v.	)	No. 21-1028 (consolidated with No. 21-1060)
ENVIRONMENTAL PROTECTION AGENCY; JANE NISHIDA, IN HER OFFIICAL CAPACITY AS ACTING ADMINISTRATOR OF THE UNITED STATES ENVIORNMENTAL PROTECTION AGENCY, *Respondents*	)	

CERTIFICATE AS TO PARTIES AND AMICI

As governmental parties, the proposed intervenors are not subject to the requirements of Federal Rule of Appellate Procedure 26.1. In accordance with D.C. Circuit Rule 27(a)(4), they certify that the parties, intervenors, and amici are:

Petitioners in 21-1028: State of New York; State of California; State of Connecticut; District of Columbia; State of Illinois; State of Maryland; Commonwealth of Massachusetts; State of Minnesota; State of New Jersey; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; Commonwealth of Virginia; State of Washington; State of Wisconsin; City of New York

Petitioners in 21-1060: American Academy of Pediatrics; American Lung Association; American Public Health Association; Appalachian Mountain Club; Chesapeake Bay Foundation, Inc.; Clean Air Council; Conservation Law Foundation; Environment America; Environmental Defense Fund; Environmental Law and Policy Center; National Parks Conservation Association; Natural Resources Council of Maine; Natural Resources Defense Council; Sierra Club

Respondents: Environmental Protection Agency; Jane Nishida, in her official capacity as Acting Administrator of the United States Environmental Protection Agency

Movant – Intervenors (motion filed): Chamber of Commerce of United States of America; American Petroleum Institute, American Forest & Paper Association; American Wood Council; American Chemistry Council

Rulings Under Review: The petition in this proceeding challenges EPA's final rule entitled "Review of the Ozone National Ambient Air Quality Standards," published in the Federal Register at 85 Fed. Reg. 87,256 (Dec. 31, 2020).

Related Cases: This case has never appeared before this Court or any other court. By Order of this Court dated February 16, 2021, the above-captioned case (No. 21-1028) was consolidated with American Academy of Pediatrics et al. (No. 21-1060), in which the petitioners are challenging the same final EPA rule that is at issue in the present proceeding.

Respectfully submitted.

LESLIE RUTLEDGE
Attorney General of Arkansas

/s/ Nicholas J. Bronni
NICHOLAS J. BRONNI
Arkansas Solicitor General
VINCENT M. WAGNER
Deputy Solicitor General
DYLAN L. JACOBS
Assistant Solicitor General
Office of the Attorney General
323 Center St., Suite 200
Little Rock, AR 72201
Tel.: (501) 682-2007
Nicholas.Bronni@arkansasag.gov

JEFF LANDRY
Attorney General of Louisiana

/s/ Elizabeth B. Murrill
Elizabeth B. Murril
Solicitor General
Office of the Attorney General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, LA 70804
Tel: (225) 326-6085
murrille@ag.louisiana.gov

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

/s/ Judd E. Stone II
JUDD E. STONE II
Solicitor General

LANORA PETTIT
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1896
Fax: (512) 370-9191

Counsel for the State of Texas

LYNN FITCH
Attorney General of Mississippi

/s/ Krissy C. Nobile
Krissy C. Nobile
Deputy Solicitor General
State of Mississippi
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205
Tel: (601) 359-3680
Krissy.Nobile@ago.ms.gov

AUSTIN KNUDSEN
Attorney General of Montana

/s/ David M.S. Dewhirst
David M.S. Dewhirst
Solicitor General
Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Tel: (406) 444-4145
David.Dewhirst@mt.gov

ERIC S. SCHMITT
Attorney General of Missouri

/s/ D. John Sauer
D. John Sauer
Solicitor General
Missouri Attorney General's Office
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, Missouri 65102
Tel: (573) 751-8870
Fax: (573) 751-0774
John.Sauer@ago.mo.gov

Certificate of Compliance

The foregoing motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it is written in 14-point Equity typeface. It complies with Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(f) and (g) because it contains 2543 words, excluding exempted portions, according to Microsoft Word.

/s/ Judd E. Stone II
Judd E. Stone II
Solicitor General

Certificate of Service

On February 18, 2021, the foregoing motion and certificate as to parties and amici were served via CM/ECF on all registered counsel.

/s/ Judd E. Stone II
Judd E. Stone II
Solicitor General