ORAL ARGUMENT NOT YET SCHEDULED

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

State of West Virginia, et al., Petitioners, **v.** **United States Environmental Protection Agency, et al.,** Respondents.	Case No. 24-1009

On Petition for Review of Final Action of the United States Environmental Protection Agency

UNOPPOSED MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), New York and the additional undersigned States move to intervene in support of the federal respondents. In this case, West Virginia and other States challenge federal regulations that govern state plans to limit air pollution from existing stationary sources under section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). The undersigned States seek to intervene to defend the regulations, which would improve transparency and flexibility in the state plan process while promoting the statute's goal of protecting public health and welfare from air pollution.

BACKGROUND

This case involves a petition filed by West Virginia and other states (State Petitioners) challenging a final rule of the Environmental Protection Agency (EPA) entitled "Adoption and Submittal of State Plans for Designated Facilities; Implementing Regulations Under Clean Air Act Section 111(d)," published at 88 Fed. Reg. 80,480 (Nov. 17, 2023) (Rule). EPA promulgated the Rule pursuant to its authority in section 111(d) of the Clean Air Act. 42 U.S.C. § 7411(d).

Section 111

Section 111 requires EPA to limit pollution from any source category that EPA determines "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). The statute refers to these emission limits as "standards of performance," defined as a "standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impacts and energy

requirements) the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1).

Section 111(b) requires standards of performance for new stationary sources. *Id.* § 7411(b)(1)(B). Once EPA establishes a performance standard for new stationary sources, it must issue an emissions guideline to control certain types of air pollutants—those not regulated as criteria or hazardous air pollutants—from existing sources in the same category. *See id.* § 7411(d)(1). Although EPA promulgates standards of performance under section 111(b) that directly apply to new (as well as modified and reconstructed) sources, States establish standards of performance for existing sources under section 111(d). *Id.* Those standards are informed by the EPA emissions guideline that sets forth its determination of the best system of emission reduction for the source category and the degree of emission limitation achievable through applying the best system. *West Virginia v. EPA*, 597 U.S. 697, 709-11 (2022). Section 111(d) also directs EPA to permit States—in establishing a standard of performance for a particular source—to take into account a source's remaining useful life and other factors. 42 U.S.C. § 7411(d)(1).

Section 111(d) Implementing Regulations

The statute also directs EPA to issue regulations that establish a procedure for States to submit plans on how they intend to establish and enforce standards of performance for existing sources. *Id.* § 7411(d)(1). These procedures are to be similar to those provided by section 110 of the Act, which governs state implementation plans to implement the National Ambient Air Quality Standards (NAAQS). *Id.* (citing 42 U.S.C. § 7410).

EPA has an important oversight role under section 111(d) to ensure that state plans are "satisfactory" in meeting section 111(d) requirements. 42 U.S.C § 7411(d)(2)(A). If a State fails to submit a plan or EPA determines that a state plan is not satisfactory, EPA must promulgate a federal plan to regulate those sources. *Id.*

In 1975, EPA issued its first implementing regulations to govern section 111(d) plans. 40 Fed. Reg. 53,340 (Nov. 17, 1975). In 2019, as part of its Affordable Clean Energy (ACE) rule, EPA revised those regulations, including significantly lengthening the time period for state plan submission and EPA review of section 111(d) plans following EPA's issuance of emission guidelines. *See* 84 Fed. Reg. 32,520 (July 8, 2019). The D.C. Circuit vacated

those timing provisions as arbitrary and capricious. *American Lung Ass'n v. EPA*, 985 F.3d 914, 991 (D.C. Cir. 2021), *rev'd on other grounds*, *West Virginia v. EPA*, 597 U.S. 697 (2022).

The Rule

To "address the vacatur of the timing provisions by the D.C. Circuit in [*American Lung Ass'n*], and to further improve the state and federal plan development and implementation process," EPA issued a proposed rule in late 2022. *See* 87 Fed. Reg. 79,176 (Dec. 22, 2022). After receiving and considering public comments, EPA finalized the Rule, including the following provisions:

- ***Timing of state plan process.*** The Rule establishes shorter revised deadlines for submission and review of state plans, including a default 18-month deadline for state plan submittal following EPA's issuance of an emissions guideline under section 111(d). *See* 40 C.F.R. § 60.23a(a)(1). EPA may decide to supersede the 18-month deadline for a particular category of sources when it issues an emission guideline. *Id.*
- ***Regulatory mechanisms for state plan implementation.*** The Rule adds several tools to implement section 111(d) plans that EPA currently uses in reviewing state implementation

plans under section 110 of the Act, such as partial approvals and conditional approvals. *See* 40 C.F.R. § 60.27a(b), (c), (h)-(j).

- ***Meaningful engagement.*** The Rule requires States to document in section 111(d) plans how they have meaningfully engaged with pertinent stakeholders, including communities located near regulated sources. *See* 40 C.F.R. § 60.23a(i).
- ***Remaining useful life and other factors.*** The Rule adds specific language to clarify the circumstances under which States are permitted to take into account remaining useful life and other factors in establishing less stringent standards of performance for specific sources than in EPA's emission guideline. *See* 40 C.F.R. § 60.24a(e), (f). These changes are intended "to ensure consistency with the statute and to enhance clarity and equitable treatment for states." *See* 88 Fed. Reg. at 80,508.
- ***More stringent state plans.*** EPA adopts a revised legal interpretation in the preamble to the Rule providing that States may include more stringent standards of performance in their state plans and that EPA would have to approve such

plans provided they met all other requirements. 88 Fed. Reg. at 80,529-30; *see* 40 C.F.R. § 60.24a(i)(1).

- ***Compliance flexibility.*** The Rule reverses EPA's statutory interpretation in the ACE rule that prohibited States from allowing sources to use emissions averaging or trading as compliance mechanisms. *See* 88 Fed. Reg. at 80,532-33.

This Litigation

State Petitioners filed a petition for review on January 16, 2024, challenging the Rule. *See* ECF Doc. No. 2036191. Before filing this motion, counsel for the undersigned States (Movant-Intervenor States), contacted counsel for State Petitioners and for EPA. State Petitioners do not oppose this motion and EPA takes no position on the motion.

LEGAL STANDARD

Federal Rule of Appellate Procedure (FRAP) 15(d) authorizes intervention in circuit court proceedings to review agency actions on a motion containing "a concise statement of interest of the moving party and the grounds for intervention" that is filed within 30 days after the petition for review. In determining whether to grant intervention, this Court typically draws on the policies

underlying Federal Rule of Civil Procedure (FRCP) 24. *See Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997). Under FRCP 24, a party seeking to intervene as of right must satisfy four factors:

> 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest.

Crossroads Grassroots Pol'y Strategies v. FEC, 788 F.3d 312, 320 (D.C. Cir. 2015); *see also Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1233 (D.C. Cir. 2018) (looking "to the timeliness of the motion to intervene and whether the existing parties can be expected to vindicate the would-be intervenor's interests").

A court may also grant permissive intervention when a movant makes a timely application and the applicant's claim or defense and the main action have a question of law or fact in common. FRCP 24(b)(1); *see EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

ARGUMENT

I. MOVANT-INTERVENOR STATES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

A. Movant-Intervenor States Have Article III Standing and Legally Protected Interests that Could Be Impaired if the Petition is Granted.

The standing inquiry for an intervenor-respondent is the same as for a petitioner: the intervenor must show injury in fact, causation, and redressability. *Crossroads Grassroots*, 788 F.3d at 316. Movant-Intervenor States can establish these factors.

Movant-Intervenor States have concrete interests in having the Rule upheld, satisfying the injury-in-fact element. Where the party seeking to establish standing is an object of the challenged government action, "[s]tanding is usually self-evident." *New Jersey v. EPA*, 989 F.3d 1038, 1045 (D.C. Cir. 2021). Here, the Rule directly regulates States in how they implement their plan obligations under section 111(d) of the statute.

As described above, the Rule contains several provisions that improve on the current regulations with respect to timeliness, transparency, and equity in implementing section 111(d)'s pollution reduction mandate. For example, the Rule: (i) imposes

reasonable timelines to ensure prompt and achievable emission reductions within our States and in neighboring States from which emissions travel into our States; (ii) clarifies approval processes that will help our States design and implement state plans; (iii) details the meaningful engagement our States must undertake with affected communities; (iv) clarifies that EPA will approve more stringent standards of performance in state plans, enabling us to better protect the health of our residents without having to enact separate federal and state standards; and (v) allows compliance flexibilities that make it possible for our States to use existing, well-developed, and effective emissions-reduction measures, saving our States time and resources and minimizing uncertainty for regulated sources. These concrete regulatory, economic, and environmental interests easily satisfy injury-in-fact. *See Crossroads Grassroots*, 788 F.3d at 317 ("cases have 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.")

Although State Petitioners have not yet identified in court filings any specific portion of the Rule they claim is unlawful,

West Virginia's rulemaking comments (joined by many of State Petitioners) signal that they will likely challenge aspects of the Rule that—if those challenges succeeded—would injure Movant-Intervenor States in two ways.[1]

First, challenges to the Rule's timing and "remaining useful life and other factors" provisions could, if successful, impair Movant-Intervenor States' interest in seeing that EPA's emissions guidelines result in timely and significant pollution reductions, benefitting our States and residents. Regarding the timing for submitting state plans, West Virginia argued that the Act "sets 36 months as the default" and that EPA had failed to justify its proposed 15-month deadline. WV Comments at 3-6. As for EPA's changes to the remaining useful life and other factors regulations, West Virginia argued that EPA lacks authority to require States that want to impose less stringent emission standards on a source to show that the source's circumstances are fundamentally

[1] *See* Comments of West Virginia, et al. (Feb. 27, 2023), EPA-HQ-OAR-2021-0527-0080, https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0527-0080. Movant-Intervenor States reserve the right to provide additional evidence and arguments in support of their standing after State Petitioners identify the aspects of the Rule that they are challenging (and the basis of their standing to pursue those challenges).

different than the information EPA considered in determining the best system of emission reduction for the source category. *Id.* at 8.

These arguments, if successful, would injure our interests in timely and significant pollution reductions that benefit our States and residents. This Court has already drawn a connection between a lengthy state plan process and public health and environmental harms. In vacating the regulation with a 36-month schedule for state plan submissions in *American Lung Ass'n*, the Court faulted EPA for failing to consider "added environmental and public health damage likely to result from slowing down the entire Section 7411(d) regulatory process." 915 F.3d at 993. EPA drew a similar connection in this rulemaking with respect to States applying the remaining useful life criteria. The agency found that without a clear analytical framework for applying remaining useful life and other factors, "the current provision may be used by states to set less stringent standards such that they could effectively" render EPA's best system of emission reduction determination "meaningless." 87 Fed. Reg. at 79,197.

In light of the fact that pollutants regulated under section 111(d)—such as carbon dioxide and methane—have impacts

beyond the state borders of the emitting source, foregone pollution reductions due to delays or relaxed standards would likely impair Movants' interests in addressing climate change harms. *See Massachusetts v. EPA*, 549 U.S. 497, 521-26 (2007); *NRDC v. Wheeler*, 955 F.3d 68, 77 (D.C. Cir. 2020). And given that efforts to limit these emissions can also cut pollution that contributes to nonattainment for ozone and other criteria pollutants,[2] a successful challenge to the Rule could impede our ability to meet our obligations to attain and maintain clean air in compliance with section 110 of the Act. *Cf. West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004) (EPA action that makes it more onerous for State to address pollution causes cognizable injury to State).

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[2] *See*, *e.g.*, EPA, Regulatory Impact Analysis for Proposed New Source Performance Standards for Greenhouse Gas Emissions from Fossil Fuel-Fired Electricity Generating Units (May 2023), at ES-10, tbl. ES-1 (proposed rule to limit carbon dioxide from coal and gas-fired power plants projected to result in 64,000 tons of nitrogen oxide emissions in 2030, including 22,000 during the ozone season), https://www.epa.gov/system/files/documents/2023-05/utilities_ria_proposal_2023-05.pdf; Regulatory Impact Analysis of the Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, Table 1-3 at 1-11 (final rule regulating existing methane from existing oil and gas facilities projected to also reduce ozone-causing volatile organic compounds by 8.6 million short tons between 2024-2038), https://www.epa.gov/system/files/documents/2023-12/eo12866_oil-and-gas-nsps-eg-climate-review-2060-av16-ria-20231130.pdf.

Second, a successful challenge to EPA's decision to change its ACE rule interpretation that barred States from including emissions averaging and trading in their state plans, *see* 88 Fed. Reg. at 80,533, could make it more difficult for Movant-Intervenor States to satisfy their section 111(d) pollution reduction obligations. Although West Virginia stated in its rulemaking comments it did not object per se to States using these compliance options in their plans, it qualified its position based on its view of what EPA may lawfully consider as a "system" under the statute. WV Comments at 9. Movant-Intervenor States use emissions averaging and trading to, for example, limit carbon dioxide from power plants, *see, e.g.*, 6 N.Y.C.R.R. § 242 (cap-and-trade program to limit carbon pollution from power plants in New York), and may use these approaches to comply with future EPA emissions guidelines dealing with pollution from those same sources. California, for example, included its state cap-and-trade regulations in its section 111(d) plan to comply with the federal Clean Power Plan. *See* California's Compliance Plan for the Federal Clean Power Plan, adopted by Cal. Air Res. Bd., Resolution 17-22 (July 17, 2017), https://ww2.arb.ca.gov/our-

work/programs/clean-power-plan/compliance-plan-final. Therefore, our States have a concrete interest in preserving these compliance tools. *See West Virginia*, 362 F.3d at 868.

These benefits to Movant-Intervenor States are "directly traceable" to the Rule and Movant-Intervenor States "can prevent the[se] injur[ies] by defeating" State Petitioners' challenge. *Crossroads Grassroots*, 788 F.3d at 316. The Movant-Intervenor States thus meet all three standing requirements.

For the same reasons, Movant-Intervenor States also meet the FRCP 24(a) requirements for legally protected interests that may be impaired or impeded by this litigation. As this Court has observed, "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). As discussed above, if State Petitioners are successful in challenging the Rule, Movant-Intervenor States' interests in pollution reductions and regulatory flexibility will be impaired. Movants thus satisfy the interest requirements for intervention as of right under FRCP 24(a), as well as the requirements for Article III standing.

B. Movant-Intervenor States Also Satisfy the Other Elements for Intervention as a Matter of Right.

Movant-Intervenor States meet the additional elements of timeliness and inadequate representation of interests to be able to intervene as of right. First, this motion is timely. FRAP 15(d) provides that a party seeking intervention must do so "within 30 days after the petition for review is filed." As noted above, the petition in this case was filed on January 16, 2024. This motion is thus within the 30-day period provided by FRAP 15(d).

Second, no existing party can vindicate or adequately address Movant-Intervenor States' interests. This element turns on "whether the existing parties can be expected to vindicate the would-be intervenor's interests." *Old Dominion*, 892 F.3d at 1233; *see also* FRCP 24(a) (considering whether "existing parties adequately represent" the would-be intervenor's interests). The requirement is "not onerous," and a "movant ordinarily should be allowed to intervene unless it is clear that" existing parties "will provide adequate representation." *Crossroads Grassroots*, 788 F.3d at 321. "[G]eneral alignment" between would-be intervenors and existing parties is not dispositive. *Id.*

Movant-Intervenor States readily satisfy this "minimal burden" because their interests are not adequately represented by the other parties. Although Movants would be joining EPA in defending the Rule in the litigation, our interests are distinct because the Rule directly regulates States, imposing obligations on states that it does not impose on EPA itself. *See West Virginia*, 597 U.S. at 710 (EPA has "the primary regulatory role in Section 111(d)," but in applying those EPA regulations "the States set the actual rules governing existing power plants."). We also have sovereign and quasi-sovereign interests that are distinct from EPA's interests. As a result, EPA and Movant-Intervenor States may choose to advance different arguments or make different strategic choices in this litigation. Movants therefore satisfy this final requirement for intervention as of right.

II. ALTERNATIVELY, MOVANT-INTERVENOR STATES ARE ENTITLED TO PERMISSIVE INTERVENTION.

Although Movant-Intervenor States readily satisfy the requirements for intervention as of right, we also satisfy the requirements for permissive intervention. Under FRCP 24(b)(1), courts may "permit anyone to intervene who . . . has a claim or

defense that shares with the main action a common question of law or fact" so long as the motion is timely and intervention would not "unduly delay or prejudice the rights of the original parties." FRCP 24(b)(1)(B), (3). As noted above, there are common questions of law and fact, the motion is timely, and intervention at this early stage will not cause any delay or prejudice.

For the foregoing reasons, we respectfully request that this Court grant this motion to intervene.

Dated: February 15, 2024 Respectfully submitted,

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CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), I hereby certify the parties and amici are as follows:

In case 24-1009, petitioners are West Virginia, Oklahoma, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming, the Arizona Legislature, and the Texas Commission on Environmental Quality.

In case 24-1009, respondents are United States Environmental Protection Agency and Michael S. Regan, Administrator of the Environmental Protection Agency.

There are no amici that have appeared in the litigation.

/s/ Michael J. Myers

MICHAEL J. MYERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font. I further certify that the motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,169 words, excluding the parts of the motion exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Michael J. Myers

MICHAEL J. MYERS

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Unopposed Motion for Leave to Intervene as Respondents have been served through the Court's CM/ECF system on all registered counsel this 15th day of February, 2024.

/s/ Michael J. Myers

MICHAEL J. MYERS