ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE REGULATION, INC., *et al.*,	
Petitioners,	Case No. 09-1322
v.	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS

The Commonwealth of Massachusetts and the States of Arizona, California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the City of New York (collectively, "Proposed Intervenors") hereby move for leave to intervene as party respondents in this action for the reasons set forth below.

BACKGROUND

1. Under Section 307(b)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), the Coalition for Responsible Regulation, Inc., *et al*., filed a Petition for Review with this Court on December 23, 2009, for review of the final action of respondent United States Environmental Protection Agency ("EPA") published in the Federal Register at 74 Fed. Reg. 66496, *et seq*., (Dec. 15, 2009), and titled "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule."

2. EPA issued the Final Rule in direct response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). 74 Fed. Reg. 66499/2. *Massachusetts v. EPA*

involved review of EPA's denial of a 1999 petition for rulemaking submitted by the International Center for Technology Assessment ("ICTA"), and 18 other environmental and renewable energy industry organizations, requesting that EPA issue standards under CAA § 202(a) for emissions of carbon dioxide, methane, nitrous oxide and hydrofluorocarbons from new motor vehicles and engines ("202 Petition"). 549 U.S. at 510-11. EPA had denied the 202 Petition based on two reasons: (1) that EPA lacked authority under the CAA to regulate greenhouse gas emissions; and, (2) that even if EPA had such authority, it chose not to exercise it in these circumstances for a variety of policy reasons. 68 Fed. Reg. 52922, 52925-31 (September 8, 2003).

3. Twelve States and five other governmental entities, including many of the Proposed Intervenors, joined ICTA and the other 202 Petitioners in seeking review of the denial in this Court, which ultimately denied the petition for review because, "[a]lthough each of the three judges on the panel wrote a separate opinion, two judges agreed 'that the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rule making.'" 549 U.S. at 514, *quoting*, 415 F.3d 50, 58 (2005).

4. Sixteen States and governmental entities, including many of the Proposed Intervenors,[1] sought and obtained a grant of certiorari from the Supreme Court to review two issues: "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether [EPA's] stated reasons for refusing to do so are consistent with the statute." 549 U.S. at 505. Noting the Act's "sweeping" and "capacious" definition of "air pollutant" (549 U.S. at 528, 532), the Supreme Court "ha[d] little trouble concluding" that the CAA "authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the

[1] The Proposed Intervenors that were also Petitioners in *Massachusetts v. EPA* include: Massachusetts, California, Connecticut, Illinois, Maine, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the City of New York.

event that [EPA] forms a 'judgment' that such emissions contribute to climate change." 549 U.S. at 528, *quoting* CAA §202(a).

5. Besides simply confirming that EPA has existing authority under the CAA to regulate GHG emissions from motor vehicles, the Supreme Court declared that EPA must exercise its CAA authority to regulate GHGs unless the agency could articulate a science-based reason not to do so. *See e.g.*, 549 U.S. at 533-34 (EPA's reasons for action or inaction must conform to the authorizing statute, which poses the question whether sufficient scientific information exists to make an endangerment finding); *see also*, 549 U.S. at 507-11 (discussing studies and reports, from the 1970s to 2001, finding a relationship between increases of greenhouse gases in the atmosphere due to anthropogenic sources and effects on temperature and climate, including a 2001 National Research Council report concluding: "[g]reenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising"). The Supreme Court also included an admonition that scientific uncertainty is not a sufficient ground on which to refrain from acting unless "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming." 549 U.S. at 534.

6. In direct response to *Massachusetts v. EPA* and the 202 Petition (74 Fed. Reg. 66499/2), EPA promulgated the Final Rule, in which the Administrator finds that "the body of scientific evidence compellingly supports" her finding that "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare." 74 Fed. Reg. 66497/2. The Administrator defines the "air pollution" referred to in CAA § 202(a) to be "the mix of six long-lived and directly-emitted greenhouse gases: carbon dioxide (CO_2),

methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)." *Id.* "The Administrator also finds that emissions of well-mixed greenhouse gases from the transportation sources covered under CAA section 202(a) contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare." 74 Fed. Reg. 66499/1 (footnote omitted). As should be apparent from many of the Proposed Intervenors' prior involvements in proceedings on these issues, they concur with these findings.

7. The effect of the Final Rule setting forth the Administrator's ultimate determination (*i.e,* that emissions of greenhouse gases from motor vehicles and engines that are subject to CAA § 202(a) contribute to global warming air pollution that may reasonably be anticipated to endanger public health and welfare) is to trigger EPA's statutory duty, pursuant to CAA § 202(a), to promulgate regulations establishing emission standards for motor vehicles covered by CAA § 202(a).[2] By separate rulemaking process, EPA has begun to take steps toward complying with that duty. *See* 74 Fed. Reg. 66499/3-66500/1; 74 Fed. Reg. 49454 (Sept. 28, 2009). Notably, however, the Final Rule being challenged here imposes no requirements or obligations on regulated industries.

8. The Proposed Intervenors are requesting leave to intervene in this action under Rule 15(d) of the Federal Rules of Appellate Procedure because the Court's action on the petition for review will affect the public health and welfare of their residents and will also affect a host of

[2] Specifically, CAA § 202(a) provides: "The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 202(a)(1).

global warming impacts that the Proposed Intervenors are suffering, and will continue to suffer, in the future.

ARGUMENT

A. The Proposed Intervenors Have Direct and Substantial Interests in this Action that Warrant Intervention under Fed. R. App. Pro. Rule 15(d).

9. Rule 15(d) of the Federal Rules of Appellate Procedure imposes no specific requirements on a party seeking to intervene other than that it must explain its interest in the proceeding. In this way, Rule 15(d) permits intervention where the intervenor has a direct and substantial interest in the outcome of the action. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (allowing Rule 15(d) intervention because petitioners were "directly affected by" application of agency policy); *New Mexico Dep't of Human Servs. v. HCFA*, 4 F.3d 882, 884 n.2 (10th Cir. 1993) (permitting intervention because intervenors had substantial and unique interest in outcome); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with "substantial interest in the outcome"). In determining whether a potential intervenor has a direct and substantial interest in a particular controversy, courts should consider the design of the statute at issue. *Texas v. United States Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (denying intervention to 31 utilities whose only participation in the statutory scheme was to provide funding).

10. Here, the Proposed Intervenors have a direct and substantial interest in the outcome of this action. Indeed, the Supreme Court has already determined as much by holding that petitioners in *Massachusetts v. EPA* – who included many of the Proposed Intervenors here – "ha[d] standing to challenge the EPA's denial of their [202 Petition]." 549 U.S. at 526. In conducting its thorough standing analysis, the Supreme Court found that petitioners demonstrated that impacts of climate change were affecting, and would continue to affect, the

petitioner States. *See e.g.*, 549 U.S. at 521-23, 526 ("the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts"). The Supreme Court summarized:

> [I]t is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent." There is, moreover, a "substantial likelihood that the judicial relief requested" will prompt EPA to take steps to reduce that risk.

549 U.S. at 521 (citations omitted).[3] The Supreme Court's analysis in *Massachusetts v. EPA* demonstrates that Massachusetts (and other States) have a direct relationship with, and interest in, the outcome of this action. If the Final Rule is upheld, EPA's duty to regulate greenhouse gases under CAA § 202(a) has been triggered and, in the words of the Supreme Court, EPA must then "take steps to reduce th[e] risk" to Massachusetts (and others). On the other hand, a negative outcome here in terms of the validity of the Final Rule will delay or prevent EPA from taking steps to reduce the direct risk to Massachusetts (and others), thereby directly harming the interests of Proposed Intervenors.

11. Looking more closely at the Supreme Court's analysis also makes clear that the Proposed Intervenors' interests are substantial. Referring to petitioners' uncontested affidavits, the Supreme Court noted that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming" and "[t]hese rising seas have already begun to swallow Massachusetts' coastal land." 549 U.S. at 522. Referring to the fact that

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[3] The Second Circuit has also held that a group of eight States and New York City – six of which, and New York City, are Proposed Intervenors here – had standing to bring an action against six electric power corporations that own and operate fossil-fuel-fired power plants on the basis of a federal common law public nuisance of global warming claim. *Connecticut v. American Elec. Power Corp., Inc.*, 582 F.3d 309, 332-49 (2nd Cir. 2009).

Massachusetts "'owns a substantial portion of the state's coastal property'" (549 U.S. at 522), the Supreme Court further noted that the petitioners had documented that loss of such land to global warming induced sea level rise constituted particularized injury, the severity of which is alleged to "only increase over the course of the next century." 549 U.S. at 522-23. The Supreme Court quoted the belief of one Massachusetts official who concluded that "a significant fraction of coastal property will be 'either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events'" and referenced the allegation that remediation costs associated with such circumstances in Massachusetts "could run well into the hundreds of millions of dollars." 549 U.S. at 523; *see also* 549 U.S. at 523 n.19 (identifying the numerous types of State owned infrastructure and the broad range of State resources associated with State-owned coastal property in Massachusetts).[4]

12. In addition to the direct and substantial interests referenced by the Supreme Court, the Proposed Intervenors have numerous other direct and substantial interests that will be affected by the outcome of this case. For example, the failure or delay in implementing regulations to control greenhouse gas emissions from motor vehicles due to overturning of the Final Rule will harm hardwood forests in a number of the Proposed Intervenor States in a manner that will negatively affect Fall tourism and threaten the maple sugar industry in Vermont and other New England States. In addition, the residents of the Proposed Intervenors will be at

[4] Other direct and substantial interests of Proposed Intervenor States, related to those discussed by the Supreme Court, will also be affected by the outcome of this case. For example, the failure or delay in implementing regulations to control greenhouse gas emissions from motor vehicles due to overturning of the Final Rule will harm their financial and economic interests and the public welfare in numerous ways, such as: by adding regulatory costs of meeting ozone obligations under the CAA; by adding costs to deal with emergency response measures and impacts to low-lying infrastructure caused by more frequent intense storm surge flooding events; by adding costs due to increased health effects that will harm State economies or revenues; by reducing water supply due to reduced snowpack, increased saltwater intrusion, and other factors; and by damaging State-owned property due to wildfires.

risk of a range of increased health effects due to climate change, and risks of impacts to welfare will also increase. Notably, climate change is expected to result in increased regional ozone pollution due to higher average temperatures and weaker air circulation. Increased regional ozone pollution will produce associated risks in respiratory infection, aggravation of asthma, and premature death. These serious health effects are and will be consequences of climate change, and steps EPA may take as a result of the Final Rule will address such effects.

13. Thus, by serving as the trigger to require EPA to take steps toward implementing regulation of greenhouse gas emissions from motor vehicles covered by CAA § 202(a), the Final Rule initiates the process towards reduction of the risks that are and will be affecting the direct and substantial interests of the Proposed Intervenors and the health and welfare of their residents.

14. Finally, the Proposed Intervenors possess an "'interest independent of and behind the titles of [their] citizens, in all the earth and air within [their] domain'" (549 U.S. at 518-19 *quoting Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907)) that gives them each a "special position and interest" (549 U.S. at 518). The Supreme Court noted: "It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual." 549 U.S. at 518. The "special solicitude" to which the petitioner-States were entitled in *Massachusetts v. EPA* (549 U.S. at 519) in the standing context is equally applicable to this Court's analysis here.

15. Likewise, EPA has long recognized that "State governments will be affected by the environmental impacts of climate change." 66 Fed. Reg. 18246 (April 6, 2001) (discussing threats to state infrastructure, damage to State natural resources, and increased number of ozone exceedences).

16. Thus, there can be no doubt that the Proposed Intervenors have an interest in the subject matter of this litigation that is both substantial and direct, supporting their right to intervene in the action. The Proposed Intervenors have sufficient interest in the rulemaking at issue to support intervention under Rule 15(d).

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

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

18. Addressing intervention as of right, Fed. R. Civ. Pro. 24(a) provides:

> On timely motion, the court must permit anyone to intervene who: . . .
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. Pro. 24(a)(2).

19. Rule 24(a) is construed liberally in favor of granting intervention. *See United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002); *Southwest Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 818 (9th Cir. 2001). The Proposed Intervenors easily meet Rule 24(a)(2)'s criteria.

20. The courts are especially sensitive to the needs of states to intervene in actions that implicate State laws and policy interests. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert "California interests in a competitive system").

21. Fed. R. Civ. Pro. 24(b), which provides for permissive intervention, gives a federal court discretion to allow intervention when the proposed intervenor makes a timely application demonstrating that it "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Pro. 24(b)(1)(B). In exercising such discretion, courts "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. Pro. 24(b)(3). *See also Citizens for an Orderly Energy Policy, Inc. v. Suffolk County*, 101 F.R.D. 497, 502 (E.D.N.Y. 1984) (possibility of undue delay or prejudice is the "principal consideration").

22. As EPA's issuance of the Final Rule was a direct response to *Massachusetts v. EPA* – a case brought by many of the Proposed Intervenors seeking to get EPA to regulate greenhouse gases under CAA § 202(a) – it is beyond doubt that the Proposed Intervenors have direct, and long-standing, interests in the subject of this action. This alone warrants that they be permitted to intervene.

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

23. Unlike Fed. R. Civ. Pro. 24(a), Rule 15(d) of the Federal Rules of Appellate Procedure does not, on its face, require an intervenor to show inadequate representation by the parties in the litigation. Nevertheless, Proposed Intervenors would satisfy this element of Rule 24(a). According to the Supreme Court, "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

24. The proposed intervenor need not show that the representation of its interest *will* in fact be inadequate. *See Diamond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

Moreover, "[a] governmental party that enters a lawsuit solely to represent the interests of its citizens . . . *differs from other parties, public or private,* that assert their own interests, even when these interests coincide." *United States v. Hooker Chems. & Plastics Corp*., 749 F.2d 968, 992 n.21 (2d Cir. 1984) (emphasis added). Any doubts about intervention here should be resolved in favor of the Proposed Intervenors. *See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

25. EPA and Administrator Jackson may resolve or settle this action in a manner that does not square with the interests of the Proposed Intervenors. The potential difference between the interests of the Proposed Intervenors and EPA is readily apparent in the fact that at the outset of the litigation over EPA's denial of the 202 Petition, the Proposed Intervenors were challenging EPA over its decision not to regulate greenhouse gas emissions.

D. Proposed Intervenors' Intervention Is Timely.

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

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

28. On January 21, 2010, the Massachusetts Attorney General's Office informed counsel for Respondents and Petitioners in this case of Proposed Intervenors' intent to file this motion. Counsel for Respondent and Petitioners stated that they are not taking a position with regard to this motion at this time, but Petitioners reserved the right to do so.

29. Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), the undersigned counsel for the Commonwealth of Massachusetts

hereby represents that the other parties listed in the signature blocks below have consented to the filing of this motion for leave to intervene as respondents.

CONCLUSION

For the foregoing reasons, the Proposed Intervenor States respectfully request that this Court grant their motion to intervene as party-respondents.

Dated: January 22, 2010

Respectfully Submitted,

FOR THE COMMONWEALTH OF MASSACHUSETTS

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene as Respondents filed through the Court's CM/ECF System has been served electronically on all registered participants of the CM/ECF System as identified in the Notice of Docket Activity, and that paper copies will be sent by first class mail, postage prepaid, to those indicated as non-registered participants who have not consented in writing to electronic service, on January 22, 2010.

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