ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1050 (and consolidated cases)

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

COMMONWEALTH OF KENTUCKY, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ALLIANCE OF NURSES FOR HEALTHY ENVIRONMENTS, AMERICAN LUNG ASSOCIATION, AND ENVIRONMENTAL DEFENSE FUND'S UNOPPOSED MOTION TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d) and D.C. Circuit Rule 15(b), Alliance of Nurses for Healthy Environments, American Lung Association, and Environmental Defense Fund ("EDF") (collectively, "Movants") hereby respectfully move to intervene in support of Respondents U.S. Environmental Protection Agency ("EPA") in the above-captioned challenges to EPA's regulation titled *Reconsideration of the National Ambient Air Quality Standards for Particulate Matter*, 89 Fed. Reg. 16,202 (Mar. 6, 2024) ("Final Rule"). Pursuant to D.C. Circuit Rule 15(b), this motion also constitutes a motion to intervene in all

petitions for review of the challenged Final Rule, except for any petitions that may be filed challenging the Final Rule as insufficiently stringent.

EPA and Petitioners in Nos. 24-1050, 24-1051, and 24-1052 take no position on this motion. Petitioners in No. 24-1073 do not oppose this motion. The movant-intervenor-respondents who filed their motion on March 27 consent to this motion.

BACKGROUND

The Clean Air Act ("the Act") requires EPA to adopt and periodically update National Ambient Air Quality Standards ("air quality standards") for harmful air pollutants. 42 U.S.C. § 7409. These air quality standards must include "primary"—or "health"—standards requisite to protect public health with an adequate margin of safety, and "secondary"—or "welfare"—standards requisite to protect public welfare. *Id.* § 7409(b); *see also id.* § 7602(h) (defining "welfare"). Once in place, these standards are implemented by enforceable regulatory programs at the state and federal level sufficient to ensure that air quality will come into attainment with the standards. *Id.* §§ 7410(a), (c), 7502.

At issue here is EPA's 2024 revision of the annual health standard for fine particulate matter ("$PM_{2.5}$"). Exposure to $PM_{2.5}$ pollution is linked to premature death, increased hospital admissions and emergency department visits, and development of chronic respiratory disease. 89 Fed. Reg. at 16,203. Furthermore, exposure to $PM_{2.5}$ is not evenly distributed, as Black and Hispanic populations

experience, "on average, higher $PM_{2.5}$ exposures and $PM_{2.5}$-related health risks than non-Hispanic White populations." *Id.* at 16,204. These disparities also include higher rates of $PM_{2.5}$ -associated hypertension and mortality. *Id*. at 16,235.

EPA's 2024 revision of the annual health standard for $PM_{2.5}$ follows its decision to reconsider a 2020 final action, which retained air quality standards that were last revised in 2012. 85 Fed. Reg. 82,684 (Dec. 18, 2020). Shortly after EPA published its 2020 final action, several parties, including many of the current Movants, filed petitions for review and administrative petitions for reconsideration of that final action. *See, e.g.*, *American Lung Association, et al. v. EPA*, No. 21-1027 (D.C. Cir. 2021). Before briefing began in those cases, EPA announced in June 2021 that it was reconsidering the 2020 decision "because available scientific evidence and technical information indicate that the current standards may not be adequate to protect public health and welfare, as required by the Clean Air Act."[1]

On March 6, 2024, after going through a notice and comment process, EPA published the Final Rule revising the $PM_{2.5}$ health standard in the Federal Register. 89 Fed. Reg. 16,202. Among other things, EPA strengthened the annual primary $PM_{2.5}$ standard to 9 $\mu g/m^3$ (compared to its prior level of 12 $\mu g/m^3$) and retained the

[1] EPA Press Release, *EPA to Reexamine Health Standards for Harmful Soot that Previous Administration Left Unchanged* (June 10, 2021), https://www.epa.gov/newsreleases/epa-reexamine-health-standards-harmful-soot-previous-administration-left-unchanged.

pre-existing 24-hour standard of 35 μg/m^3. *Id.* The annual standard is within the range recommended by the majority of the Clean Air Scientific Advisory Committee ("CASAC"), whose advice EPA must, under the Act, consider in reviewing and revising air quality standards. *Id.* at 16,204. EPA also updated and strengthened various requirements related to air quality standards for $PM_{2.5}$, such as air quality monitoring and communications requirements. *Id.* at 16,205, 16,301-02.

Petitioners here seek to invalidate, weaken, delay, or vacate the Final Rule. In comments on the proposed version of the Final Rule, many of the Petitioners argued against strengthening the annual $PM_{2.5}$ standard, raising various legal and technical objections. *See, e.g.*, EPA-HQ-OAR-2015-0072-2180 (comments of Petitioners Kentucky, Texas, et al.); EPA-HQ-OAR-2015-0072-2193 (comments of Petitioner National Association of Manufacturers).

Movants are national organizations that seek to protect people's health and wellbeing, including their members', against harm from air pollution. Many of them submitted extensive comments—arguing for stronger standards than EPA ultimately adopted—on EPA's proposal. *See* Comments of Appalachian Mountain Club, et al., EPA-HQ-OAR-2015-0072-2233; Comments of American Lung Association, et al., EPA-HQ-OAR-2015-0072-2348. As described below, the Final Rule provides critical safeguards for Movants' members' health and welfare.

Movants and their members have strong interests in maintaining the level of health protection provided by the revised annual $PM_{2.5}$ health standard and in ensuring that the air quality standards are timely, fully, and effectively implemented. Accordingly, they meet the standards for intervention in Petitioners' challenges pursuant to Fed. R. App. P. 15(d), as further detailed below.

ARGUMENT

Under the Federal Rules of Appellate Procedure, a potential intervenor must file a motion to intervene "within 30 days after the petition for review" and provide "a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d); *see Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991). Movants satisfy this standard.

In determining what constitutes appropriate grounds for intervention in cases in other postures, this Court has sometimes looked to the standard for intervention in the district courts. *See Building & Construction Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (noting that "the policies underlying intervention [in district court] may be applicable in appellate courts") (alteration in original) (quoting *Int'l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965)). Under Federal Rule of Civil Procedure 24(a)(2), a movant is entitled to intervention as-of-right whenever (1) its motion is "timely;" (2) the movant claims an "interest relating to

the … subject of the action;" (3) disposition of the action "may as a practical matter impair or impede the movant's ability to protect its interest;" and (4) the existing parties may not "adequately represent" the movant's interest. Fed. R. Civ. P. 24(a)(2); *see also Fund for Animals v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Intervention is also allowed where movants have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Movants satisfy these standards here, if they were to apply.

I. Movants satisfy the standard for intervention.

A. This motion is timely filed.

Petitioners filed their petition for review on March 6, 2024. Accordingly, this motion is timely filed on April 5, 2024. Fed. R. App. P. 15(d).

B. Movants and their members have significant interests in defending the Final Rule.

Movants seek to intervene to oppose Petitioners' attempts to weaken public health and environmental safeguards that benefit their members. This Court has previously allowed Movants to intervene in petitions for review challenging EPA actions under the Clean Air Act—including promulgation of air quality standards.[2]

[2] *See, e.g.*, Order of May 20, 2013, *National Association of Manufacturers v. EPA*, No. 13-1069 (and consolidated case) (granting American Lung Association and EDF's motion to intervene in defense of EPA's decision to revise the $PM_{2.5}$ annual health standard); Order of Nov. 18, 2010, *Nat'l Env't. Dev. Ass'n's Clean Air Project v. EPA*, No. 10-1252 (and consolidated cases) (same, in challenge to sulfur dioxide standard).

Comparable circumstances warrant a grant of intervention to Movants here.

As in previous cases, Movants have an interest in this action because their organizational purposes include the prevention of harmful air pollution and advocacy on behalf of those most affected by air pollution, especially the members of their organizations. *See* attached declarations. Further, Movants have members who live in communities[3] with air quality that does not meet the revised annual $PM_{2.5}$ standard, and who are therefore breathing air that EPA has determined to be unhealthy. *Id.* Many of these members have or care for patients who have health conditions that require medication and that are exacerbated by air pollution. *Id.* And many of these members find their day-to-day activities impaired by elevated levels of air pollution. *Id.*

Invalidating, weakening, or delaying implementation of the revised standard would prolong exposure of these members to $PM_{2.5}$ levels that EPA—as well as other medical experts—has determined are unsafe to breathe and would harm Movants' members' health and welfare interests. *Id.* Moreover, as Movants' comments on the proposed standards argued—based on substantial scientific evidence—air quality standards even more protective than those that were

[3] EPA, *Fine Particle Concentrations for Counties with Monitors Based on Air Quality Data from 2020-2022* (Feb. 2024), https://www.epa.gov/system/files/documents/2024-02/table_annual-pm25-county-design-values-2020-2022-for-web.pdf.

ultimately adopted were warranted to protect people's health. *E.g.*, Comments of Appalachian Mountain Club, *et al.*, EPA-HQ-OAR-2015-0072-2233. For this reason, and because there is no safe threshold for $PM_{2.5}$ exposure, reductions in $PM_{2.5}$ pollution will benefit residents (including members) in downwind areas even if they are designated as having met the air quality standard.

The health interests of Movants' members are of central importance to the underlying Clean Air Act provisions governing EPA's adoption and revision of the air quality standard. Those provisions require EPA to adopt health standards "requisite to protect the public health," "allowing an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The Supreme Court has unanimously ruled that EPA must base these health standards *solely* on public health considerations. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465-71 (2001).

Because the Clean Air Act grants this Court exclusive jurisdiction to review the challenged rules, this Court is the only venue where Movants may defend the validity of these air quality standards. 42 U.S.C. § 7607(b)(1), (e). Movants' interest in preventing weakening of health protections for their members under the Clean Air Act will be prejudiced if they are not allowed to intervene. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 317 (D.C. Cir. 2015) (intervention warranted where petitioners' challenge would "remove" the "benefit[s]" of the rule).

For the foregoing reasons, Movants have a clear "interest" in this matter within the meaning of Federal Rule of Appellate Procedure 15(d). Further, to the extent that this Court has required and continues to require respondent-intervenors to do so, the injuries Movants' members would suffer from a weakening or reversal of the Final Rule are more than sufficient to satisfy the requirements of Article III standing.[4] *See, e.g.*, *Friends of the Earth v. Laidlaw Env't'l. Servs.*, 528 U.S. 167, 183 (2000) (environmental group has standing to enforce pollution limits where members have reasonable concern about adverse effects of pollution in area they use); *Sierra Club v. EPA*, 129 F.3d 137, 139 (D.C. Cir. 1997) (environmental group with members in affected areas has standing to challenge weakening of Clean Air Act requirements for such areas).

Movants, however, note that because they seek to intervene in support of the respondent, they are thus not affirmatively invoking the Court's jurisdiction. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (stating that "it was not … incumbent on [a party] to demonstrate its standing" when it participated "as an intervenor in support of the … Defendants" or "as an appellee"

[4] Any weakening, delay, or vacatur of the rule would injure Movants' members and organizational interests. Thus, Movants would satisfy all standing requirements. *See Crossroads*, 788 F.3d at 317 (holding that a movant-intervenor has standing to defend a challenged regulation when it "benefits from [the] agency action, the action is then challenged in court, and an unfavorable decision would remove the [movant's] benefit").

on appeal "[b]ecause neither role entailed invoking a court's jurisdiction"). In an appropriate case, Movants request that this Court clarify intervenor-respondents' obligations regarding standing in light of recent Supreme Court case law.

II. Movants' interests may not be adequately represented by other parties.

Movants satisfy their "minimal" burden to show that existing parties' representation "'may be' inadequate." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). Movants need not "predict now the specific instances" in which conflicts may arise, *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977); a "potential conflict," *Dimond v. Dist. of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986); or a "possibility of disparate interests" is sufficient, *Costle*, 561 F.2d at 912.

As this case now stands, the Court will hear EPA's arguments against challenges to the Final Rule. But as this court "ha[s] often concluded … governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736; *see also Costle*, 561 F.2d at 913 (holding that industry intervenors' interests may not be adequately represented by EPA and that intervention as a matter of right is thus justified). That is especially true here, where Movants submitted comments arguing for air quality standards even more protective than those ultimately adopted by EPA. Indeed, Movants have frequently disagreed with—and challenged in rulemaking comments and court

proceedings—EPA's actions and inaction under the Clean Air Act, including on air quality standards.[5]

Further, "skeptic[ism] [regarding] government entities serving as adequate advocates for private parties" is especially warranted here, given EPA's decision to reconsider these air quality standards after initially refusing to revise them in 2020. *Crossroads*, 788 F.3d at 321. It was only after the filing of a petition for review and an administrative petition for reconsideration by Movants, that EPA reversed itself and strengthened these air quality standards. Here, the government may change position or make litigation concessions with which Movants disagree. For example, in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007), the United States declined to seek certiorari from an adverse court of appeals decision. Environmental intervenors petitioned for certiorari and eventually prevailed on the merits, despite the United States switching sides to align itself with Duke Energy. *Id.* at 582. It is possible that EPA may take positions here regarding stays, abeyances, remedies, or rehearing that would harm Movants' members.

The groups that moved last week to intervene as respondents are not yet

[5] *See, e.g.*, *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (challenge by American Lung Association and EDF to $PM_{2.5}$ air quality standards); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) (challenge by American Lung Association, EDF, and others to EPA rules to implement ozone air quality standard).

parties, and thus are not relevant to the adequacy of representation analysis at this time. *See, e.g.*, *Fund for Animals*, 322 F.3d at 736-37 (examining adequacy of representation by "existing parties"). In any event, Movants' interests also may not be adequately represented by those other groups. Unlike any of those groups, several of Movants are national health organizations, and all Movants have unique, specific perspectives and interests that may not perfectly align with those of the other organizations that have also moved to intervene. *See id.* at 737 ("partial congruence of interests…does not guarantee the adequacy of representation"). Further, representation of Movants and other intervenor-respondents by the same counsel does not show adequacy of representation by the parties. *Id.* Even though, as noted below, Movants plan to join a single brief with other non-governmental intervenor-respondents, Movants' interests are distinct.

Movants' interests and experience provide them with a unique and distinctive perspective on the issues at stake. As a result, they respectfully submit that the Court's adjudication will be assisted by hearing from these non-governmental experts and advocates of the Clean Air Act's public health protections. And consistent with the Circuit's rules, Movants will "focus on points not made or adequately elaborated upon in ... [EPA's] brief, although relevant to the issues before this court" and will join a single brief with other non-governmental intervenor-respondents. D.C. Cir. R. 28(d)(2), (4).

CONCLUSION

For the foregoing reasons, Movants respectfully request that the Court grant them leave to intervene as respondents in support of EPA in all challenges to the Final Rule, except for any petitions that may be filed challenging the Final Rule as insufficiently stringent.

Dated: April 5, 2024

Respectfully submitted,

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and D.C. Circuit Rule 26.1, Movants Alliance of Nurses for Healthy Environments, American Lung Association, and Environmental Defense Fund state that they are non-profit health and environmental organizations without any parent corporation or stock.

Dated: April 5, 2024

/s/ Marvin C. Brown IV
Marvin C. Brown IV

CERTIFICATE OF PARTIES

Pursuant to D.C. Circuit Rule 27(a)(4) and 28(a)(1)(A), I certify that the parties to this case are set forth below.

Petitioners: Kentucky, West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Wyoming, in No. 24-1050; Chamber of Commerce of the United States of America, American Chemistry Council, American Forest & Paper Association, American Petroleum Institute, American Wood Council, National Association of Manufacturers, National Mining Association, and Portland Cement Association, in No. 24-1051; Texas and the Texas Commission on Environmental Quality, in No. 24-1052; and President of the Arizona State Senate Warren Petersen, Speaker of the Arizona House of Representatives Ben Toma, and Arizona Chamber of Commerce and Industry, in No. 24-1073.

Respondents: United States Environmental Protection Agency ("EPA") and Michael S. Regan, in his official capacity as Administrator of the EPA.

Intervenors: Citizens for Pennsylvania's Future, Conservation Law Foundation, Natural Resources Defense Council, Northeast Ohio Black Health Coalition, Rio Grande International Study Center, and Sierra Club moved to intervene in No. 24-1050 (and consolidated cases) on March 27, 2024.

Amici Curiae: Government Accountability & Oversight moved to participate as amicus curiae on April 5, 2024.

Dated: April 5, 2024

/s/ Marvin C. Brown IV
Marvin C. Brown IV

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(g)(1), that the foregoing motion contains 2,653 words, as counted by counsel's word processing system, and thus complies with the 5,200-word limit. *See* Fed. R. App. P. 27(d)(2)(A).

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word for Microsoft 365** using **size 14 Times New Roman** font.

Dated: April 5, 2024

/s/ Marvin C. Brown IV
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