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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 19-0869

IN THE SUPREME COURT OF TEXAS

IN RE VOLKSWAGEN GROUP OF AMERICA, INC., VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC, AUDI OF AMERICA, LLC, AND PORSCHE CARS NORTH AMERICA, INC.,

Relators.

Original Proceeding from the 353rd Judicial District Court
In Travis County, Texas
The Honorable Tim Sulak, Presiding

RELATORS VOLKSWAGEN GROUP OF AMERICA, INC., VOLKSWAGEN GROUP OF AMERICA CHATTANOOGA OPERATIONS, LLC, AUDI OF AMERICA, LLC, AND PORSCHE CARS NORTH AMERICA, INC.'S UNOPPOSED MOTION FOR LEAVE TO FILE LETTER NOTICE OF RECENT DEVELOPMENT

COME NOW, Relators Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations LLC, Audi of America, LLC, and Porsche Cars North America, Inc. (collectively, "Relators"), and file this Unopposed Motion for Leave to File Letter Notice of Recent Development (the "Motion") in this original proceeding. As support, Relators show as follows:

Texas Rule of Appellate Procedure 38.7 provides that "[a] brief may be amended or supplemented whenever justice requires, on whatever reasonable terms

the court may prescribe." Tex. R. App. P. 38.7. Texas appellate courts have interpreted the "justice requires" language of Rule 38.7 broadly to allow for supplemental briefing in various contexts. *See, e.g.*, *Villareal v. State*, 267 S.W.3d 204, 207 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.) (finding supplemental brief appropriate "[i]n the interest of justice" because Fifth Circuit issued relevant opinion after parties submitted their briefs).

Here, the Court should give Relators permission to file a Letter Notice of Recent Development (attached hereto as Ex. A) to direct the Court's attention to a recent development in another case relevant to Relators' pending Mandamus Petition. Specifically, Relators seek leave to notify the Court that after Relators filed their Mandamus Petition, the State of Texas filed a motion for leave to intervene on the side of the federal government in a case concerning the federal government's recent decision to revoke California's waiver from the preemption clause in Clean Air Act § 209(a), through which the State asserts a position that contradicts its position in this case. As such, Relators' Letter Notice of Recent Development will provide the Court with relevant information concerning the preemption issues presented in this proceeding and will give important context to the State's opposition to preemption.

PRAYER

For the reasons stated above, Relators respectfully request that the Court:

1. Grant their Motion and consider the attached Letter Notice of Recent Development; and

2. Provide any and all further relief, at law or in equity, to which Relators are justly entitled.

DATED: November 6, 2019

Respectfully submitted,

By: */s/ William S. Snyder*

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CERTIFICATE OF CONFERENCE

On November 6, 2019, I conferred by telephone with Lisa Bennett, counsel for the State of Texas, regarding this motion. She advised that the State does not oppose the motion.

/s/ Robert L. Sayles
Robert L. Sayles

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing Reply has been forwarded this 29th day of October, 2019, to the following attorneys of record via electronic service:

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/s/ William S. Snyder
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EXHIBIT A

Bradley

November 6, 2019

Via Electronic Filing
Blake A. Hawthorne
Clerk of the Court
Supreme Court of Texas
201 W. 14th
Austin, Texas 78701

Re: No. 19-0869: *In Re Volkswagen Grp. of Am. et al* (Orig. Proceeding)
Notice of Recent Development

Dear Mr. Hawthorne,

On behalf of Relators Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations LLC, Audi of America, LLC, and Porsche Cars North America, Inc., we advise the Court of an important recent development in another case relevant to Relators' pending Mandamus Petition filed in this Court on September 26, 2019.

On October 25, 2019, the State of Texas joined with several other states in filing a motion for leave to intervene on the side of the federal government in a lawsuit brought by California and other states challenging the federal government's recent decision to revoke, among other things, California's waiver from the express preemption clause in § 209(a) of the Clean Air Act ("CAA"), a waiver which had

allowed California to set emissions standards different from federal standards. *See* Ex. A-1. The arguments advanced by Texas in that intervention motion contradict the arguments it advances in this litigation.

In its intervention motion, Texas argues that permitting California to set its own standards and "evade otherwise preemptive law . . . upsets [the] balance" of federalism by permitting California to "shape the market for the regulated vehicles nationwide." *Id*. at 3. Texas further argues that the federal revocation of California's waiver from the CAA's preemption provisions—which will result in a single set of nationwide emissions regulations—will "lower[] vehicle prices, improv[e] the variety of vehicles on the market, and preserv[e] jobs tied to manufacturing of those vehicles." *Id.* at 7. Texas's position in the intervention motion—that state-by-state regulation of automobile emissions standards will adversely impact the uniform national regulatory regime—is contrary to Texas's position in this litigation that Texas may regulate model-wide emissions-related conduct (of both pre- and post-sale cars), including regulating conduct that the U.S. Environmental Protection Agency ("EPA") has already comprehensively redressed.

Indeed, Texas's lawsuit here, if successful, could give Texas many of the powers to regulate emissions standards that it decries California having. It could, to borrow Texas's phrase, allow Texas (and each other state) to "shape the market for the regulated vehicles nationwide," *id.* at 3, by subjecting a car manufacturer that releases post-sale a model-wide software update with an impact on the operation of

the emissions system—a common occurrence in the context of modern, computerized vehicles—to regulatory enforcement and litigation by numerous states, each with differing conceptions of what constitutes "tampering" under their state laws. Texas's position would thus create the "anarchic patchwork of federal and state regulatory programs" and associated "nightmares for the manufacturers" that—as Judge Breyer's well-reasoned decision in *Counties* recognized—Congress sought to avoid in enacting Title II of the CAA. *In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 310 F. Supp. 3d 1030 (N.D. Cal. 2018) (appeal pending).[1] The courts of every other state in which the issue has been litigated have come to the same conclusion, dismissing substantively identical claims to those asserted against Relators here as preempted by the CAA.[2]

Relators respectfully request that this Court consider this development in deciding whether to order full briefing or grant Relators' Mandamus Petition.

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[1] In their Mandamus Petition, Relators advised this Court that the Ninth Circuit had invited the EPA and the U.S. Solicitor General to submit *amicus* briefs on the preemption issues in *Counties*. *See* Mandamus Petition at 6-7. On November 4, 2019, the EPA and U.S. Solicitor General advised the Ninth Circuit that they did not intend to submit any *amicus* briefs "at this stage of the litigation," noting specifically that "the decision not to participate as an *amicus curiae* should not be understood to communicate the government's agreement with either party's construction of the Clean Air Act, as [counsel for the Counties] suggested at oral argument." *See* Ex. A-2.

[2] *State* v. *Volkswagen AG*, __So.3d__, 2018 WL 6583430 (Ala. Dec. 14, 2018); *State* v. *Volkswagen Aktiengesellschaft*, 2018 WL 6273103 (Minn. Ct. App. Dec. 3, 2018); *State ex rel. Slatery* v. *Volkswagen Aktiengesellschaft*, 2019 WL 1220836 (Tenn. Ct. App. Mar. 13, 2019); *People ex rel. Madigan* v. *Volkswagen Aktiengesellschaft*, 2018 WL 3384883 (Ill. Cir. June 5, 2018) (appeal pending); *State* v. *Volkswagen Aktiengesellschaft*, 2018 WL 3349094 (Mo. Cir. June 26, 2018); *Ohio ex rel. DeWine* v. *Volkswagen Aktiengesellschaft*, 2018 Ohio Misc. LEXIS 3335 (Ohio Ct. C.P. Dec. 7, 2018) (appeal pending).

Sincerely,

/s/ William S. Snyder

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Counsel for Porsche Cars North America, Inc.

Enclosures

ORAL ARGUMENT NOT YET SCHEDULED

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

ENVIRONMENTAL DEFENSE FUND, Petitioner, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, Respondent.	)	Case No. 19-1200

MOTION OF THE STATES OF OHIO, ALABAMA, ALASKA, LOUISIANA, TEXAS, UTAH, AND WEST VIRGINIA FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d), the States of Ohio, Alabama, Alaska, Louisiana, Texas, Utah, and West Virginia ("the Intervening States") move for leave to intervene as respondents in the above-captioned case (and any future cases regarding the same agency action). For the reasons stated below, this litigation directly concerns the Intervening States, and the Intervening States have a compelling interest in the outcome. Counsel for Petitioner and counsel for Respondents have no objection to the States' intervention.

EXHIBIT A-1

I. INTRODUCTION

The Petitioning States—twenty-three States, the District of Columbia, and the cities of New York and Los Angeles—sued in the D.C. District Court to challenge a final regulation of National Highway Traffic Safety Administration. The regulation in question is the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, which this motion will call, "the Rule." The Rule will override California laws that set standards for certain vehicle emissions by declaring them preempted. It will also revoke California's waiver from the otherwise preemptive force of the Clean Air Act.

The Environmental Defense Fund filed a similar suit, also in the D.C. District Court, challenging the same Rule. In addition, the Environmental Defense Fund filed what it calls a "protective petition" in this Court. That protective petition gave rise to this case, in which Ohio, Alabama, Alaska, Louisiana, Texas, Utah, and West Virginia now move to intervene.

The Clean Air Act generally prohibits States or political subdivisions from enforcing "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). The Administrator of the Environmental Protection Agency may waive this preemption for California—and *only* California—if Califor-

nia's emissions standards meet certain criteria. *Id.* § 7543(b). Other States may adopt standards "identical to the California standards for which a waiver has been granted." 42 U.S.C. § 7507(1). California has received waivers from Clean Air Act preemption for many years. The Rule ends that waiver.

Ohio and the Intervening States seek a role in this litigation both because California's standards elevate California's sovereignty above other States and because those standards shape the market for the regulated vehicles nationwide. The outcome of this litigation will have a direct effect on the Intervening States' interests. In our Republic, no State is more equal than others. Allowing California alone to evade otherwise preemptive law upsets that balance, and the Intervening States have an interest in recalibrating it. In addition, this case implicates the Intervening States' interests because invalidating the Rule will result in their citizens having to pay higher vehicle costs. The federal government has an interest in its proposed final rule, but only Ohio and the Intervening States have an interest in protecting the equal dignity of all States and the citizens within their borders.

The Intervening States support the Rule; they seek to intervene to oppose any request to invalidate the Rule. Accordingly, the Intervening States request leave to intervene in this action under Fed. R. App. P. 15(d) in support of the Rule. Further, pursuant to Circuit Rule 15(b), the Intervening States request that this

motion to intervene be deemed filed in all cases challenging the Rule, including any later-filed cases.

II. ARGUMENT

A motion to intervene "must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). Aside from this language, Rule 15(d) offers no additional standards for intervention, so courts look to the "statutory design of the act" and the rules governing intervention under Federal Rule of Civil Procedure 24. *See Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985).

The Intervening States should be granted intervention of right pursuant to Fed. R. Civ. P. 24(a). Intervention of right is appropriate when: (1) the application is timely; (2) the applicant has an interest relating to the subject of the action; (3) as a practical matter, disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) the existing parties do not adequately represent the applicant's interest. *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

In the alternative, the Intervening States seek permissive intervention under Fed. R. Civ. P. 24(b). Rule 24(b) allows intervention if the intervenor "has a claim

or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). The Intervening States have, at a minimum, met the more relaxed standard for permissive intervention.

A. In light of the cooperative-federalism principles embedded in the Clean Air Act, the Intervening States should be heard in litigation about standards that affect all States and all States' citizens.

The Clean Air Act is designed to "encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." 42 U.S.C. § 7401(c). And regulation under the Act "is an exercise in cooperative federalism." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). Given that structure, the Intervening States deserve a seat at the table when this Court decides a question that affects the States as States. They also ought to be heard in suits about federal rules that impact their citizens.

B. The Intervening States' Motion is Timely

The Environmental Defense Fund filed its Petition for Review in this Court on September 27, 2019. This Motion for Leave to Intervene is timely because it is filed within 30 days. Fed. R. App. P. 15(d).

C. The Intervening States Have a Substantial Interest in this Action

The Intervening States have a substantial interest in the outcome of this litigation. The Petitioning States challenge administrative action that will affect both the equal sovereignty of all States and the price of vehicles nationwide. It follows that the Intervening States should be allowed to participate in these actions.

The Intervening States have an interest in a Rule that restores the equal status of all States by blocking the effects of California's special status. The Supreme Court has long held that "the States in the Union are coequal sovereigns under the Constitution." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012); *see also Pollard v. Hagan*, 3 How. 212, 223 (1845); *Shelby Cty. v. Holder*, 570 U.S. 529, 588 (2013) (Ginsburg, J., dissenting) (recognizing that the majority holding extended this "equal sovereignty principle"). Ohio and the intervening States will argue that, not only *may* the federal government block California's special status to regulate emissions, it *must* do so because that special status is unconstitutional under the "fundamental principle of equal sovereignty" among the States. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U. S. 193, 203 (2009). Ohio and the Intervening States have a fundamental interest in their equal status with all other States. And only the States—not the federal government—can adequately advance that argument.

Ohio and the Intervening States also have an interest in this litigation because the Rule will affect the citizens of the Intervening States by lowering vehicle prices, improving the variety of vehicles on the market, and preserving jobs tied to manufacturing those vehicles. Any standard California sets will drive the market nationwide. In fact, when Congress expanded California's special status in 1977, a committee report justified the change *because* manufacturers would need "to produce vehicles meeting the California standards for sale in California" "in any event." *See* H.R. Rep. No. 95-294, at 310 (1977).

Most of Ohio's congressional delegation made the same point about California affecting other States in a comment during the rulemaking process. A letter from 11 Ohio members of the House of Representatives told federal regulators that Ohio consumers value "vehicle choice and competitive prices," and that Ohio counts nearly 630,000 jobs in the automotive industry. NHTA-2018-0067-1854 (July 23, 2018), online at https://www.regulations.gov/document?D=NHTSA-2018-0067-1854.

When a State's citizens are affected, a State may litigate to protect them. That includes instances where one State's regulations "threaten[] withdrawal" of a product from the market in another State. *See Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923). In such situations, the affected State "has an interest apart

from that of the individuals affected" and may sue, "as the representative of the public." *Id.* States have, that is, the right to "represent the interests of its residents in maintaining access to" specific goods. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 605 (1982).

D. Existing Parties Do Not Adequately Represent the Intervening States' Interests

Intervenors who seek to show that their interests would not be adequately represented by existing parties bear only a "minimal" burden. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). They "need only show that representation of [their] interest[s] 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). The standard for intervention is particularly forgiving when the existing defendants are governmental agencies like the United States. This Court has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736. Finally, States are entitled to special consideration when they seek to intervene. In the context of air-pollution regulation, the Supreme Court has recognized that they possess an interest in protecting their "quasi-sovereign" rights. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

The Intervening States have a unique interest in this matter that is separate from the interests of the existing parties—the relief sought by the Petitioning States would directly affect the Intervening States and their citizens. The Intervening States' interests are distinct from the broad regulatory interests advanced by the federal defendants; the Intervening States are obligated to protect the interests of their citizens. *See Fund for Animals*, 322 F.3d at 736 (granting Mongolia's motion to intervene even though its interests overlapped with the interests of the federal defendants). The Intervening States also cannot predict all of the arguments of Petitioning States' or the federal defendants' responses. *See Nat'l Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (declining to predict when intervenors "might wish to urge before the Court" arguments different from those of the EPA). The Intervening States are in the best position to advocate the merits of their arguments, as they have first-hand knowledge about the consequences to their own sovereign interests and the consequences to their citizens.

E. Intervention Will Not Unduly Delay or Prejudice the Parties' Rights

The parties will be neither delayed nor prejudiced by intervention. To date, the petition is merely a protective petition while the Petitioners and the federal respondents litigate the proper forum for the substantive questions. Further, counsel for the United States have stated that they do not oppose this motion for interven-

tion and counsel for the Environmental Defense Fund have stated that they do not oppose this motion. Thus, delay and prejudice caused by intervention is not at issue here.

III. CONCLUSION

For the foregoing reasons, the Intervening States hereby request that the Court grant their motion to intervene as respondents.

Dated: October 25, 2019

Respectfully submitted,

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Counsel for State of West Virginia

CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 27(a)(4) and 28(a)(1)(A), I certify that the parties—including intervenors and amici curiae—are set forth below.

Petitioners: Environmental Defense Fund

Respondents: National Highway Traffic Safety Administration

Intervenors: There are no intervenors at the time of this filing.

Amici Curiae: There are no amici curiae at the time of this filing.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio

CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32 (f) and (g), I hereby certify that the foregoing motion complies with the limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(a)(2) because it contains 1,877 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of October, 2019, I caused the foregoing motion to be electrically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system. I further certify that a copy of the foregoing has been served via United States First Class Mail upon the following:

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Washington, DC 20530-0001

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio

ORAL ARGUMENT HELD ON AUGUST 8, 2019
No. 18-15937

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES, PRACTICES AND PRODUCTS LIABILITY LITIGATION

THE ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, FLORIDA; SALT LAKE COUNTY,

Plaintiffs-Appellants

v.

VOLKSWAGEN GROUP OF AMERICA, INC.; ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES' RESPONSE TO THE COURT'S ORDER OF AUGUST 22, 2019, REGARDING AMICUS PARTICIPATION

ERIC GRANT
Deputy Assistant Attorney General

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EXHIBIT A-2

This case is fully briefed, and oral argument was held on August 8, 2019. In an August 22, 2019 order, the Court invited the Solicitor General and the Environmental Protection Agency (EPA) "to submit amicus curiae briefs setting forth their views on a key issue in this case" relating to preemption under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* Doc. No. 64 at 1.

After conducting a careful review, the United States has determined not to file an amicus curiae brief in this case at this stage of the litigation. The choice not to participate as an amicus curiae at this stage of the litigation should not be construed as an indication of the government's views about the proper resolution of this case. In particular, the decision not to participate as an amicus curiae should not be understood to communicate the government's agreement with either party's construction of the Clean Air Act, as Appellants suggested at oral argument. *See* Oral Argument at 49:57-50:05.

We appreciate the Court's invitation and its patience in this matter.

Respectfully submitted,

ERIC GRANT
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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ David S. Gualtieri
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DATED: November 4, 2019