ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and E. SCOTT PRUITT, in his Official Capacity as Administrator, U.S. Environmental Protection Agency, Respondents.	)	Case No. 17-1273

MOTION OF STATES OF OHIO, INDIANA, MICHIGAN, AND WEST VIRGINIA AND THE KENTUCKY ENERGY AND ENVIRONMENT CABINET, FOR LEAVE TO INTERVENE AS RESPONDENTS

Pursuant to Federal Rule of Appellate Procedure 15(d), the States of Ohio, Indiana, Michigan and West Virginia and the Kentucky Energy and Environment Cabinet ("the Intervening States") move for leave to intervene as a party respondent in the above-captioned proceedings and all other proceedings challenging the same or related action. For the reasons stated below, this case directly concerns the Intervening States, and the Intervening States have a direct, substantial, and compelling interest in the ultimate resolution of this matter.

I. INTRODUCTION

Under Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), New York, Connecticut, Delaware, Maryland, Massachusetts, Pennsylvania, Rhode Island, and Vermont ("the Petitioning States") filed a petition for review with this Court on December 26, 2017. They challenge a final action taken by the United States Environmental Protection Agency ("EPA") and its Administrator entitled "Response to December 9, 2013, Clean Air Act Section 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont." 82 Fed. Reg. 51238 (Nov. 3, 2017). Keeping with an agency determination proposed by the EPA under the previous administration, the EPA denied the Petitioning States' request to force Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, West Virginia, and the parts of Virginia not already included in the Ozone Transport Region (the "Affected States") to join the Ozone Transport Region.

In 1990, Congress established the Ozone Transport Region, which is comprised of a group of eleven northeastern States and the District of Columbia, and has a goal of reducing ozone pollution in that region. 42 U.S.C. §7511c(a). Notably, Congress declined to include the Affected States. In 2013, however, the Petitioning States sought to compel the Affected States into the Ozone Transport Region by filing a petition with the EPA under a provision that they allege permits

that agency to expand the statutorily created Ozone Transport Region. *See* 42 U.S.C. § 7506a. In response to that petition, the environmental agency directors and commissioners from each of the Affected States wrote the EPA, urging the agency to deny the petition. *See* http://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0596-0008. After informal negotiations with the Petitioning States failed to result in a withdrawal of the petition, directors and commissioners from the environmental agencies for Ohio, Indiana, Kentucky, Michigan, and West Virginia once again wrote the EPA and urged the agency to deny the petition. *See* http://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0596-0013.

In January 2017, EPA and its then Administrator published a notice of its proposed decision to deny the Petitioning States' petition because, among other things, the Clean Air Act has other provisions that address interstate ozone pollution. *Response to December 9, 2013 Clean Air Act 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island and Vermont*, 82 Fed. Reg. 6509, 6511 (Jan. 19, 2017). Both Ohio Attorney General Mike DeWine and Ohio EPA Director Craig Butler submitted written comments in support of EPA's proposed denial of the petition. *See* https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0596-0090 (Comments from Director Butler); https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0596-0091

(Comments from Attorney General DeWine). Kentucky and Michigan submitted similar comments. *See* http://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0596-0022 (Comments from Kentucky Secretary of Energy and Environment); http://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0596-0021 (Comments from Michigan Department of Environmental Quality Air Quality Division Director). After thorough consideration, the EPA determined that the Affected States did not belong in the Ozone Transport Region and denied the petition. 82 Fed. Reg. 51238 (Nov. 3, 2017). The analysis behind that determination has remained consistent over the past two presidential administrations.

The Intervening States support the EPA's decision to deny the petition; they seek to intervene to oppose the Petitioning States' request and advocate that the current regulatory scheme be maintained—not arbitrarily expanded. The outcome of this litigation will have a direct and substantial impact on the Intervening States' interests, including the potential to impose additional regulatory burdens—with accompanying economic costs—on them and their citizens. Accordingly, the Intervening States request leave to intervene in this action under Fed. R. App. P. 15(d) in support of the EPA. Further, pursuant to Circuit Rule 15(b), the Intervening States request that this motion to intervene be deemed filed in all cases

challenging the EPA's denial of the requested expansion of the Ozone Transport Region, including any later-filed cases.

II. ARGUMENT

A motion to intervene "must be filed within thirty 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) does not provide additional standards for intervention, so courts look to the "statutory design of the act" and the rules governing intervention under Fed. R. Civ. P. 24. *Texas v. U.S. Dept. 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 may not adequately represent the applicant's interest. *Building & Constr. Trades Dept. 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 when the proposed intervenor makes a timely application demonstrating that (1) a federal statute

provides a conditional right to intervene, or (2) 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. The Design of the Clean Air Act Compels the Intervening States' Participation in this Action

Congress created the Ozone Transport Region to include certain States (including the Petitioning States) and exclude others (including the Intervening States). 42 U.S.C. § 7511c. Those who seek to include more States within the Ozone Transport Region, as the Petitioning States propose here, must file a petition with the EPA. 42 U.S.C. § 7506a(a). Because Congress directed that there be sufficient "public participation" to determine whether the EPA should add or remove States from the Ozone Transport Region, it intended to provide the Intervening States —as States subject to such a proposal—with full and complete participation at all levels of the review process. *See id.*

B. The Intervening States' Motion is Timely

The Petitioning States filed their Petition for Review in this Court on December 26, 2017. 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 Direct and Substantial Interest in this Action, Which Warrants Intervention

The Intervening States have a direct, substantial, and compelling interest in the outcome of this action. The Petitioning States and the EPA are disputing whether the Intervening States should be added to the Ozone Transport Region. It follows that the Intervening States are entitled to a seat at that table. The Intervening States have an absolute and direct interest in their own fate, as the outcome will determine how they can regulate air pollution sources within their borders.

A contrary designation (forced participation in the Ozone Transport Region) would impose additional regulatory and permitting requirements on air sources within the Intervening States. And the Intervening States' taxpayers would be required to bear the costs of the unnecessary regulation. For example, Ohio's vehicle inspection and maintenance program (its "E-Check" program) would need to be significantly expanded, with an estimated additional cost in excess of $23 million on an annual basis. *See* Comments from Ohio EPA Director Butler, *supra*. This is an undue and excessive regulatory and economic burden on Ohio. Similarly, Michigan would need to adopt and develop a vehicle inspection and maintenance program from the ground up, at the expense of other programs to protect the environment. *See* Comments from Michigan DEQ Air Division Director Fiedler, *supra.*

Finally, the Intervening States have a substantial interest in efficiently allocating state resources to effectively control air pollution. The Clean Air Act creates a framework for cooperative federalism specifically providing all States an opportunity to develop their own plans to attain and maintain the NAAQS. *See* 42 U.S.C. § 7410; *Michigan v. EPA*, 213 F.3d 663, 671 (D.C. Cir. 2000) ("States have the primary responsibility to attain and maintain NAAQS within their borders."). And this framework *already* requires the Intervening States to control in-state emissions to avoid impacting downwind States, 42 USC 7410(a)(2)(D)(i), but gives them the flexibility to decide *how* to do so. Forcing a host of midwestern and southern States into the northeast Ozone Transport Region is not the answer. Petitioning States seek to upend the Intervening States' sovereign authority recognized by the Clean Air Act. In short, the Intervening States have a direct and compelling interest in the administration of their air pollution control regulatory programs.

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 '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 here. 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 (2008).

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 and specifically affect the Intervening States and their citizens. The Intervening States' interests are distinct from the broad regulatory interests advanced by the EPA; the Intervening States are obligated to protect the interest 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 foretell the Petitioning States' exact arguments for appealing the EPA's denial of their proposed expansion of the Ozone Transport Region beyond the general statements in their Petition for Review, or how the EPA might respond. *See National Resources 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 of their own regulatory schemes, possible practical implications, and relevant technical data.

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

The parties will be neither delayed nor prejudiced by intervention. The Court, in a January 22nd Order, extended the deadlines for both procedural and dispositive motions. Doc. No. 1714156. Further, counsel for the United States have stated that they do not oppose this motion for intervention and counsel for the Petitioning States have stated that they take no position on the motion. Thus, delay and prejudice caused by intervention is not at issue here.

III. CONCLUSION

The Intervening States have a direct, immediate, and significant interest in this case that would be harmed if the petition for review were to be granted. The Intervening States should be permitted to intervene in this matter in order to fully explain and defend their legal positions and to protect their sovereign rights.

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

Dated: January 24, 2018

Respectfully submitted,

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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: State of New York, State of Connecticut, State of Delaware, State of Maryland, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, State of Rhode Island, and State of Vermont

Respondents: United State Environmental Protection Agency, and E. Scott Pruitt, in his official capacity as the Administrator of EPA

Intervenors: Utility Air Regulatory Group (motion to intervene pending)

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

/s/ *Eric E. Murphy*
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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 2,018 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 Times New Roman Font.

/s/ *Eric E. Murphy*
ERIC E. MURPHY
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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th Day of January, 2018, 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.

/s/ Eric E. Murphy
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