ORAL ARGUMENT NOT YET SCHEDULED

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

COMPETITIVE ENTERPRISE INSTITUTE, *et al.*, Petitioners, v. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*, Respondents.	No. 20-1145 Consolidated with Nos. 20-1167, 20-1168, 20-1169, 20-1173, 20-1174, 20-1176, 20-1177, and 20-1230

RESPONSE OF THE ALLIANCE FOR AUTOMOTIVE INNOVATION TO PETITIONERS' MOTION TO ESTABLISH BRIEFING SCHEDULE AND FORMAT

Movant-Intervenor Alliance for Automotive Innovation ("Auto Innovators") respectfully submits this response to the Motion of All Petitioners, State and Local Government Intervenors, and Public Interest Organization Intervenors to Establish Briefing Schedule and Format, ECF No. 1860054 (filed Sept. 4, 2020) ("Motion"). For the reasons explained by respondents, Auto Innovators opposes the briefing schedule and word limits proposed by petitioners in the Motion. Instead, Auto Innovators supports the briefing schedule and word limits proposed by respondents.

See Respondents' Combined Opposition to Petitioners' Motion to Establish Briefing Schedule and Format, and Motion to Establish Briefing Schedule and Format, ECF No. 1861390 (filed Sept. 14, 2020). With respect to the word limit for intervenors, Auto Innovators respectfully submits that, as the only movant-intervenor proposing to represent full-line vehicle manufacturers on all merits issues in this litigation, Auto Innovators should be permitted to file a brief consistent with Circuit Rule 32(e)(2)(B)(i) of up to 9,100 words.

I. BACKGROUND

Auto Innovators is a not-for-profit trade association of motor vehicle manufacturers, original equipment suppliers, and technology and other automotive-related enterprises. On May 22, 2020, Auto Innovators moved to intervene on behalf of certain of its members in these nine now-consolidated proceedings, which seek review of a final rule published by the National Highway Traffic Safety Administration ("NHTSA") and the United States Environmental Protection ("EPA") under the title *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174 (Apr. 30, 2020) ("SAFE Part 2").[1] That final rule established new nationwide motor

[1] Certain petitioners also renew their earlier effort to seek review of an intermediate step in EPA's rulemaking process leading to the final rule. *See California ex rel. Brown v. EPA*, 940 F.3d 1342 (D.C. Cir. 2019).

vehicle fuel economy and greenhouse gas ("GHG") emissions standards for model years 2021-2026. Petitioners Competitive Enterprise Institute et al. ("CEI") challenge those standards as too stringent; the other petitioners challenge those standards as not stringent enough. For the reasons explained in its motion to intervene, Auto Innovators seeks to participate in these consolidated proceedings to support respondents, defend the challenged rule as within the agencies' statutory authority and a reasonable exercise of their discretion, and urge dismissal of all the petitions for review.

Three other groups have also moved to intervene in these proceedings. First, certain state and local governments and nongovernment organizations (the "Petitioner-Intervenors") that have filed petitions challenging the SAFE Part 2 standards as not stringent enough have also filed unopposed motions to intervene in support of respondents to rebut CEI's petition challenging the same standards as too stringent. Second, Ingevity Corporation ("Ingevity") has filed an unopposed motion to intervene in support of respondents that focuses on specific provisions of the SAFE Part 2 rule affecting natural-gas vehicles.

Third, a group of five vehicle manufacturers (the "Five Manufacturers") have filed a separate motion to intervene. According to their motion to intervene, the Five Manufacturers "take no position on the merits of the petitions for review" and seek leave to intervene "only to address the issue of remedy." Motion to Intervene of

Automobile Manufacturers at 5, ECF No. 1849385 (filed June 29, 2020) ("Five Manufacturers' Intervention Motion"). Their motion does not specify whether the Five Manufacturers consider themselves intervenors in support of petitioners or in support of respondents.

II. ARGUMENT

These consolidated proceedings include dozens of petitioners who are seeking up to seven different briefs on the merits, totaling more than 100 pages. However the Court rules on petitioners' request, Auto Innovators respectfully requests that in setting the word limits for intervenors, the Court should permit Auto Innovators to file its own brief of up to 9,100 words—the normal default limit—separate from any other briefs by other intervenors. *See* D.C. Cir. R. 32(e)(2)(B)(i). Auto Innovators recognizes that this Court generally requires intervenors on the same side to join in a single brief "to the extent practicable," but respectfully submits that separate briefing "is necessary" here in light of its important and unique perspective on the issues involved, its mission to represent the interests of its members participating in its intervention motion,[2] and the apparent conflicts of interest between its position and the views of other proposed intervenors. D.C. Cir. R. 28(d)(4).

[2] The members of Auto Innovators who are participating in its motion to intervene produced over 60 percent of the new cars and light trucks sold in the United States in 2019, and currently employ an estimated 236,000 U.S. workers.

First, Auto Innovators is not aligned with the Petitioner-Intervenors. Despite moving to intervene in support of respondents in response to CEI's petition challenging the SAFE Part 2 standards as too stringent, the Petitioner-Intervenors do not support those standards on the merits; on the contrary, they have filed their own petitions claiming that those standards are unlawful and not stringent enough. Auto Innovators, by contrast, has moved to intervene to argue that the SAFE Part 2 standards are lawful and a reasonable exercise of the agencies' regulatory discretion. Given the clear conflict in their positions, Auto Innovators should not be required to join a single brief or share a single word limit with the Petitioner-Intervenors.

Second, Auto Innovators also is not aligned with Ingevity, which seeks to address a narrow set of issues that it claims will be involved in the litigation but that to date no petitioner has included in the burgeoning list of claims they intend to raise. Ingevity produces technologies used in vehicles designed to operate on natural gas and to control fuel tank emissions from gasoline-powered cars and trucks. It seeks to defend the SAFE Part 2 rule's changes to earlier EPA regulations, codified at 40 C.F.R. part 600, that govern the calculation of the fuel economy of natural-gas-powered vehicles, as well as the SAFE Part 2 rule's creation of new credits for the production of such vehicles. *See* Motion of Ingevity Corporation to Intervene in Support of Respondents at 4-7, ECF No. 1848163 (filed June 19, 2020). That narrow and limited interest in those specific aspects of the SAFE Part 2 rule, from the

perspective of an entity focused on the market for natural-gas vehicles and gasoline vapor emissions control, is fundamentally different from (and potentially conflicts with) Auto Innovators' broader interest on behalf of vehicle manufacturers in defending the GHG and fuel economy standards in the SAFE Part 2 rule on the issues that petitioners have now targeted. It is far from clear that the natural-gas-vehicle provisions of the SAFE Part 2 final rule on which Ingevity is focused will play any significant role in petitioners' challenges to the rule—underscoring the propriety of allowing Auto Innovators to file a separate brief with a separate word limit on behalf of vehicle manufacturers addressed to the issues petitioners actually raise.

Third, if this Court were to grant the Five Manufacturers' motion to intervene, Auto Innovators likewise would not be aligned with the Five Manufacturers. To begin with, the Five Manufacturers' motion to intervene appears to seek intervention in support of *neither* party, rather than (like Auto Innovators) intervention in support of respondents. *See* Five Manufacturers' Intervention Motion at 5 (taking "no position on the merits" and seeking leave to intervene "only to address the issue of remedy"). Under this Court's rules, the Five Manufacturers' brief would normally be due one week after *petitioners* file their opening brief—well before the briefs for intervenors supporting respondents (such as Auto Innovators), which would normally be due one week after *respondents* file their opening brief. *See* D.C. Cir. R. 28(d)(3) (incorporating Fed. R. App. P. 29(a)(6)). That scheduling difference not

only underscores the differing interests at stake, but plainly makes it not "practicable" for Auto Innovators and the Five Manufacturers to join in a single brief. D.C. Cir. R. 28(d)(4).

Even setting aside those scheduling issues, the differences between Auto Innovators' position and the Five Manufacturers' position on the issues presented here would make separate briefing necessary. As explained in its intervention motion, Auto Innovators seek to intervene in support of respondents to defend the SAFE Part 2 Rule on the merits as within the agencies' statutory authority and a reasonable exercise of their discretion. By contrast, the Five Manufacturers explicitly refrain from taking any position on the merits of the SAFE Part 2 rule, and seek to intervene solely to "address the issue of remedy"—apparently based on their concern over the potential impacts of vacating the SAFE Part 2 standards. Five Manufacturers' Intervention Motion at 5; *see* Reply in Support of Motion to Intervene of Automobile Manufacturers at 4, ECF No. 1851963 (filed July 16, 2020) (noting that "vacatur could result in different future standards that would profoundly affect [the Five Manufacturers'] compliance obligations and business plans going forward").

If the question of vacatur were ever to become relevant here, well-settled Circuit doctrine would not permit the decoupling of the merits from the remedial issues identified by the Five Manufacturers. A decision whether to vacate a rule

depends on whether "the agency's decision is so deficient as to raise serious doubts whether the agency can adequately justify its decision at all" as well as whether vacatur "would be seriously disruptive or costly." *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860-61 (D.C. Cir. 2012); *see also Humane Soc'y v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) ("[W]e may remand without vacatur depending upon the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of vacat[ur.]") (citation and internal quotation marks omitted). A court may therefore refuse to vacate an agency action if it concludes that there are no defects in the agency's reasoning serious enough to justify the disruptiveness of vacatur—but that is a merits argument that the Five Manufacturers have decided they will not make. Given the conflict between Auto Innovators' view of the merits and how to avoid vacatur if the issue became relevant, and the Five Manufacturers' refusal to take any position on the merits, it is not practicable to attempt to combine their positions in a single brief.

For the foregoing reasons, the Court should permit Auto Innovators to file its own brief of up to 9,100 words as intervenor in support of respondents. D.C. Cir. R. 28(d)(4), 32(e)(2)(B)(i).

Respectfully submitted,

s/John C. O'Quinn
John C. O'Quinn
Stuart Drake
C. Harker Rhodes IV
Kirkland & Ellis LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000

Kevin M. Neylan, Jr.
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Dated: September 14, 2020

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,730 words, excluding the parts of the response exempted by Fed. R. App. P. 32(f).

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

s/John C. O'Quinn
John C. O'Quinn

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I also certify that the foregoing was served by U.S. postal mail upon the following attorney, who is not registered with the Court's CM/ECF system:

William F. Cooper
State of Hawaii Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

s/John C. O'Quinn
John C. O'Quinn